Denver Law Review

Volume 93 | Issue 2 Article 9

January 2016

Vol. 93, no. 2: Full Issue

Denver Law Review

Vol. 93, no. 2: Full Issue

Published by the
University of Denver
Sturm College of Law

DENVER LAW REVIEW

2016 Volume 93 Issue 2

ARTICLES

COMMENTS

Denver Law Review (ISSN 2469-6463) Spring 2016

The *Denver Law Review* is published quarterly by the University of Denver Sturm College of Law through the Denver Law Review Association.

Denver Law Review
2255 East Evans Avenue, Suite 425
Denver, Colorado 80208
(303) 871-6172

Cite as: 93 DENV. L. REV. ___ (2016).

Subscriptions: Subscriptions to the *Denver Law Review* are $40.00 per volume (add $5.00 for mailing addresses outside the United States). All subscriptions will be renewed automatically unless the subscriber provides timely notice of cancellation.

Single and Back Issues: Single issues of the current volume are available from the Association at $15.00 per issue. All previous volumes and issues of the *Denver Law Review* are available exclusively from William S. Hein & Co., Inc., 2350 North Forest Road, Getzville, NY 14068, (800) 828-7571, www.heinonline.org.

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Previous Nomenclature: Published as the *Denver Bar Association Record* from 1923 to 1928, *Dicta* from 1928 to 1965, *Denver Law Journal* from 1966 to 1984, and *Denver University Law Review* from 1985 to 2015.

Postmaster: Please send all address changes to *Denver Law Review*, 2255 East Evans Avenue, Suite 425, Denver, Colorado 80208.

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THE *NEW YORK TIMES* AND CREDIT RATING AGENCIES: INDISTINGUISHABLE UNDER FIRST AMENDMENT JURISPRUDENCE

DORI K. BAILEY[†]

ABSTRACT

Much has been said about the importance of the First Amendment to our society. This very first amendment to our Constitution may be the most significant piece of legislation ever written by our legislators. The First Amendment not only shapes the political discourse in our country, it informs who we are as citizens of a democracy. The First Amendment is the foundation of a society in which freedom of speech and of the press are fundamental rights. Yet, the safeguards of the First Amendment have, in some cases, been misapplied. Rather than simply protecting the right to freely express honestly believed opinions, the First Amendment has been used as a shield against liability for falsity. In particular, the credit rating agencies have used the First Amendment to avoid liability for false or misleading credit ratings. Hence, this Article will question the theoretical underpinnings of applying the protections of the First Amendment in the context of the credit rating agencies.

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[†] © 2016 Dori K. Bailey, Adjunct Professor of Law, Syracuse University College of Law, J.D. Cornell Law School. Special thanks to Janet Wilmoth, PhD., Professor of Sociology, Syracuse University, for her support. This Article is dedicated to Christine Pagnotta Danko whose courage and generosity of spirit has been an inspiration.

INTRODUCTION

If one were to ask the public which two are analogous—the *New York Times*, a credit rating agency, or an auditor—I venture most people would believe the credit rating agency and the auditor are the apples, and the newspaper is the orange. Yet, according to the courts, those people would be mistaken. Under First Amendment jurisprudence as applied by the lower courts, credit rating agencies are indistinguishable from the *New York Times*.[1]

Credit rating agencies are bond market professionals paid to provide an assessment regarding the creditworthiness of a debt security, or the issuer of a debt security, based on factual information.[2] Nevertheless, both the judiciary and the regulatory branches of our government have afforded the credit rating agencies protections from liability.[3] The judiciary has considered credit ratings to be pure statements of opinion and

1. *See* Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & "ERISA" Litig.), 511 F. Supp. 2d 742, 818 (S.D. Tex. 2005) (observing that some courts have characterized credit rating agencies as "publishers or journalists" and provided the rating agencies with protection under the First Amendment); Cty. of Orange v. McGraw Hill Cos., 245 B.R. 151, 154–57 (Bankr. C.D. Cal. 1999) (considering Standard & Poor's to be a "financial publisher" and applying the protections of the First Amendment); Pan Am Corp. v. Delta Air Lines, Inc. (*In re* Pan Am Corp.), 161 B.R. 577, 586 (Bankr. S.D.N.Y. 1993) (holding that the credit rating agency functioned as a publisher of publicly disseminated ratings and, thus, "as a matter of law," should be afforded "the full breadth of First Amendment safeguards").

2. Abu Dhabi Commercial Bank v. Morgan Stanley & Co., 888 F. Supp. 2d 431, 455 (S.D.N.Y. 2012) (explaining that a "[credit] rating agency . . . analyze[s] data, conduct[s] an assessment, and [provides] a *fact-based* conclusion as to creditworthiness"); Commercial Fin. Servs., Inc. v. Arthur Andersen LLP, 94 P.3d 106, 110 (Okla. Civ. App. 2004) (finding that the rating agencies provided their opinions regarding the creditworthiness of the plaintiff's bonds "as professionals being paid to provide their opinions to a client"); U.S. SEC. & EXCH. COMM'N, REPORT ON THE ROLE AND FUNCTION OF CREDIT RATING AGENCIES IN THE OPERATION OF THE SECURITIES MARKETS 5 (2003) [hereinafter ROLE & FUNCTION] ("For almost a century, credit rating agencies have been providing opinions on the creditworthiness of issuers of [debt] securities and their financial obligations.").

3. *See* STAFF OF S. COMM. ON GOVERNMENTAL AFFAIRS, 107TH CONG., REP. ON FINANCIAL OVERSIGHT OF ENRON: THE SEC AND PRIVATE-SECTOR WATCHDOGS 96–98 (Comm. Print 2002) [hereinafter PRIVATE-SECTOR WATCHDOGS] (noting the courts have shielded the credit rating agencies from legal accountability by affording the agencies with protections under the First Amendment and that the Securities and Exchange Commission has permitted the credit rating agencies to "escape[] regulation").

provided the rating agencies with First Amendment protections.[4] These protections are the same First Amendment protections provided to journalists.[5] In the words of the credit rating agencies, a credit rating has been deemed "the world's shortest editorial" and, thus, entitled to First Amendment protection.[6] However, credit rating agencies should not be viewed as journalists impartially reporting the news or providing an objective opinion regarding the current issues of our society. Credit ratings are not pure statements of opinion akin to a statement of opinion regarding a social or political matter. Moreover, the issuer of a security hires and pays the rating agencies to assign a credit rating.[7] Thus, credit rating agencies function very differently than newspapers. Furthermore, in the years preceding the recent financial crisis, the credit rating agencies were significantly involved in structuring mortgage-backed securities, "placing the [a]gencies in the [conflicting] position of 'rating their own work.'"[8]

Simply stated, credit ratings are not editorials. Rather, credit ratings are "fact-based opinions" made by professionals.[9] Thus, as providers of a commercial service, credit rating agencies should be subject to the same liability as other businesses. For example, security analysts that evaluate equity securities and auditors that provide opinions concerning financial

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4. *See* Jefferson Cty. Sch. Dist. No. R–1 v. Moody's Inv'r's Servs., Inc., 175 F.3d 848, 855–56 (10th Cir. 1999) (holding that a credit rating agency's article regarding the creditworthiness of an issuer of bonds "constitutes a protected expression of opinion" under the First Amendment); *Enron Corp.*, 511 F. Supp. 2d at 816–17 (finding that the courts generally have afforded the credit rating agencies protection under the First Amendment in cases of alleged fraud or professional negligence); *Pan Am Corp.*, 161 B.R. at 586 (holding that the rating agency functioned as a publisher of credit ratings that are publicly disseminated and, thus, should receive the full protections of the First Amendment "as a matter of law").

5. *See Enron Corp.*, 511 F. Supp. 2d at 818 (noting that some courts have viewed the credit rating agencies as "publishers or journalists" and provided the rating agencies with First Amendment protection); *Cty. of Orange*, 245 B.R. at 154–57 (referring to Standard & Poor's as a "financial publisher" and applying the safeguards of the First Amendment); *Pan Am Corp.*, 161 B.R. at 581–82 (finding a credit rating agency "functions as a journalist when gathering information in connection with its rating process . . . with the intent to use the material to disseminate information to the public").

6. PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 96 (quoting Statements of Charles Brown, Fitch General Counsel).

7. *Commercial Fin. Servs., Inc.*, 94 P.3d at 110 (finding that the credit rating agencies assigned a rating concerning the creditworthiness of the bonds "as professionals being paid to provide their opinions to a client"); *see also infra* notes 577–78 and accompanying text.

8. Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs. LLC, 700 F.3d 829, 833–34 (6th Cir. 2012) (quoting Complaint para. 80, Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs., LLC, 813 F. Supp. 2d 871 (S.D. Ohio 2011) (No. 2:09-cv-1054)) ("[T]o attract the significant rating fees paid by [mortgage-backed securities] arrangers, the [a]gencies 'became intimately involved in the issuance of [mortgage-backed securities]' by assisting arrangers in structuring their securities to achieve certain credit ratings, turning the process into a form of negotiation and placing the [a]gencies in the position of 'rating their own work.'" (quoting Complaint, *supra*, paras. 56, 80)).

9. Abu Dhabi Commercial Bank v. Morgan Stanley & Co., 888 F. Supp. 2d 431, 455 (S.D.N.Y. 2012) (emphasis omitted) ("Ratings should best be understood as *fact-based opinions*. When a rating agency issues a rating, it is not merely a statement of that agency's unsupported belief, but rather a statement that the rating agency has analyzed data, conducted an assessment, and reached a *fact-based* conclusion as to creditworthiness.").

statements are held liable for any damages.[10] Why should the credit rating agencies, which occupy a role analogous to security analysts and auditors,[11] be regarded in a different light? Yet, the misapplication of First Amendment protections by the courts has shielded the credit rating agencies from liability in actions for fraudulent or negligently prepared ratings.[12]

Moreover, the Securities and Exchange Commission (the Commission) has provided the credit rating agencies with regulatory protections by exempting the rating agencies from liability for false or misleading statements in a registration statement.[13] These protections afforded to the credit rating agencies are even more incongruous when one considers the conflicts of interest inherent in the "issuer-pays" model of the credit rating agencies.[14] In response to this issue and many others that ultimately culminated in the financial crisis,[15] Congress enacted the Dodd–Frank Wall Street Reform and Consumer Protection Act (the Dodd–Frank Act).[16] The Dodd–Frank Act was intended "[t]o promote the financial stability of the United States by improving accountability and transparency."[17] However, despite the express intention of Congress to hold the credit rating agencies accountable,[18] the Commission has, to a large extent, nullified those intentions.[19]

Accordingly, this Article will argue that the legal and regulatory protections provided to the credit rating agencies are misguided. As we consider the factors that contributed to the financial crisis, the evidence is clear that the credit rating agencies inaccurately rated "tens of billions" of structured securities, such as mortgage-backed securities.[20] Many in-

10. *See infra* notes 387–88, 483 and accompanying text.

11. *See infra* notes 332, 498–502 and accompanying text.

12. *See* Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & "ERISA" Litig.), 511 F. Supp. 2d 742, 815–18 (S.D. Tex. 2005) (explaining that "while there is no automatic, blanket, absolute First Amendment protection" for publications issued by the credit rating agencies, the majority of courts have historically shielded the rating agencies from liability for the allegedly fraudulent or negligent ratings disseminated in those publications); *see also* PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 96 (finding that courts have shielded the credit rating agencies from liability by affording the rating agencies protection under the First Amendment).

13. *See* SEC Written Consents Rule, 17 C.F.R. § 230.436(g)(1) (2015) (providing the credit rating agencies with an exemption from liability under Section 11 of the Securities Act of 1933 for false or misleading statements in a registration statement).

14. *See infra* Section III.A.

15. *See* John Rogers, *A New Era of Fiduciary Capitalism? Let's Hope So*, FIN. ANALYSTS J., May/June 2014, at 6 ("[T]he causes of the . . . financial crisis were many and complex.").

16. Dodd–Frank Wall Street Reform and Consumer Protection (Dodd–Frank) Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

17. *Id.* pmbl.

18. *See id.* § 939G (repealing the Commission's Rule 436(g) exemption from Section 11 liability for credit rating agencies); *see also* 17 C.F.R. § 230.436(g)(1) (2015).

19. *See* Ford Motor Credit Co. LLC, SEC No-Action Letter, 2010 WL 2882538, at *1–2 (Nov. 23, 2010) [hereinafter SEC No-Action Letter] (reestablishing the credit rating agencies' exemption from Section 11 liability).

20. Dodd–Frank Wall Street Reform and Consumer Protection (Dodd–Frank) Act, Pub. L. No. 111-203, title IX, § 931(5), 124 Stat. 1872 ("In the recent financial crisis, the ratings on structured financial products have proven to be inaccurate."); Martin Pfinsgraff, Deputy Comptroller for

vestors relied upon these inaccurate ratings, which ultimately contributed to substantial losses.[21] Yet, the misapplication of the First Amendment has provided the credit rating agencies with "absolute immunity" from legal actions.[22] Moreover, the regulatory protections provided by the Commission[23] have further shielded the credit rating agencies from liability. Instead, the courts should hold credit rating agencies liable for fraudulent or negligently prepared credit ratings that are false or misleading. Similarly, the Commission should respect the express intentions of Congress and eliminate the exemption from liability provided to the credit rating agencies for false or misleading statements in a registration statement. Finally, while Congress has attempted to address the conflicts involved in the credit rating agencies, the recently issued Credit Rating Agency Reform Rules of 2014[24] fail to eliminate the inherent conflicts of interest in a business model in which the issuer of the security hires and pays the fee of the agency that determines the rating of the security.

This Article will begin by exploring some of the basic protections of the freedom of speech embodied in the First Amendment. Part I will first discuss the protections afforded to the press, including the "journalist's privilege" and the extension of this privilege to the credit rating agencies. This Article will then explore the protections provided to fully protected speech, as compared to commercial speech, and consider the level of protection that courts should afford to speech by a credit rating agency. Next, this Article will discuss the contours of protection provided to statements of opinion, including the actual malice standard, and the context in which the actual malice standard has been applied to the credit rating agencies. This part will then examine statements of opinion by professionals and the application of this concept to cases involving the credit rating agencies. Finally, this part will consider whether the First Amendment protections afforded to the credit rating agencies are justified and conclude that the First Amendment should not shield the credit rating agencies.

Credit and Market Risk, Office of the Comptroller of the Currency, Remarks Before the Risk Magazine Credit Risk Conference 2 (May 22, 2012), http://www.occ.treas.gov/news-issuances/speeches/2012/pub-speech-2012-81.pdf (stating the proposition that credit rating agencies "mis-rate[d] tens of billions of subprime securitizations and their derivative [collateralized debt obligations]").

21. *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, TESTIMONY OF JOHN WALSH ACTING COMPTROLLER OF THE CURRENCY BEFORE THE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS, U.S. SENATE Att. A at 2 (2010) [hereinafter TESTIMONY OF JOHN WALSH], http://www.occ.treas.gov/news-issuances/congressional-testimony/2010/pub-test-2010-119-written.pdf ("Issues surrounding credit ratings were a significant factor in market overconfidence that contributed to subsequent losses in the markets for mortgage-backed securities in 2008-2009.").

22. *See* Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs., LLC, 813 F. Supp. 2d 871, 877 & n.1 (S.D. Ohio 2011) (noting the rating agencies' argument that credit "ratings enjoy absolute immunity under the First Amendment" and explaining that "[c]ourts have traditionally extended First Amendment protection to credit ratings").

23. *See, e.g.*, SEC No-Action Letter, *supra* note 19, at *1–2.

24. Nationally Recognized Statistical Rating Organizations, 79 Fed. Reg. 55,078, 55,078 (Sept. 15, 2014) (to be codified at 17 C.F.R. pts. 232, 240, 249 & 249b).

In Part II, this Article will examine the regulatory protections provided to the credit rating agencies. This part will argue that, despite the attempts of Congress to hold the credit rating agencies accountable for false or misleading statements in a registration statement, the Commission has persisted in shielding the agencies from liability. Finally, in Part III, this Article will discuss the conflicts of interest inherent in the issuer-pays model and the minimal reforms implemented to address this significant issue.

I. THE JUDICIARY PROTECTIONS

The freedom of speech, established by the First Amendment,[25] is a right that many may take for granted, but few may realize the extent of its use in protecting the credit rating agencies. The following part will explore the doctrine of free speech in the context of the credit rating agencies.

A. The First Amendment

The First Amendment of the United States Constitution provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[26] Thus, in its simplest form, the First Amendment protects the right of citizens and of the press to free speech.[27] However, this right to free speech is not absolute.[28] For exam-

25. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

26. *Id.*

27. *See id.*; *see also* Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." (alteration in original) (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964))); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) ("The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions."); Roth v. United States, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."); Schneider v. New Jersey, 308 U.S. 147, 161 (1939) (noting that the Supreme Court has considered free speech and a free press to be "fundamental personal rights and liberties").

28. Lowe v. SEC, 472 U.S. 181, 233 (1985) (White, J., concurring) ("Not all restrictions on speech are impermissible."); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 150 (1967) ("Federal securities regulation, mail fraud statutes, and common-law actions for deceit and misrepresentation are only some examples of our understanding that the right to communicate information of public interest is not 'unconditional.'" (footnotes omitted)); Near v. Minn. *ex rel.* Olson, 283 U.S. 697, 708 (1931) ("Liberty of speech and of the press is also not an absolute right, and the state may punish its abuse."); *see also* WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW 614 (8th ed. 1996) ("Laws forbidding speech . . . are commonplace."). *But see* Konigsberg v. State Bar of Cal., 366 U.S. 36, 61 (1961) (Black, J., dissenting) ("[T]he First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech . . . shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field. . . . [T]he very object of adopting the First Amendment . . . was to put the freedoms protected there completely out of the area of any congressional control . . . .").

ple, a citizen is "not free to yell 'fire' falsely in a crowded theater."[29] Likewise, laws against fraud effectively limit free speech.[30] Moreover, the Supreme Court has noted that the constitutionality of laws that prohibit fraud is "beyond question."[31] Notwithstanding the qualified nature of the right to free speech, the credit rating agencies have successfully used the First Amendment as a shield against liability for issuing what many would consider fraudulent or, at the very least, negligent credit ratings.[32]

The First Amendment protection of credit rating agencies emanates from the "freedom of . . . the press"[33] clause. This clause was intended "to preserve an untrammeled press as a vital source of public information."[34] While a credit rating agency does not issue a daily newspaper reporting on a wide variety of information ranging from world news to sports, the Supreme Court has found that "[t]he liberty of the press is not confined to newspapers and periodicals . . . [t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."[35] Courts have found that the role of a credit rating agency is to gather information and to use that information to publish a credit rating.[36] Thus, some courts have characterized credit rating

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29. LOCKHART ET AL., *supra* note 28, at 614 (explaining that notwithstanding the freedom of speech protections of the first amendment, citizens are not "free to say anything, anywhere, at any time"); *see also* Schenck v. United States, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

30. *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2547 (2012) ("Where false claims are made to effect a fraud . . . it is well established that the Government may restrict speech without affronting the First Amendment." (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (noting that the government may prohibit misleading or deceptive speech))); *see also* LOCKHART ET AL., *supra* note 28, at 614 (noting that laws prohibiting fraud restrict free speech).

31. *Alvarez*, 132 S. Ct. at 2561 ("Laws prohibiting fraud . . . were in existence when the First Amendment was adopted, and their constitutionality is now beyond question." (citing Donaldson v. Read Magazine, Inc., 333 U.S. 178, 190 (1948) (explaining that the power of the government "to protect people against fraud . . . has always been recognized in this country and is firmly established"))).

32. *See* Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & "ERISA" Litig.), 511 F. Supp. 2d 742, 815–18 (S.D. Tex. 2005) ("[T]his Court finds that generally the courts have not held credit rating agencies accountable for alleged professional negligence or fraud and that plaintiffs have not prevailed in litigation against them."); *see also* PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 96 ("[C]ourts have extended First Amendment protections to credit ratings, shielding the agencies from liability.").

33. *See* U.S. CONST. amend. I.

34. Grosjean v. Am. Press Co., 297 U.S. 233, 250–51 (1936) (holding that a license tax imposed upon the press is unconstitutional); *see also* Near v. Minn. *ex rel.* Olson, 283 U.S. 697, 713 (1931) (Butler, J., dissenting) (explaining the "chief purpose" of the constitutional guarantee of "liberty of the press" is "to prevent previous restraints upon publication"); von Bulow *ex rel.* Auersperg v. von Bulow, 811 F.2d 136, 142 (2d Cir. 1987) (noting "the strong public policy supporting the unfettered communication of information by the journalist to the public").

35. Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (holding a city ordinance prohibiting the distribution of handbooks, circulars, literature, or advertising without a permit to be void on its face).

36. Pan Am Corp. v. Delta Air Lines, Inc. (*In re* Pan Am Corp.), 161 B.R. 577, 581–82 (Bankr. S.D.N.Y. 1993) (describing Standard & Poor's "gathering of a wide range of information from a variety of sources . . . for the purpose and with the intent of publishing a [credit] rating").

agencies as "publishers or journalists" and provided the rating agencies with First Amendment protection.[37]

However, the First Amendment does not provide publishers with automatic protection from liability when there is a violation of laws generally.[38] The Supreme Court has found that "[a] business 'is not immune from regulation'" simply because it is a member of the press.[39] "The publisher of a newspaper has no special immunity from the application of general laws."[40] Moreover, the "enforcement of . . . general laws against the press is not subject to stricter scrutiny than [what] would be applied to . . . other [entities]."[41] Thus, a publisher must abide by "nondiscriminatory, neutral laws" that do not have an impact on the "impartial distribution of news."[42] For example, a publisher has no First Amendment protection for libel.[43] A publisher also may be subject to penalties for contempt of court.[44] Therefore, "[t]he First Amendment does not grant the press . . . limitless protection."[45] Similarly, a credit rating agency is not entitled to protection under the First Amendment simply because of its "status as a financial publisher."[46] Thus, a publisher's First Amendment protection is qualified.[47]

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37. *Enron Corp.*, 511 F. Supp. 2d at 818 (citing *Pan Am Corp.*, 161 B.R. at 581–82 (finding that a credit rating agency "functions as a journalist when gathering information in connection with its rating process . . . with the intent to use the material to disseminate information to the public")); Cty. of Orange v. McGraw Hill Cos., 245 B.R. 151, 154–56 (Bankr. C.D. Cal. 1999) (referring to Standard & Poor's as a "financial publisher" and applying the protections of the First Amendment).

38. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 150 (1967); *see also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring) ("[T]he First Amendment does not 'belong' to any definable category of persons or entities . . . .").

39. *Curtis Publ'g Co.*, 388 U.S. at 150 (quoting Associated Press v. NLRB, 301 U.S. 103, 132 (1937) ("[T]he Associated Press is not immune from regulation because it is an agency of the press.")).

40. Cohen v. Cowles Media Co., 501 U.S. 663, 670 (1991) (quoting *Associated Press*, 301 U.S. at 132–33 ("[The publisher of a newspaper] has no special privilege to invade the rights and liberties of others.")).

41. Compuware Corp. v. Moody's Inv'rs Servs., Inc., 499 F.3d 520, 529 (6th Cir. 2007) (quoting *Cohen*, 501 U.S. at 670).

42. *Cty. of Orange*, 245 B.R. at 154 (citing *Cohen*, 501 U.S. at 670 (holding that newspaper publishers must abide by general laws)); *Associated Press*, 301 U.S. at 130–33 (holding that publishers are subject to the National Labor Relations Act).

43. *Associated Press*, 301 U.S. at 132–33 (noting that a newspaper publisher "must answer for libel"); Robertson v. Baldwin, 165 U.S. 275, 281 (1897) ("[T]he freedom of speech and of the press . . . does not permit the publication of libels . . . .").

44. *Associated Press*, 301 U.S. at 132–33 (noting that a newspaper publisher "may be punished for contempt of court").

45. *Cohen*, 501 U.S. at 665, 671 (finding that the First Amendment does not protect a newspaper from liability for "breach of a promise of confidentiality").

46. *Cty. of Orange*, 245 B.R. at 154 ("[T]he question is not whether the defendant is a publisher but whether the cause of action impacts expression." (quoting Cty. of Orange v. McGraw-hill Cos. (*In re* Cty. of Orange), 245 B.R. 138, 144 (Bankr. C.D. Cal. 1997))).

47. Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & "ERISA" Litig.), 511 F. Supp. 2d 742, 818 (S.D. Tex. 2005) ("The journalist privilege is a qualified one." (quoting Am. Sav. Bank, FSB v. UBS Painewebber, Inc., No. M8–85, 2002 WL 31833223, at *3 (S.D.N.Y. Dec. 16, 2002))); Pan Am Corp. v. Delta Air Lines, Inc. (*In re* Pan Am Corp.), 161 B.R. 577, 584 (Bankr. S.D.N.Y. 1993) (finding "the journalist's privilege [to be] a qualified one"); *In re* Scott Paper Co. Sec. Litig., 145 F.R.D. 366, 370 (E.D. Pa. 1992) ("The journalist privilege is a qualified one . . . .").

1. The Journalist's Privilege

One example of a qualified privilege is the journalist's privilege to withhold "confidential sources and information in judicial proceedings."[48] The qualified First Amendment right to engage in the "process of newsgathering" forms the basis of the journalist's privilege.[49] The intent of the person or entity at the very beginning of the "information-gathering process" determines whether that person or entity is considered a journalist and, therefore, entitled to the protection of the journalist's privilege.[50] In particular, the ability to invoke the journalist's privilege is based on the established intent to gather information and material for public dissemination, and that specific intent must be present from the start of the "newsgathering process."[51] Thus, at the point when the information is received, the person or entity must be "professionally engaged in newsgathering."[52] Moreover, the journalist's privilege may be available if the individual or entity is engaged in traditional newsgathering and dissemination functions even if the individual or entity is not usually considered a part of the "institutionalized press."[53]

Credit rating agencies generally have been afforded the journalist's privilege in cases concerning the subpoena of information.[54] For example, in *In re Pan Am Corp.*,[55] the U.S. District Court for the Southern District of New York held that Standard & Poor's was entitled to invoke the journalist's privilege to withhold information sought through a sub-

48. von Bulow *ex rel.* Auersperg v. von Bulow, 811 F.2d 136, 141 (2d Cir. 1987); *see also Pan Am Corp.*, 161 B.R. at 584 ("[T]he journalist's privilege is a qualified one and may be overcome by a showing of need by the party seeking disclosure.").

49. *von Bulow*, 811 F.2d at 142 ("[T]he process of newsgathering is a protected right under the First Amendment, albeit a qualified one. This qualified right, which results in the journalist's privilege, emanates from the strong public policy supporting the unfettered communication of information by the journalist to the public."); *see also* Branzburg v. Hayes, 408 U.S. 665, 681 (1972) (acknowledging that "without some protection for seeking out the news, freedom of the press could be eviscerated").

50. *von Bulow*, 811 F.2d at 142 (explaining the standards of the journalist's privilege).

51. *Id.* at 144 ("We hold that the individual claiming the privilege must demonstrate . . . the intent to use material—sought, gathered or received—to disseminate information to the public and that such intent existed at the inception of the newsgathering process.").

52. *Pan Am Corp.*, 161 B.R. at 580 (quoting Don King Prods., Inc. v. Douglas, 131 F.R.D. 421, 424 (S.D.N.Y. 1990)).

53. *von Bulow*, 811 F.2d at 142. *But cf.* Am. Sav. Bank, FSB v. UBS PaineWebber, Inc. (*In re* Fitch, Inc.), 330 F.3d 104, 111 (2d Cir. 2003) (per curiam) (finding that a credit rating agency was not acting in the role of "professional journalist" engaged in "newsgathering activities" when it gathered information used to publish ratings and, thus, was not entitled to assert the journalist's privilege and not addressing the question of whether a credit rating agency "could *ever* be" afforded the journalist's privilege).

54. PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 96–97 ("Courts have even refused to require that credit rating agencies produce records in connection with their work, citing the 'journalist's' privilege."); *see, e.g.*, *Pan Am Corp.*, 161 B.R. at 582, 586 (finding "the journalist's privilege to be applicable" in quashing a subpoena seeking information from Standard & Poor's in connection with its credit rating of Pan Am).

55. 161 B.R. 577 (Bankr. S.D.N.Y. 1993).

poena.[56] The court found that Standard & Poor's gathered information and communicated it to the public by means of several periodicals that were circulated on a regular basis to the general public.[57] Standard & Poor's included in its publications not only information provided by the issuers of securities rated by Standard & Poor's but also information based on the agency's own research with the intention of publishing "objective ratings for the [public's] benefit."[58] Thus, the court found that Standard & Poor's possessed the "requisite newsgathering intent" from the inception of the process; therefore, the agency should be accorded the journalist's privilege.[59] The fact that some of the information sought through the subpoena was gathered on a confidential basis and, thus, without the intent to disseminate to the public, did not eviscerate the applicability of the journalist's privilege.[60] The privilege extends to confidential information as well as to other nonpublished information that is used for resource purposes.[61]

Moreover, the district court rejected the bankruptcy court's conclusion that Standard & Poor's issues credit ratings primarily for economic gain and, thus, was not entitled to "heightened First Amendment protection."[62] The district court found that Standard & Poor's does not issue

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56. *Id.* at 581–82, 586; *accord In re* Scott Paper Co. Sec. Litig., 145 F.R.D. 366, 367–71 (E.D. Pa. 1992) (finding the journalist's privilege applicable to Standard & Poor's with respect to documents associated with Standard & Poor's credit rating of Scott Paper Co.'s debt securities).

57. *Pan Am Corp.*, 161 B.R. at 579, 584 ("[S&P] publishes its ratings and other financial information in periodicals like *CreditWeek*, *High Yield Quarterly*, and *Ratings Handbook*. . . . S&P . . . regularly publishes [these] periodicals containing subjective financial analysis and commentary for widespread distribution to the public at large."); *see also Scott Paper Co.*, 145 F.R.D. at 370 ("S&P publishes periodicals with a regular circulation to a general population.").

58. *Pan Am Corp.*, 161 B.R. at 583 ("S&P does not merely depend on information provided by issuers to fill its publications, but rather conducts its own independent research with an eye toward publishing objective ratings for the benefit of the public."); *see also Scott Paper Co.*, 145 F.R.D. at 370 ("S&P publishes information for the benefit of the general public.").

59. *Pan Am Corp.*, 161 B.R. at 581–83, 586 ("As a publisher of publicly distributed financial ratings, analysis and commentary, S&P is, as a matter of law, deserving of the full breadth of First Amendment safeguards."); *see also Scott Paper Co.*, 145 F.R.D. at 370 ("S&P falls within [the First Amendment's] umbrella of protection.").

60. *Pan Am Corp.*, 161 B.R. at 582–83 ("Thus, the fact that S&P may not have accepted all of the information Pan Am seeks with specific intent to disclose that particular information does not render the privilege inapplicable because . . . the information sought by the subpoena was received as part of S&P's newsgathering process with the intent to disseminate information to the public.").

61. von Bulow *ex rel.* Auersperg v. von Bulow, 811 F.2d 136, 143–44 (2d Cir. 1987) ("Journalists who seek to guard information that has not been published likewise have been accorded the protective shroud. 'Like the compelled disclosure of confidential sources, [the compelled production of a reporter's resource materials] may substantially undercut the public policy favoring the free flow of information to the public that is the foundation of the privilege.'" (alteration in original) (quoting United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980))); *see also* Am. Sav. Bank, FSB v. UBS PaineWebber, Inc. (*In re* Fitch, Inc.), 330 F.3d 104, 108–09 (2d Cir. 2003) (per curiam) (noting that the journalist's privilege prevents the discovery of confidential information and "unpublished nonconfidential information" (citing Gonzales v. Nat'l Broad. Co., 194 F.3d 29, 32 (2d Cir. 1998) (agreeing that the journalist's privilege "applies to nonconfidential as well as to confidential materials"))).

62. *Pan Am Corp.*, 161 B.R. at 583 ("[T]he Bankruptcy Court's findings . . . that S&P receives a fee for its ratings activity and its conclusion that economic factors predominate in its ratings activities are clearly erroneous.").

ratings only when requested by an issuer for a fee; rather, the rating agency typically provides unsolicited ratings without any fee.[63] For example, Standard & Poor's assigns credit ratings to nearly all issues of preferred stock and debt securities regardless of whether the rating agency has been hired to do so and irrespective of receiving a fee.[64] Moreover, the court found that the journalist's privilege is fully applicable to publications of a financial nature.[65] Thus, the court held that Standard & Poor's acted in the role of a journalist when it gathered information to produce its ratings with the specific intent to use that material to circulate information to the general public and, thus, was entitled to invoke the journalist's privilege to withhold information sought by a subpoena.[66]

However, some courts have declined to extend the journalist's privilege to the credit rating agencies.[67] For example, the Second Circuit has held that the journalist's privilege is inapplicable when the credit rating agency is unable to demonstrate that it gathered the subpoenaed information as part of the "newsgathering activities of a professional journalist."[68] *In re Fitch, Inc.*,[69] provides a case in point concerning the "outer boundaries" of the journalist's privilege and the limits to asserting the privilege by an entity that is not regarded as part of the traditional media.[70]

In examining the nature of the information gathering activities at issue, the Second Circuit found that Fitch gathered information to publish ratings based on the needs of its clients rather than on the basis of the

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63. *Id.* ("The record is uncontradicted that S&P does not merely provide ratings to issuers who pay a fee.").

64. *Id.* ("Similarly, even without a request or fee from an issuer, S&P revises, updates and reviews a prior rating or analysis of an issuer or debt instrument on S&P's determination that such information is important to its readers or subscribers.").

65. *Id.* at 584 ("[S]ubstantial authority [has held] that the financial press is fully shielded by the umbrella of the First Amendment." (citing McGraw-Hill, Inc. v. Arizona (*In re* Petroleum Prods. Antitrust Litig.), 680 F.2d 5, 7–8 (2d Cir. 1982) (finding the journalist's privilege applicable to a division of McGraw-Hill, Inc. with respect to documents regarding the "names of confidential sources of information"))); *see also In re* Scott Paper Co. Sec. Litig., 145 F.R.D. 366, 369–71 (E.D. Pa. 1992) (finding the journalist's privilege applicable to Standard & Poor's with respect to documents associated with Standard & Poor's credit rating of Scott Paper Co.'s debt securities).

66. *Pan Am Corp.*, 161 B.R. at 581–86. The court also found that Pan Am was unable to "pierce the journalist's privilege" because Pan Am failed to show that the information it sought was unavailable through other sources. *Id.* at 586.

67. Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & "ERISA" Litig.), 511 F. Supp. 2d 742, 818 (S.D. Tex. 2005) (noting that other courts "have questioned in particular the extension of the 'journalist's privilege' recognized by some courts to extend to credit rating agencies").

68. Am. Sav. Bank, FSB v. UBS PaineWebber, Inc. (*In re* Fitch, Inc.), 330 F.3d 104, 111 (2d Cir. 2003) (per curiam) (holding that the journalist's privilege is inapplicable to quash a subpoena against a credit rating agency where the agency failed to show that it gathered the requested information "pursuant to the newsgathering activities of a professional journalist").

69. 330 F.3d 104 (2d Cir. 2003) (per curiam).

70. *Id.* at 105 (noting that the court was deciding the "outer boundaries" of the journalist's privilege "and the extent to which information-gathering organizations that are not traditionally considered part of the media may claim that privilege").

"newsworthiness" of the information.[71] Distinguishing the *Pan Am* case, in which Standard & Poor's published ratings for "virtually all public debt financing and preferred stock issues" regardless of whether or not the issuers were clients, the court found that "Fitch only 'covers' its own clients."[72]

Moreover, the court found that Fitch was actively engaged in helping the client structure the relevant transaction.[73] For example, an employee of Fitch offered suggestions to the client regarding changes to the transaction that would be necessary to obtain the ratings desired by the client.[74] The Second Circuit concluded that the "level of involvement" Fitch displayed with respect to its client's transaction was not characteristic of the relationship normally observed between a "professional journalist" and the news reported by the journalist.[75]

Based on the foregoing analysis, the Second Circuit held that Fitch failed to establish that it functioned in the role of a professional journalist engaged in "newsgathering activities" when it gathered the requested material, and thus, the rating agency could not use the journalist's privilege to prevent the discovery of the information.[76] Additionally, the Second Circuit explained that it was not determining whether, as a general matter, the journalist's privilege is applicable to a credit rating agency under New York law.[77] As the court stated, the question of whether a credit rating agency "could *ever* be entitled to assert the . . . privilege" in New York is yet to be determined.[78] While the Second Circuit expressly maintained that it was not deciding the larger question of whether the journalist's privilege is generally applicable to a credit rating agency under New York law, the emphasis of the word "ever" in the court's

71. *Id.* at 109–10 ("Fitch's information-disseminating activity does not seem to be based on a judgment about newsworthiness, but rather on client needs.").

72. *Id.* (noting the lack of evidence "to support Fitch's claim that it regularly analyzes or publishes a rating for a transaction it is not paid to rate" and contrasting "Standard & Poor's practice . . . of rating nearly all public debt issuances regardless of whether it was hired to do so or not"); *see also* Pan Am Corp. v. Delta Air Lines, Inc. (*In re* Pan Am Corp.), 161 B.R. 577, 583 (Bankr. S.D.N.Y. 1993) (explaining that Standard & Poor's regularly publishes ratings regardless of whether it receives a fee).

73. *Fitch*, 330 F.3d at 110–11 ("Fitch played an active role in helping [the client] decide how to structure the transaction.").

74. *Id.* (noting that a Fitch employee commented on the potential transactions and offered "suggestions about how to model the transactions to reach the desired ratings").

75. *Id.* ("Fitch has an extremely close relationship with the companies it rates. . . . [Its] level of involvement with the client's transactions . . . is not typical of the relationship between a journalist and the activities upon which the journalist reports.").

76. *Id.* at 111 (concluding that "the district court did not abuse its discretion in finding that Fitch was not entitled to assert the journalist's privilege" for the subpoenaed information).

77. *Id.* ("For the sake of clarity, we note that we are not deciding the general status of a credit rating agency like Fitch under New York's [journalist's privilege] . . . .").

78. *Id.* ("Whether Fitch, or one of its rivals, could *ever* be entitled to assert the newsgathering privilege is a question we leave for another day.").

statement appears to imply that the ability of a credit rating agency to assert the privilege in the future may be somewhat limited.[79]

The Supreme Court has not yet determined whether it would consider credit rating agencies to be members of the press and, therefore, entitled to the same protections under the First Amendment.[80]

2. Fully Protected Speech v. Commercial Speech

As noted in Section I.A.1, the First Amendment protects publications specifically concerning economic or business matters.[81] However, the courts have recognized that the First Amendment does not fully protect every type of publication.[82] For example, the Supreme Court has distinguished commercial speech from other types of speech and found that commercial speech is deserving of a different level of protection under the First Amendment.[83] Accordingly, the Supreme Court has developed two canons of law in this area, namely the doctrine of fully protected speech and the commercial speech doctrine.[84] A restriction on fully protected speech may be permitted "only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest."[85]

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79. *See id.* (emphasizing the word "ever" in its statement regarding whether a credit rating agency would be able to assert the journalist's privilege in the future).

80. *In re* Scott Paper Co. Sec. Litig., 145 F.R.D. 366, 369 (E.D. Pa. 1992) (noting that the Supreme Court has yet to analyze whether the credit rating agencies "constitute the press under the First Amendment").

81. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (finding that "commercial speech . . . is protected"); Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & "ERISA" Litig.), 511 F. Supp. 2d 742, 810 (S.D. Tex. 2005) ("First Amendment protections reach publications related to business or economic issues."); *Scott Paper Co.*, 145 F.R.D. at 369 ("[D]isseminators of corporate financial information should . . . have as strong a claim to First Amendment protection as do disseminators of other kinds of information. . . . Economic . . . information, for example, has as great a claim to First Amendment protection as does political discourse."); *see also supra* note 65 and accompanying text.

82. *Scott Paper Co.*, 145 F.R.D. at 369 (citing *Va. State Bd. of Pharmacy*, 425 U.S. at 771–72 & n.24 (finding that commercial speech is not fully protected by the First Amendment)) ("[N]ot every publication which purports to disclose information automatically qualifies as the press with full First Amendment protection."); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985) ("[N]ot all speech is of equal First Amendment importance.").

83. *Scott Paper Co.*, 145 F.R.D. at 369 ("[T]he Supreme Court has held that commercial speech is only afforded limited First Amendment protection." (citing *Va. State Bd. of Pharmacy*, 425 U.S. at 771–72 & n.24 (clarifying that while "commercial speech enjoys First Amendment protection . . . it is [not] wholly undifferentiable from other forms" of speech))).

84. *See* Lowe v. SEC, 472 U.S. 181, 233–35 (1985) (White, J., concurring) (acknowledging the doctrine of fully protected speech and the commercial speech doctrine); *see also Va. State Bd. of Pharmacy*, 425 U.S. at 771–72 & n.24 (discussing commercial speech).

85. Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 540 (1980); *see, e.g.*, People v. Foley, 257 A.D.2d 243, 246, 252 (N.Y. App. Div. 1999) (holding that a statute prohibiting dissemination of "indecent material to minors" over the Internet "is a precisely drawn means of serving a compelling [state] interest" and "is thus constitutional under the First Amendment"); *cf. Consol. Edison Co. of N.Y.*, 447 U.S. at 540, 544 (holding that a government proscription of "bill inserts that discuss controversial issues of public policy" is not "a narrowly drawn prohibition justified by a compelling state interest" and, thus, "directly infringes the freedom of speech protected by the First . . . Amendment[]").

Under the commercial speech doctrine, the government may prevent commercial speech when it is "false, deceptive, or misleading,"[86] or when it "proposes an illegal transaction."[87] In the case of commercial speech that is not false, deceptive, or misleading and does not involve an unlawful transaction, the government may still restrict such speech but only when "a substantial governmental interest" exists and the restrictions "directly advance that interest."[88] Thus, the First Amendment protects commercial speech; however, the protections afforded to such speech are relatively less than the safeguards provided for fully protected or noncommercial speech.[89] Accordingly, the government may regulate commercial speech by means that might not be deemed tolerable in the context of noncommercial speech.[90]

The commercial speech doctrine was developed in the context of advertisements in that such communications suggest a commercial transaction between the receiver of the communication and the speaker.[91]

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86. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 638 (1985); *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980) (noting that the government may prohibit commercial speech "likely to deceive the public"); Friedman v. Rogers, 440 U.S. 1, 9 (1979) (noting that restrictions on deceptive, misleading, or false commercial speech are permissible); Bates v. State Bar of Ariz., 433 U.S. 350, 383 (1977) ("[T]he public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena."); *Va. State Bd. of Pharmacy*, 425 U.S. at 771 ("Untruthful speech, commercial or otherwise, has never been protected for its own sake. . . . [M]uch commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem." (citations omitted)).

87. *Zauderer*, 471 U.S. at 638 (citing Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 389 (1973) ("Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.")); *see also Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563–64 (noting the government may prohibit "commercial speech related to illegal activity").

88. *Zauderer*, 471 U.S. at 638; *Lowe*, 472 U.S. at 233 (White, J., concurring) ("Under the commercial speech doctrine, restrictions on commercial speech that directly advance a substantial governmental interest may be upheld."); *see also Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564 ("The State must assert a substantial interest to be achieved by restrictions on commercial speech. . . . [T]he restriction must directly advance [that] . . . interest . . . .").

89. *Zauderer*, 471 U.S. at 637 ("There is no longer any room to doubt that what has come to be known as 'commercial speech' is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded 'noncommercial speech.'"); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 n.5 (1985) (noting that "[i]n the area of protected speech," commercial speech is deserving of "reduced protection" because "[s]uch speech . . . occupies a 'subordinate position in the scale of First Amendment values'" (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978))); *Lowe*, 472 U.S. at 233–34 (White, J., concurring) (acknowledging that commercial speech is afforded less protection than fully protected speech); *Va. State Bd. of Pharmacy*, 425 U.S. at 770–71 & n.24 (explaining that commercial speech is protected under the First Amendment but is afforded a "different degree of protection" than other forms of speech).

90. *Greenmoss Builders Inc.*, 472 U.S. at 758 n.5 (explaining that commercial speech "may be regulated in ways that might be impermissible in the realm of noncommercial expression" (citing *Ohralik*, 436 U.S. at 456)).

91. *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 561, 563 (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience" and finding that "promotional advertising" constitutes commercial speech (citing *Va. State Bd. of Pharmacy*, 425

However, the commercial speech doctrine has been considered in other contexts as well.[92] For example, in *Lowe v. SEC*,[93] the Supreme Court granted certiorari to address the question of whether a securities newsletter containing commentary and investment advice constituted protected speech under the First Amendment.[94] The majority of the Court decided the case on statutory grounds[95] and, thus, did not squarely address the constitutional question.[96] However, the majority noted that the newsletter and a securities chart service offered by the petitioner would constitute protected communications under the First Amendment to the extent that the publications contained "factual information" and commentary regarding the securities market.[97] Thus, without directly deciding the issue, the majority indicated that a financial newsletter may constitute an "expression of opinion" that should be protected under the First Amendment.[98] The Court's use of the language "expression of opinion" appears to imply that, if squarely addressing the issue, the Court would consider a financial newsletter containing commentary regarding the securities market to be fully protected speech under the First Amendment.[99]

U.S. at 761–62 (finding that "speech which does 'no more than propose a commercial transaction'" is commercial speech protected under the First Amendment and, thus, an advertisement containing the prices of prescription drugs is considered commercial speech (quoting *Pittsburgh Press Co.*, 413 U.S. at 385))); *see also Bates*, 433 U.S. at 363–64, 384 (noting that commercial speech should not be excluded from protection under the First Amendment "merely because it propose[s] a mundane commercial transaction [and] . . . the speaker's interest is largely economic"; therefore, advertising by attorneys is commercial speech protected by the First Amendment).

92. *See Lowe*, 472 U.S. at 233–35 (White, J., concurring) (discussing the commercial speech doctrine in the context of financial newsletters); *see also In re* Scott Paper Co. Sec. Litig., 145 F.R.D. 366, 369–70 (E.D. Pa. 1992) (discussing the commercial speech doctrine in the context of the journalist's privilege).

93. 472 U.S. 181 (1985).

94. *Id.* at 185, 188–89 ("A typical issue of the [newsletter] . . . contained general commentary about the securities . . . market[], reviews of market indicators and investment strategies, and specific recommendations for buying, selling, or holding stocks . . . .").

95. *Id.* at 183, 211 (concluding that the "publications fall within the statutory exclusion for bona fide publications" under the Investment Advisors Act of 1940; thus, the petitioners were not "investment adviser[s]" under the Act, and the newsletters could not be enjoined for failure to register as investment advisers); *see also Scott Paper Co.*, 145 F.R.D. at 369–70 (discussing *Lowe* and explaining that "[t]he majority of the court, as a matter of statutory interpretation, held that an investment newsletter was not subject to regulation by the Securities and Exchange Commission under the Investment Advisor's Act of 1940").

96. *Lowe*, 472 U.S. at 211 (stating that the Court "need not specifically address the constitutional question"); *see also Scott Paper Co.*, 145 F.R.D. at 369–70 (discussing Lowe and noting that "the Supreme Court considered, but declined to determine, whether investment newsletters fell within the definition of the press for First Amendment purposes").

97. *Lowe*, 472 U.S. at 210 ("To the extent that the chart service contains factual information about past transactions and market trends, and the newsletters contain commentary on general market conditions, there can be no doubt about the protected character of the communications . . . .").

98. *Id.* at 210 n.58 ("[W]e have squarely held that the expression of opinion about a commercial product such as a loudspeaker is protected by the First Amendment; [therefore,] it is difficult to see why the expression of an opinion about a marketable security should not also be protected." (citation omitted) (citing Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 513 (1984))).

99. *See Scott Paper Co.*, 145 F.R.D. at 370 ("[T]he Supreme Court would be likely to hold, if squarely faced with the issue, that the investment newsletters . . . would . . . be protected by the free press clause of the First Amendment."); *see also Lowe*, 472 U.S. at 210 & n.58; R&W Tech. Servs. Ltd. v. Commodity Futures Trading Comm'n, 205 F.3d 165, 175 (5th Cir. 2000) ("[T]he publication

The concurring opinion authored by Justice White, and joined by Chief Justice Burger and Justice Rehnquist, directly considered the constitutional issue of whether the financial newsletters were protected speech under the First Amendment.[100] Justice White sidestepped the more narrow issue of whether the newsletters contained commercial speech or fully protected speech maintaining that it was unnecessary to determine the specific type of speech in order to resolve the primary issue of whether the First Amendment protected the newsletters.[101] If the newsletters contained fully protected speech, then the government prohibition, which extended not only to deceptive, manipulative, or fraudulent speech but also to "legitimate, disinterested advice," is "presumptively invalid" as a "flat prohibition or prior restraint on speech."[102] Alternatively, if the newsletters were commercial speech, then any restrictions on such speech must be "narrowly tailored to advance a legitimate governmental interest."[103] While the interest in this case was legitimate in that the government desired to protect investors from unscrupulous individuals that may publish misleading or fraudulent advice, the means used by the government to achieve its objective were "extreme."[104] The government restriction was intended to prevent the petitioner from publishing advice altogether, irrespective of whether or not the advice was misleading or fraudulent.[105] Even with the "reduced level of scrutiny" employed with restrictions concerning commercial speech, Justice White

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of impersonal advice about specific investments is fully protected speech under the First Amendment.").

100. *Lowe*, 472 U.S. at 211 (White, J., concurring) ("I concur in the judgment . . . because to prevent petitioner from publishing at all is inconsistent with the First Amendment.").

101. *Id.* at 234 (maintaining that the determination of whether financial newsletters constitute commercial speech or fully protected speech is unnecessary).

102. *Id.* (citing N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("Both the history and language of the First Amendment support the view that the press must be left free to publish news . . . without censorship, injunctions, or prior restraints.")) (finding that a ban on "legitimate, disinterested advice" is "a flat prohibition or prior restraint on speech" and, "as applied to fully protected speech, [is] presumptively invalid and may be sustained only under the most extraordinary circumstances"); Schneider v. New Jersey, 308 U.S. 147, 164 (1939) ("To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees."); Near v. Minn. *ex rel.* Olson, 283 U.S. 697, 713 (1931) (noting that the "chief purpose" of the "constitutional protection" is "to prevent previous restraints upon publication").

103. *Lowe*, 472 U.S. at 234 (White, J., concurring) ("[E]ven where mere 'commercial speech' is concerned, the First Amendment permits restraints on speech only when they are narrowly tailored to advance a legitimate governmental interest."); *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 565 (1980) (recognizing that the First Amendment requires restrictions on speech to be "narrowly drawn" (quoting *In re* Primus, 436 U.S. 412, 438 (1978))).

104. *Lowe*, 472 U.S. at 234–35 (White, J., concurring) (finding a legitimate government interest in desiring "to prevent investors from falling into the hands of scoundrels and swindlers" while also finding "[t]he means chosen [to be] extreme").

105. *Id.* ("Based on petitioner's past misconduct, the Government fears that he may in the future publish advice that is fraudulent or misleading; and it therefore seeks to prevent him from publishing *any* advice, regardless of whether it is actually objectionable.").

found the government's prohibition to be "too blunt an instrument to survive" constitutional scrutiny.[106]

Similarly, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[107] the Supreme Court did not directly address the issue of whether a credit report issued by a credit reporting agency would be considered fully protected speech or commercial speech.[108] However, the Court appeared to imply that it would deem such speech to be commercial speech.[109] The Court explained that, similar to advertising, a credit report that provides subscribers with financial information regarding businesses "is hardy and unlikely to be deterred by incidental state regulation."[110] Moreover, such speech is "motivated by the desire for profit" and, therefore, is not as easily deterred as other forms of speech.[111] The Court also explained that the market creates a strong incentive for a credit reporting agency to issue an accurate report because an inaccurate report would have no value.[112] Therefore, the possibility of an "incremental 'chilling' effect" on such speech because of the potential for a lawsuit merits a reduced level of concern.[113]

The Supreme Court has yet to address the issue of whether speech by a credit rating agency regarding the credit rating of an issuer or issue of securities is fully protected speech or commercial speech. Notably, in *Lowe*, the majority's use of the language "expression of opinion" when referring to a financial newsletter containing commentary regarding securities may imply that the Court would consider credit ratings to be fully protected speech under the First Amendment.[114] Conversely, in *Greenmoss Builders*, the Court's comparison of a credit report issued by a credit reporting agency to commercial advertising may imply that the Court would view a credit rating issued by a credit rating agency as

106. *Id.* at 235 (reasoning that "less drastic remedies than outright suppression . . . are [likely] available to achieve the Government's asserted purpose of protecting investors").

107. 472 U.S. 749 (1985).

108. *See id.* at 762–63.

109. *See id.* (explaining how the speech at issue is similar to advertising); *see also* Oberman v. Dun & Bradstreet, Inc., 460 F.2d 1381, 1384 (7th Cir. 1972) (expressing a lack of acceptance of the proposition that a "credit rating . . . was entitled to the same treatment that the Supreme Court has afforded newspapers and magazines").

110. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762–63 (1985) (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771–72 & n.24 (1976) ("[T]he greater objectivity and hardiness of commercial speech[] may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.")).

111. *Id.* at 762–63 (citing *Va. State Bd. of Pharmacy*, 425 U.S. at 771–72 & n.24 (noting that since commercial speech is inextricably linked to "commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely")).

112. *Id.* ("[T]he market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors.").

113. *Id.* at 763 (noting that "any incremental 'chilling' effect of libel suits would be of decreased significance" with respect to speech contained in a credit report).

114. *See* Lowe v. SEC, 472 U.S. 181, 210 & n.58 (1985) (referring to the commentary contained in a financial newsletter as an "expression of opinion").

commercial speech.[115] A financial newsletter and a credit report issued by a credit reporting agency are substantially similar in that they both provide an assessment of creditworthiness. However, a credit report, such as that provided by Dun & Bradstreet (D&B) in *Greenmoss Builders*,[116] contains not only financial information but also a rating that provides an "indicator of financial strength and viability" of a business[117] similar to a credit rating issued by a credit rating agency.[118] The D&B Rating provides a "composite credit appraisal" of the credit risk of a business.[119] Moreover, D&B provides "predictive scores" of the future financial health of a business.[120] Thus, the speech contained in a credit rating assigned by a credit reporting agency, such as D&B, and the speech included in a credit rating issued by a credit rating agency, such as Standard & Poor's, appear to be strikingly similar if not virtually the same. Therefore, courts should treat the speech of a credit rating agency the same as the speech of a credit reporting agency: as commercial speech.

Although a credit rating does not propose a commercial transaction between the credit rating agency (as the speaker) and its audience (the investing public), a credit rating, in effect, proposes a commercial transaction between the issuer of the security and the investing public. As the issuer of the rating, the credit rating agency is, effectively, the speaker. Thus, a credit rating could certainly be considered a form of commercial speech. Moreover, credit ratings assigned for a fee paid by the issuer of the security contain the attributes of commercial speech. A credit rating issued for a fee is clearly "motivated by the desire for profit."[121] Furthermore, when the issuer of the security pays the fee, an inherent conflict of interest is present,[122] which defies the concept of a pure expression of opinion.

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115. *See Greenmoss Builders, Inc.*, 472 U.S. at 762–63 (comparing a credit report to advertising).

116. *See id.* at 751 (explaining the general information contained in a credit report).

117. *Samples and Descriptions*, DUN & BRADSTREET, INC., https://www.dnb.com/product/availrpt.htm (last visited Jan. 7, 2016) (explaining that the "D&B Rating" is a "widely-used indicator of financial strength and viability" of a company).

118. *See infra* notes 145, 303 and accompanying text.

119. *Samples and Descriptions*, *supra* note 117 (noting that the "D&B Rating" is "[a] powerful indicator of a firm's . . . composite credit appraisal that can help assess credit risk quickly and effectively").

120. *Id.* ("Predictive scores [are] based on statistically proven mathematical models that indicate the likelihood of a firm paying in a severely delinquent manner . . . and the likelihood of a company experiencing financial stress within an 18 month period . . . .").

121. *Greenmoss Builders, Inc.*, 472 U.S. at 762–63 (noting that commercial speech "is hardy and unlikely to be deterred by incidental state regulation" and that "[i]t is solely motivated by the desire for profit, which . . . is a force less likely to be deterred than others").

122. *See* Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & "ERISA" Litig.), 511 F. Supp. 2d 742, 823 & n.81 (S.D. Tex. 2005) ("[T]here is a potential conflict of interest created by compensation of credit rating agencies."); Steven L. Schwarcz, *Private Ordering of Public Markets: The Rating Agency Paradox*, 2002 U. ILL. L. REV. 1, 15 (noting the "conflict of interest inherent" in

Nevertheless, as discussed in Section I.A.3.b, many courts have treated the credit ratings assigned by the credit rating agencies as opinions, and as such, fully protected by the First Amendment.[123] However, the classification of credit ratings as statements of opinion by the lower courts should not end the analysis. If the Supreme Court ultimately determines that credit ratings are fully protected speech, then a government prohibition extending only to false, deceptive, or misleading speech would not be analogous to any kind of "flat prohibition or prior restraint on speech" that would be "presumptively invalid" in the context of fully protected speech.[124] In contrast, such a prohibition on fully protected speech would appear to be "a precisely drawn means of serving a compelling [state] interest"[125]: the protection of investors.

The Supreme Court has not yet addressed the issue of whether it considers the protection of investors a compelling state interest in the context of fully protected speech. However, in the Dodd–Frank Act, Congress determined that credit ratings have "systemic importance."[126] Congress further found that the appropriate functioning and accuracy of the credit rating agencies "are matters of national public interest."[127] Thus, the Supreme Court may determine that the protection of investors may be reasonably considered a compelling state interest. Moreover, the means used would be precisely drawn in that the restriction would prohibit only those credit ratings that are false, deceptive, or misleading.[128] Therefore, a prohibition against false, deceptive, or misleading credit ratings would not infringe the safeguards of the First Amendment.

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the fact that credit rating agencies are "virtually always paid their fee by the issuer of securities"); *see also infra* Section III.A.

123. *See, e.g.*, Jefferson Cty. Sch. Dist. No. R–1 v. Moody's Inv'r's Servs., Inc., 175 F.3d 848, 855–56 (10th Cir. 1999) (holding that a credit rating agency's article regarding the creditworthiness of an issuer of bonds "constitutes a protected expression of opinion" under the First Amendment); *In re* Scott Paper Co. Sec. Litig., 145 F.R.D. 366, 370–71 (E.D. Pa. 1992) (asserting that the credit rating issued by Standard & Poor's is not commercial speech; yet, finding that "the importance of S & P's ratings to an issuer's ability to market its commercial paper and debt instruments suggests that the possibility of disclosure may not chill the continued flow of financial information" and, thus, "the danger to the First Amendment . . . may be less than in other situations").

124. Lowe v. SEC, 472 U.S. 181, 234 (1985) (White, J., concurring) (citing N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam)) (finding that a ban extending not only to "fraudulent, deceptive, or manipulative speech" but also to "legitimate, disinterested advice" is "a flat prohibition or prior restraint on speech" and, "as applied to fully protected speech, [is] presumptively invalid and may be sustained only under the most extraordinary circumstances"); *see also supra* notes 14–15 and accompanying text.

125. *See, e.g.*, People v. Foley, 257 A.D.2d 243, 246, 252 (N.Y. App. Div. 1999) (holding that a statute prohibiting dissemination of "indecent material to minors" over the Internet "is a precisely drawn means of serving a compelling [state] interest" and "is thus constitutional under the First Amendment"); *cf.* Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 540, 544 (1980) (holding that a government proscription of "bill inserts that discuss controversial issues of public policy" is not "a narrowly drawn prohibition justified by a compelling state interest" and, thus, "directly infringes the freedom of speech protected by the First . . . Amendment[]").

126. Dodd–Frank Act, Pub. L. No. 111-203, title IX, § 931(1), 124 Stat. 1872 (2010).

127. *Id.* ("[C]redit rating agencies are central to capital formation, investor confidence, and the efficient performance of the United States economy.").

128. *See supra* note 125 and accompanying text.

Alternatively, if the Supreme Court determines that credit ratings are commercial speech, then the restrictions on such speech must be "narrowly tailored to advance a legitimate governmental interest."[129] As the concurring opinion found in *Lowe*, the protection of investors is a legitimate governmental interest.[130] Thus, with respect to credit ratings, the interest may be considered legitimate in that the government desires to protect investors from false, deceptive, or misleading credit ratings in a registration statement. Moreover, the means used would be narrowly tailored since the restriction would prohibit only those credit ratings that are false, deceptive, or misleading.[131]

One of the rationales for affording commercial speech a lower level of protection under the First Amendment is that such speech is less likely to be "chilled" by appropriate regulation because advertising is considered closely associated with profits.[132] Thus, disseminators of commercial speech have a financial incentive to continue to advertise even though subject to restrictions.[133] Moreover, as the issuers of the information, disseminators of commercial speech will be knowledgeable as to the truth of such speech.

In the context of credit rating agencies, the necessity of obtaining a credit rating in order to issue debt securities[134] suggests that restrictions on the journalist's privilege that may result in disclosure of financial information will not chill the issuer's provision of that information to the rating agency.[135] Likewise, the necessity of earning a profit by the credit rating agencies suggests that regulation prohibiting the issuance of false, deceptive, or misleading ratings will not chill the assignment of credit ratings. In Part II, the issues confronting this assertion will be discussed.

Moreover, even though the credit rating agencies obtain financial information from the issuers of the securities, the agencies are certainly

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129. *Lowe*, 472 U.S. at 234 (White, J., concurring) ("[E]ven where mere 'commercial speech' is concerned, the First Amendment permits restraints on speech only when they are narrowly tailored to advance a legitimate governmental interest."); *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 565 (1980) (recognizing that the First Amendment requires restrictions on speech to be "narrowly drawn" (quoting *In re* Primus, 436 U.S. 412, 438 (1978))).

130. *Lowe*, 472 U.S. at 234 (White, J., concurring) (finding a legitimate government interest in desiring "to prevent investors from falling into the hands of scoundrels and swindlers").

131. *See supra* notes 129–30 and accompanying text.

132. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976) ("[A]dvertising is the [s]ine qua non of commercial profits, [thus,] there is little likelihood of its being chilled by proper regulation and foregone entirely.")

133. Bates v. State Bar of Ariz., 433 U.S. 350, 380–81 (1977) ("Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation."); *see also Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24 (noting that "commercial speech may be more durable than other kinds" due to the associated profits and, thus, proper regulations are less likely to "silenc[e] the speaker").

134. Compuware Corp. v. Moody's Inv'rs Servs., Inc., 499 F.3d 520, 522 (6th Cir. 2007) ("Often, a company seeking to borrow funds must, as part of the loan process, ask Moody's, or a similar company, to publish its credit rating.")

135. *In re* Scott Paper Co. Sec. Litig., 145 F.R.D. 366, 370–71 (E.D. Pa. 1992).

knowledgeable as to whether the provided information represents creditworthiness of a stronger or a weaker character. For example, a debt security, such as a mortgage-backed security,[136] with an underlying cash flow derived from subprime mortgages would appear to have a much weaker level of creditworthiness than a corporate bond issued by a Fortune 500 company such as Johnson & Johnson.[137] Individuals who received subprime mortgage loans generally had "impaired or limited credit histories, or high debt relative to their income."[138] A layering of risk, including a weak borrower, a high loan-to-value, and inadequate structuring of the security,[139] should not result in a credit rating of AAA.[140] Yet, the assignment of the highest credit rating to a corporate bond issued by Johnson & Johnson and to a mortgage-backed security secured by subprime debt[141] appears to indicate a false, or at the very least misleading, credit

136. N.J. Carpenters Vacation Fund v. Royal Bank of Scot. Grp., PLC, 720 F. Supp. 2d 254, 258 (S.D.N.Y. 2010) (explaining mortgage-backed securities as securities whose cash flow is derived from underlying mortgage loans that are "pooled together" in the form of a security and subsequently sold on the secondary market to investors).

137. *Fortune 500 2014*, FORTUNE, http://fortune.com/fortune500/2014/Johnson-johnson-39/ (last visited Oct. 24, 2015) (listing Johnson & Johnson as thirty-ninth on the list of Fortune 500 companies).

138. U.S. DEP'T OF TREASURY & U.S. DEP'T OF HOUSING & URBAN DEV., JOINT REPORT ON RECOMMENDATIONS TO CURB PREDATORY HOME MORTGAGE LENDING 26 (2000), http://archives.hud.gov/reports/treasrpt.pdf; *see also* Till v. SCS Credit Corp., 541 U.S. 465, 471 (2004) (explaining that subprime loans are made "to borrowers with poor credit ratings"); *N.J. Carpenters Vacation Fund*, 720 F. Supp. 2d at 260 (noting that subprime loans involved "a higher risk of default based on weak credit history and personal finances, or fraud because borrowers either self-reported their income or were allowed to provide less information than in a typical loan").

139. Many mortgage-backed securities suffered from inadequate subordination in the structure of the security. These securities failed to have a sufficiently large enough subordinate (i.e., lowest or most junior) tranche, which would absorb the first defaults that occurred in the pool of mortgages. This subordination was intended to insulate the highest or most senior tranches of the security from default. However, the level of subordination in these structured securities was clearly inadequate. *See generally* ADAM ASHCRAFT ET AL., FED. RESERVE BANK OF N.Y., MBS RATINGS AND THE MORTGAGE CREDIT BOOM 2–3, 6 (2010) (noting subordination "declines significantly between the start of 2005 and mid-2007" and "[d]uring this . . . period, the average riskiness of new [mortgage-backed security] deals increases significantly").

140. AAA is the highest credit rating that Standard & Poor's may assign to a financial obligation. *Standard & Poor's Ratings Definitions*, STANDARD & POOR'S RATINGS SERVS. (Nov. 20, 2014, 6:46 AM), https://www.standardandpoors.com/en_US/web/guest/article/-/view/sourceId/504352. According to Standard & Poor's, when an obligation is assigned a credit rating of AAA, the capacity of the issuer to satisfy its "financial commitment" on the security is "extremely strong." *Id.* Similarly, AAA is the highest credit rating that Moody's may assign to a financial obligation. MOODY'S INV. SERV., RATING SYMBOLS AND DEFINITIONS 5 (2016), https://www.moodys.com/researchdocumentcontentpage.aspx?docid=PBC_79004. According to Moody's, obligations that are assigned a credit rating of AAA are considered to be the "highest quality" obligations with the "lowest level of credit risk" or risk of default. *Id.*

141. *See* John Morgan, *Path to Extinction: Only 3 US Companies Still Have AAA Credit Ratings*, NEWSMAX (Apr. 15, 2014, 11:48 AM), http://www.moneynews.com/Economy/S-P-rating-companies-Moodys/2014/04/15/id/565714/ (noting that Johnson & Johnson is one of only three companies that Standard & Poor's still rates as "AAA, which is reserved for companies with the unassailable financial strength and discipline"); Patrick Kingsley, *How Credit Ratings Agencies Rule the World*, GUARDIAN (Feb. 15, 2012, 3:00 PM), http://www.theguardian.com/business/2012/feb/15/credit-ratings-agencies-moodys ("In the run-up to 2008, a staggering proportion of mortgage-based debts were rated AAA, when in fact they were junk."); Thomas J. Curry, Comptroller of the Currency, Office of the Comptroller of the Currency, Remarks Before the American Securitization Forum 2 (Jan. 28, 2013), http://www2.occ.gov/news-

rating in the case of the mortgage-backed security backed by subprime debt. Such speech, whether ultimately deemed commercial speech or not, should be subject to regulation restricting the issuance of false, deceptive, or misleading ratings.

3. Statements of Opinion

As noted by Justice Brennan, ever since the Supreme Court "first hinted that the First Amendment provides some manner of protection for statements of opinion . . . courts and commentators have struggled with the contours of this protection . . . within our First Amendment jurisprudence."[142] This part will explore the relevant standards established by the Supreme Court in the context of statements of opinion and the application of those standards to the credit rating agencies.

a. The Actual Malice Standard

In *New York Times Co. v. Sullivan*,[143] the Supreme Court first addressed the issue of whether the First Amendment protections of freedom of speech and of the press restrict the power of a state to provide damages in an action for libel against critics of a public official with respect to his official conduct.[144] The *New York Times* printed allegedly false statements in an advertisement.[145] Upon review of the evidence, the Court determined that some of the statements printed in the newspaper were not accurate portrayals of certain events occurring in Montgomery, Alabama, during the civil rights movement.[146]

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issuances/speeches/2013/pub-speech-2013-19.pdf (noting that the "flawed credit ratings" assigned to mortgage-backed securities "suggest[ed] that the mortgage securities in question were as safe as investment-grade corporate bonds").

142. Milkovich v. Lorain Journal Co., 497 U.S. 1, 23 (1990) (Brennan, J., dissenting) (footnote omitted); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 325 (1974) ("[The] Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment."). *Milkovich* held that state libel laws are not prohibited by the First Amendment in a case where a newspaper article implied that the coach of a high school wrestling team lied while under oath in the course of a judicial proceeding. *Milkovich*, 497 U.S. at 3.

143. 376 U.S. 254 (1964).

144. *Id.* at 256 (noting that this case is the first time the Court will determine "the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct"); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S 749, 755 (1985) (stating that the *N.Y. Times* case was the first time the Supreme Court "held that the First Amendment limits the reach of state defamation laws").

145. *N.Y. Times Co.*, 376 U.S. at 256, 258 (discussing a libel complaint by a city Commissioner of Montgomery, Alabama, based on statements in an advertisement published by the *New York Times*); *see also Greenmoss Builders, Inc.*, 472 U.S. at 755 (describing the *N.Y. Times* case in which a public official sought "damages for the publication of an advertisement criticizing police conduct in a civil rights demonstration"); *Gertz*, 418 U.S. at 334 ("The Times ran a political advertisement endorsing civil rights demonstrations by black students in Alabama and impliedly condemning the performance of local law-enforcement officials.").

146. *N.Y. Times Co.*, 376 U.S. at 258–59 ("It is uncontroverted that some of the statements contained in the [advertisement] . . . were not accurate descriptions of events which occurred in Montgomery. . . . [For example,] [a]lthough nine students were expelled by the State Board of Edu-

Nevertheless, the Court held that the Constitution prohibits awarding damages to a public official for defamatory statements concerning his official conduct even when those statements are shown to be false unless the public official can prove that the false statements were "made with 'actual malice.'"[147] The Supreme Court defined "actual malice" as making a statement with knowledge that the statement is false or with reckless disregard concerning whether or not the statement is false.[148] Applying the actual malice standard, the Court held that the *New York Times* did not publish the false statements with actual malice.[149] The Court found that even if the defamatory statements were not shown to be "substantially correct," the contrary opinion held by one of the newspaper's employees "was at least a reasonable one."[150]

Moreover, the Supreme Court held that the statements do not lose constitutional protection because they were contained in a "paid advertisement."[151] As the Court noted, the advertisement contained expressions of opinion and provided information concerning the civil rights movement, the "existence and objectives [of which] are matters of the highest public interest and concern."[152] Furthermore, the fact that the

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cation, this was not for leading [a] demonstration at the Capitol [as the advertisement stated], but for demanding service at a lunch counter in the Montgomery County Courthouse on another day.").

147. *Id.* at 279–80 ("The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' . . . ."); *see also* Cty. of Orange v. McGraw Hill Cos., 245 B.R. 151, 154–55 (Bankr. C.D. Cal. 1999) (noting that a publisher will not be liable for printing false statements unless those statements were "made with 'actual malice'" (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) (concluding that "public figures and public officials may not recover for the tort of intentional infliction of emotional distress . . . without showing . . . that the publication contains a false statement of fact that was made with 'actual malice'")).

148. *N.Y. Times Co.*, 376 U.S. at 280 (defining actual malice); *see also* Milkovich v. Lorain Journal Co., 497 U.S. 1, 14 (1990); *Hustler Magazine, Inc.*, 485 U.S. at 56; *Gertz*, 418 U.S. at 328; Compuware Corp. v. Moody's Inv'rs Servs., Inc., 499 F.3d 520, 526 (6th Cir. 2007); Jefferson Cty. Sch. Dist. No. R–1 v. Moody's Inv'r's Servs., Inc., 175 F.3d 848, 857 (10th Cir. 1999); *Cty. of Orange*, 245 B.R. at 155.

149. *N.Y. Times Co.*, 376 U.S. at 286–88 ("[T]he facts do not support a finding of actual malice. . . . [T]he evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice.").

150. *Id.* at 286 (noting that the *Times*' Secretary stated that "he thought the advertisement was 'substantially correct'"); *see also* Garrison v. Louisiana, 379 U.S. 64, 73 (1964) (noting that "utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth").

151. *N.Y. Times Co.*, 376 U.S. at 266 (holding that "allegedly libelous statements" do not sacrifice First Amendment protections simply due to the statements being disseminated in a "paid advertisement"); *see also* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) ("That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment."); Cty. of Orange v. McGraw-Hill Cos. (*In re* Cty. of Orange), 245 B.R. 138, 143 (Bankr. C.D. Cal. 1997) (noting the protections of the First Amendment are "not diminished when the expression at issue is published and sold for profit" (citing Time, Inc. v. Hill, 385 U.S. 374, 397 (1967))).

152. *N.Y. Times Co.*, 376 U.S. at 266 (citing NAACP v. Button, 371 U.S. 415, 428–29, 433–36 (1963) (holding "that the activities of the NAACP, its affiliates and legal staff . . . are modes of expression and association protected by the First . . . Amendment[]" and, therefore, striking down a state statute that prohibits advising individuals that their rights have been infringed and referring

newspaper received a payment to publish the advertisement is no different than the payments received when selling newspapers and books, and thus, the payment is similarly "immaterial" to whether the statements contained therein are deserving of constitutional protection.[153]

Thus, the actual malice standard protects false statements unless it can be proven that the speaker made those statements with knowledge of the falsity of the statements or with a reckless disregard concerning whether or not the statements were accurate.[154] Notably, the Supreme Court has plainly stated that false statements concerning factual matters are bereft of any value under the Constitution.[155] Such false statements "interfere with the truth-seeking function of the marketplace of ideas."[156] However, the Court has also recognized that, despite the lack of value in false statements, such statements are "inevitable in free debate."[157] Thus, the Court was concerned that a strict liability standard for publishers of false factual statements would likely have the unwanted effect of "chilling" speech that possessed "constitutional value."[158] As expressed by the Court, "Freedoms of expression require 'breathing space.'"[159]

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them to a specific attorney for representation because such a statute "could well freeze out of existence" all activities in support of the civil rights movement)).

153. *Id.* at 266 (citing Smith v. California, 361 U.S. 147, 150 (1959) (noting that it is "no matter that the dissemination [of books and other forms of the printed word] takes place under commercial auspices")).

154. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 153 (1967) (explaining that recovery is permitted under the actual malice standard only when the plaintiff can "prove that the publication involved was deliberately falsified, or published recklessly despite the publisher's awareness of probably falsity" (citing *N.Y. Times Co.*, 376 U.S. at 279–80 (finding that the constitution protects false statements unless the petitioner can prove that the statements were "made with 'actual malice'" in that the speaker made the statements knowing they were false or with a reckless disregard concerning the falsity of the statements))).

155. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless . . . ."); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (finding "no constitutional value in false statements of fact").

156. *Hustler Magazine, Inc.*, 485 U.S. at 52 (citing *Gertz*, 418 U.S. at 340 ("[False statements] belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (noting that, *inter alia*, obscene, profane, and libelous speech are not protected under the First Amendment)))) (finding that false statements "cause damage to an individual's reputation that cannot easily be repaired by counterspeech").

157. *Id.* at 52 (quoting *Gertz*, 418 U.S. at 340 ("Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate.")); *see also Curtis Publ'g Co.*, 388 U.S. at 152 (stating that the Court has "recognized 'the inevitability of some error in the situation presented in free debate'" (quoting Time, Inc. v. Hill, 385 U.S. 374, 406 (1967))); *N.Y. Times Co.*, 376 U.S. at 271–72 (acknowledging that false speech is "inevitable in free debate").

158. *Hustler Magazine, Inc.*, 485 U.S. at 52 ("[A] rule that would impose strict liability on a publisher for false factual assertions would have an undoubted 'chilling' effect on speech relating to public figures that does have constitutional value."); *see also* Milkovich v. Lorain Journal Co., 497 U.S. 1, 14 (1990) (explaining that the actual malice standard was grounded on the concern that a state law requiring the speaker to warrant that all factual statements were true would have the effect of deterring speech deserving of First Amendment protection (citing *Gertz*, 418 U.S. at 334)).

159. Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 772 (1986) (quoting *N.Y. Times Co.*, 376 U.S. at 271–72 (recognizing that false statements are "inevitable in free debate" and that such statements "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive'" (alteration in original) (quoting NAACP v. Button, 371 U.S. 415,

Thus, the Supreme Court established the actual malice standard to avoid chilling valuable speech.[160] Accordingly, the actual malice rule provides publishers with protection from liability for innocent misstatements as well as for negligent falsehoods.[161]

Although the Supreme Court has observed that both the "intentional lie" and the "careless error" lack constitutional value,[162] the Court has defined the reckless disregard prong of the actual malice rule to require more than simply a "failure to investigate."[163] Reckless disregard under the actual malice standard means the publisher has a "high degree of awareness" that the statements are likely false.[164] For example, in *New York Times*, the evidence did not support a finding that the publisher was "aware of the likelihood" that the information was false; thus, the plaintiff failed to prove reckless disregard.[165] Reckless disregard of the truth

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433(1963))); *see also Gertz*, 418 U.S. at 341 ("The First Amendment requires that we protect some falsehood in order to protect speech that matters."); Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & "ERISA" Litig.), 511 F. Supp. 2d 742, 822 (S.D. Tex. 2005) (observing the need "to preserve the 'breathing space' essential for freedom of expression" (quoting *Hustler Magazine, Inc.*, 485 U.S. at 52)).

160. *Hustler Magazine, Inc.*, 485 U.S. at 52 (explaining that the needed "breathing space is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove *both* that the statement was false and that the statement was made with the requisite level of culpability"); *see also Milkovich*, 497 U.S. at 14 (noting that this rule was based on a concern that constitutionally protected speech regarding public officials would be deterred if the speaker was required to certify the truth of every statement of fact (citing *Gertz*, 418 U.S. at 334)); Cty. of Orange v. McGraw Hill Cos., 245 B.R. 151, 154–55 (Bankr. C.D. Cal. 1999) ("To accommodate the 'breathing-space' the First Amendment requires, a publisher will not incur liability for a false statement unless the statement was made with 'actual malice' . . . ." (quoting *Hustler Magazine, Inc.*, 485 U.S. at 52)).

161. *Enron Corp.*, 511 F. Supp. 2d at 811 (explaining that the actual malice rule "protects publishers from liability for 'either innocent or negligent misstatement' so as not to chill the press' exercise of constitutional guarantees" (quoting *Time, Inc.*, 385 U.S. at 389)).

162. *Gertz*, 418 U.S. at 340 ("Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." (quoting *N.Y. Times Co.*, 376 U.S. at 270)); *see also* St. Amant v. Thompson, 390 U.S. 727, 732 (1968) ("Neither lies nor false communications serve the ends of the First Amendment . . . ."); *Time, Inc.*, 385 U.S. at 390 ("[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." (quoting Garrison v. Louisiana, 379 U.S. 64, 75 (1964))).

163. Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 688 (1989) ("[F]ailure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard."); *Gertz*, 418 U.S. at 332 ("[M]ere proof of failure to investigate, without more, cannot establish reckless disregard for the truth."); *see also St. Amant*, 390 U.S. at 733 ("Failure to investigate does not in itself establish bad faith." (citing *N.Y. Times Co.*, 376 U.S. at 287–88 ("[N]egligence in failing to discover the misstatements . . . is constitutionally insufficient to show the recklessness that is required for a finding of actual malice."))); Curtis Publ'g Co. v. Associated Press, 388 U.S. 130, 153 (1967) (noting that "[i]nvestigatory failures alone" are not sufficient to meet the actual malice standard); Compuware Corp. v. Moody's Inv'rs Servs., Inc., 499 F.3d 520, 526 (6th Cir. 2007) ("[A] defendant's failure to investigate, without more, does not establish a reckless disregard of the truth.").

164. *Gertz*, 418 U.S. at 332 (noting reckless disregard requires that "the publisher must act with a 'high degree of awareness of . . . probable falsity'" (alteration in original) (quoting *St. Amant*, 390 U.S. at 731)); *see also Garrison*, 379 U.S. at 74 ("[O]nly those false statements made with [a] high degree of awareness of their probable falsity . . . may be the subject of either civil or criminal sanctions.").

165. *St. Amant*, 390 U.S. at 731 (citing *N.Y. Times Co.*, 376 U.S. at 287 ("The mere presence of . . . stories in the files does not . . . establish that the Times 'knew' the advertisement was false."))

or falsity of a statement is a "subjective standard."[166] As expressed by the Supreme Court, the measure of reckless behavior is not founded on the "reasonably prudent man" standard.[167] Whether or not a reasonably prudent man would have investigated or would have decided to publish is not the touchstone applied when determining reckless disregard.[168] Rather, to prove reckless disregard, "more than a departure from reasonably prudent conduct" is needed.[169] Reckless disregard requires proof that the publisher "entertained serious doubts" regarding the truth of the information.[170] If a publisher ignores these doubts and nevertheless publishes the information, then the plaintiff can show a reckless disregard for whether the information was true or false, and prove actual malice.[171] Moreover, if a publisher purposely avoids the truth, this "may be sufficient" to show actual malice.[172] However, it is not necessary for a publisher to "include every relevant and potentially positive detail" to prevent liability.[173]

The Supreme Court has acknowledged that the high bar of the reckless disregard standard may prove insurmountable for many plaintiffs.[174] However, the overriding interest in protecting freedom of expression concerning public matters against the possibility of self-censorship necessitates a rejection of the reasonably prudent man standard.[175] Thus, the First Amendment inevitably will protect some false publications in

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(explaining that the plaintiff in the *N.Y. Times* case "did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information").

166. *Compuware Corp.*, 499 F.3d at 526 (citing *Harte-Hanks Commc'ns, Inc.*, 491 U.S. at 688).

167. *St. Amant*, 390 U.S. at 731.

168. *Compuware Corp.*, 499 F.3d at 526 (citing *St. Amant*, 390 U.S. at 731 ("[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.")).

169. *Harte-Hanks Commc'ns, Inc.*, 491 U.S. at 688 (citing *St. Amant*, 390 U.S. at 731).

170. *Compuware Corp.*, 499 F.3d at 526 (quoting *St. Amant*, 390 U.S. at 731 ("There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.")).

171. *St. Amant*, 390 U.S. at 731 (noting that publishing with "serious doubts" regarding whether or not the information is true "shows reckless disregard for truth or falsity and demonstrates actual malice").

172. *Compuware Corp.*, 499 F.3d at 526 (citing *Harte-Hanks Commc'ns, Inc.*, 491 U.S. at 692 (noting that "purposeful avoidance of the truth is in a different category" than a "failure to investigate")).

173. *Id.* at 527 (citing Perk v. Reader's Digest Ass'n, 931 F.2d 408, 412 (6th Cir. 1991) (observing that a publisher does not have a "legal obligation to present a balanced view")).

174. *See St. Amant*, 390 U.S. at 731 ("Concededly the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher."); *see also* PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 96 (observing that the actual malice rule "poses such a high barrier that it virtually insulates the speaker from liability").

175. *See St. Amant*, 390 U.S. at 731–32 ("[T]he stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies.").

order to guarantee the protection of truthful publications regarding matters of public interest.[176]

However, the Supreme Court has rejected the idea that a statement that may be characterized as an opinion automatically deserves full constitutional protection.[177] The Court has recognized that "expressions of 'opinion' may often imply an assertion of objective fact."[178] For example, suppose a newspaper article makes the following assertion: "In my opinion, the Governor is a liar." This statement implies knowledge of certain facts, which led to the conclusion that the Governor is a liar.[179] If the statement is based on incomplete or inaccurate facts, or if the article's evaluation of the facts is incorrect, then the statement may imply an assertion of fact that is false.[180] Moreover, expressing the statement in words that appear to indicate that an opinion is being proffered, such as using the words "in my opinion" or "I think," does not negate the possibility that "the statement may . . . imply a false assertion of fact."[181] For example, the fact that a credit rating agency refers to its evaluation of a bond issue as an opinion does not, in and of itself, establish that the rating agency's statements are entitled to constitutional protection.[182] If the credit rating agency's statements were proven to have "materially false components," the rating agency would not be protected from liability simply by using the word "opinion."[183]

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176. *Id.* at 732 ("[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.").

177. Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990) (explaining that the Court did not intend "to create a wholesale defamation exemption for anything that might be labeled 'opinion'"); *see also* Jefferson Cty. Sch. Dist. No. R–1 v. Moody's Inv'r's Servs., Inc., 175 F.3d 848, 852 (10th Cir. 1999); Cty. of Orange v. McGraw-Hill Cos. (*In re* Cty. of Orange), No. SA CV 96-0765-GLT, 1997 U.S. Dist. LEXIS 22459, at *12 (C.D. Cal. June 2, 1997).

178. *Milkovich*, 497 U.S. at 18–19 (rejecting "the creation of an artificial dichotomy between 'opinion' and fact"); *see also Jefferson Cty. Sch. Dist.*, 175 F.3d at 852; Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & "ERISA" Litig.), 511 F. Supp. 2d 742, 819 (S.D. Tex. 2005); *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *12–13 ("[T]he threshold question is whether a 'reasonable fact-finder could conclude that the statement implies an assertion of objective fact.'" (quoting Unelko Corp. v. Rooney, 912 F.2d 1049, 1053 (9th Cir. 1990))).

179. *See Milkovich*, 497 U.S. at 18–19.

180. *Id.* ("Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.").

181. *Id.* (explaining that "[s]imply couching . . . statements in terms of opinion does not dispel" the implication of "a false assertion of fact"); *Jefferson Cty. Sch. Dist.*, 175 F.3d at 854 ("[C]ourts have . . . applied *Milkovich* to conclude that certain statements, even though couched as expressions of opinion, are provably false and therefore are not protected from defamation claims by the First Amendment.").

182. *Jefferson Cty. Sch. Dist.*, 175 F.3d at 856 ("[T]he fact that Moody's article describes its evaluation as an opinion is not sufficient, standing alone, to establish that Moody's statements are protected."); *see also Milkovich*, 497 U.S. at 19.

183. *Jefferson Cty. Sch. Dist.*, 175 F.3d at 856 (noting that if a statement expressed as "an opinion were shown to have materially false components, the issuer should not be shielded from liability by raising the word 'opinion' as a shibboleth"); *Enron Corp.*, 511 F. Supp. 2d at 822 ("[A] publisher may be liable for a statement of opinion if that statement reasonably implies false facts or relies on stated facts that are provably false."); *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at

However, the statement "in my opinion, the Governor is making a mistake by painting the Governor's mansion orange," would be fully protected.[184] Thus, a "statement of opinion" concerning public matters, which does not imply an assertion of fact that may be proven as false, will be fully protected under the First Amendment.[185] In contrast, a statement of opinion regarding a matter of public concern, which implies an assertion of fact that may be proven as false or depends on stated facts that may be proven as false, may be subject to liability under the actual malice standard.[186]

As intimated above, the actual malice standard is generally applied to false statements regarding "matters of public concern."[187] As stated by the Supreme Court, the First Amendment protects "the free flow of ideas and opinions on matters of public interest and concern."[188] Thus, in *New York Times*, the Court applied the actual malice rule to false statements against a public official.[189] Shortly thereafter, in *Curtis Publishing Co. v. Butts*,[190] the Supreme Court first considered whether the actual malice standard should be extended to defamatory statements against individuals who are not public officials but nevertheless are considered public figures because these individuals have some type of involvement in a matter of public interest.[191] As an initial matter, the Court explained the need to consider "the factors which arise in the particular context" rather than engage in a "blind application" of the *New York Times* actual malice

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*12–13 (explaining that a statement of opinion is actionable if the statement contains a factual assertion that may be proven as false).

184. *See Milkovich*, 497 U.S. at 20.

185. *Id.* (discussing Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 768–69 (1986) (holding that "where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false")); *Enron Corp.*, 511 F. Supp. 2d at 819 ("[I]f a statement 'cannot reasonably [be] interpreted as stating actual facts,' it is shielded by the First Amendment." (alteration in original) (quoting *Milkovich*, 497 U.S. at 20)).

186. *Milkovich*, 497 U.S. at 20 ("[W]here a statement of 'opinion' on a matter of public concern reasonably implies false and defamatory facts . . . [the plaintiff] must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth.").

187. Cty. of Orange v. McGraw Hill Cos., 245 B.R. 151, 155 (Bankr. C.D. Cal. 1999) (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 281–82 (1964)); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 755 (1985) (explaining that the advertisement in *N.Y. Times* "concerned 'one of the major public issues of our time'" and, thus, the Court in that case applied the actual malice standard to the issue of whether a public official may recover damages for false statements contained in the advertisement (quoting *N.Y. Times Co.*, 376 U.S. at 271)).

188. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."); *see also Greenmoss Builders, Inc.*, 472 U.S. at 755 (explaining "that 'freedom of expression *upon public questions* is secured by the First Amendment,' and that 'debate *on public issues* should be uninhibited, robust, and wide-open'" (citation omitted) (quoting *N.Y. Times Co.*, 376 U.S. at 269–70)); *N.Y. Times Co.*, 376 U.S. at 264–66 (finding that an advertisement containing expressions of opinion and information concerning the civil rights movement, "whose existence and objectives are matters of the highest public interest and concern," was protected under the First Amendment).

189. *N.Y. Times Co.*, 376 U.S. at 279–80.

190. 388 U.S. 130 (1967).

191. *Id.* at 134.

standard.[192] In reviewing the circumstances of this case, the Court found that the individuals involved had a sufficient degree of "continuing public interest" as a result of their position or activities as well as "sufficient access to the [channels] of counterargument" to have the ability to expose the falsity of the defamatory assertions.[193] Therefore, the Court considered the individuals to be "public figures."[194] As expressed by Chief Justice Warren in concurrence, the importance of permitting "uninhibited debate" concerning the involvement of such individuals in public matters "is as crucial as it is in the case of 'public officials.'"[195] Thus, "a majority of the Court" agreed to apply the actual malice standard to defamatory actions brought by public figures.[196] Hence, the actual malice rule has been applied to false statements against public officials as well as to falsehoods against public figures.[197] Moreover, both a public official and a public figure must show actual malice by "a clear and convincing standard of proof."[198]

However, the Supreme Court has found that the actual malice standard is inappropriate in the case of a defamatory false statement that causes injury to a private person even when the statement concerns a

192. *Id.* at 148 (quoting Time, Inc. v. Hill, 385 U.S. 374, 390–91 (1967) (applying the actual malice standard "not through blind application" of *N.Y. Times*, but upon considering "the factors which arise in the particular context of the application of the New York [Right to Privacy] statute in cases involving private individuals")).

193. *Id.* at 135, 140, 154–55 (explaining that one of the consolidated cases involved the University of Georgia athletic director who was accused "of conspiring to 'fix' a football game" and the other involved "a man of some political prominence" who had been present at the University of Mississippi during a "massive riot").

194. *Id.* at 154 (noting that both individuals "commanded a substantial amount of independent public interest at the time of the publications" and, therefore, would be considered "public figures").

195. *Id.* at 164 (Warren, C.J., concurring) ("Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.'").

196. Milkovich v. Lorain Journal Co., 497 U.S. 1, 14 (1990) (stating that in *Curtis*, "a majority of the Court" concluded that the actual malice standard should be applied in defamatory actions brought by public figures); *see also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988) (asserting that since the decision in *N.Y. Times*, the Court has "consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if" the plaintiff can show that the statement was made with actual malice); Gertz v. Robert Welch, Inc., 418 U.S. 323, 336 & n.7 (1974) ("[A] majority of the [*Curtis*] Court agreed . . . that the *New York Times* test should apply to criticism of 'public figures' as well as 'public officials.'").

197. *Hustler Magazine, Inc.*, 485 U.S. at 56–57 (applying the actual malice standard to false statements against a public figure); N.Y. Times Co. v. Sullivan,, 376 U.S. 254, 279–80 (1964) (applying the actual malice rule to false statements against a public official); Jefferson Cty. Sch. Dist. No. R–1 v. Moody's Inv'r's Servs., Inc., 175 F.3d 848, 852 (10th Cir. 1999) ("[T]he First Amendment prohibits public officials and public figures from recovering damages for false and defamatory statements unless they demonstrate that the statement was made with actual malice.").

198. *Milkovich*, 497 U.S. at 15, 20 (citing *Gertz*, 418 U.S. at 342) (explaining that "where a statement of 'opinion' on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with" actual malice and the showing of actual "malice is subject to a clear and convincing standard of proof"); Compuware Corp. v. Moody's Inv'rs Servs., Inc., 499 F.3d 520, 525 (6th Cir. 2007) ("A plaintiff who qualifies as a public official or public figure may recover for defamation only if he produces *clear and convincing evidence* that the defendant acted with actual malice.").

public matter.[199] For example, in *Gertz v. Robert Welch, Inc.*,[200] the Supreme Court held that a publisher of false defamatory statements concerning a private individual was not entitled to a constitutional privilege to avoid liability for any harm caused by the false statements.[201] The Court overturned its earlier ruling in *Rosenbloom v. Metromedia, Inc.*,[202] in which the Court extended the actual malice standard to false defamatory statements against a private individual concerning a matter of public interest.[203]

In *Gertz*, the Court reasoned that the actual malice standard is a very high bar to overcome, and a private individual normally would not have the same opportunity as a public official or public figure to correct a defamatory falsehood.[204] Moreover, the Court acknowledged the normative concern that, in contrast to a public official or a public figure, a private individual has not voluntarily exposed himself or herself to public scrutiny and to the corresponding enhanced risk of a false defamatory statement injurious to that individual.[205] Thus, weighing the competing interests between freedom of speech and of the press, on the one hand, and the legitimate state interest in compensating a private individual who is harmed by a defamatory falsehood, on the other hand, the Court held that the *New York Times* actual malice standard does not apply to false defamatory statements that cause injury to private individuals.[206] The fact

199. *Milkovich*, 497 U.S. at 15 (noting the actual malice rule "was inappropriate for a private person attempting to prove he was defamed on matters of public interest" (citing *Gertz*, 418 U.S. at 345–47 (finding the actual malice standard inapplicable in cases concerning a defamatory falsehood injurious to a private individual despite the statement concerning a matter of public interest))).

200. 418 U.S. 323 (1974).

201. *Id.* at 326–27, 345–46 (concluding "that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to . . . a private individual").

202. 403 U.S. 29 (1971), *abrogated by* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

203. *See Gertz*, 418 U.S. at 337, 345–46 (explaining the reasoning of the plurality of the Court in the *Rosenbloom* decision and finding "unacceptable" the extension of the actual malice standard to defamatory false statements that harm a private person's reputation); *see also Rosenbloom*, 403 U.S. at 43–44.

204. *Gertz*, 418 U.S. at 342–44 ("[M]any deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test. . . . Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements then [sic] private individuals normally enjoy."); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 756 (1985) (explaining that private individuals "generally lack effective opportunities for rebutting" defamatory statements).

205. *Gertz*, 418 U.S. at 344–45 (distinguishing between public and private individuals and noting "the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood[s]" whereas the same assumption does not obtain in the case of private individuals); *see also Greenmoss Builders, Inc.*, 472 U.S. at 756 (explaining that private individuals "have not voluntarily exposed themselves to increased risk of injury from defamatory statements").

206. *Gertz*, 418 U.S. at 342–49 (holding that the States are free to determine the "appropriate standard of liability" to be applied in the case of a publisher of a false defamatory statement that causes harm to a private individual); *see also Greenmoss Builders, Inc.*, 472 U.S. at 756 (explaining that the state's interest in compensating a private individual for an injurious falsehood is stronger than the First Amendment interest in protecting free speech (citing *Gertz*, 418 U.S. at 348–49)).

that a statement concerns a public matter, in and of itself, is not sufficient to justify the application of the actual malice standard to a private person.[207]

However, the Court limited the recovery to compensatory damages for injury actually suffered and did not provide for recovery of presumed or punitive damages absent a showing of actual malice.[208] Moreover, the state may not hold a defendant liable absent some fault.[209] Thus, the states may not impose a strict liability standard.[210] Further, the Supreme Court has held that in the case of a public matter concerning a private person, the plaintiff also must prove the statements are false, at least when a media defendant is implicated.[211] Hence, a plaintiff must show both falsity and fault in order to recover damages.[212]

Later, in *Greenmoss Builders*, the Supreme Court addressed the issue of whether the actual malice standard applies to false statements injurious to a private person in a private matter.[213] The Court employed the balancing approach of *Gertz* and found that the state's legitimate interest in providing compensation to a private person who is harmed by a defamatory falsehood is stronger than the constitutional interest in pro-

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207. *Greenmoss Builders, Inc.*, 472 U.S. at 756 (noting that speech regarding "a public issue [does] not by itself entitle the libel defendant to the constitutional protections of *New York Times*" (citing *Gertz*, 418 U.S. at 343 (explaining that a test which bases the application of the actual malice standard solely on whether the statement concerns a public matter does not adequately address the competing concerns))).

208. Milkovich v. Lorain Journal Co., 497 U.S. 1, 16 (1990) (noting that "recovery of presumed or punitive damages [was not permitted] on less than a showing of *New York Times* malice" (citing *Gertz*, 418 U.S. at 349–50 (finding a plaintiff may be compensated only for "actual injury" when actual malice is not shown))).

209. *Id.* at 20 (noting that where a statement of opinion implies facts that are defamatory and false and such statement "involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault"); *Greenmoss Builders, Inc.*, 472 U.S. at 766 (White, J., concurring) (explaining that in *Gertz*, the Court "for the first time [held] that [private individuals in defamation actions] could no longer recover by proving a false statement . . . . They must, in addition, prove some 'fault,' at least negligence" (citing *Gertz*, 418 U.S. at 347 ("[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher . . . of defamatory falsehood injurious to a private individual.")).

210. *Gertz*, 418 U.S. at 347–48 ("This approach . . . recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press . . . from the rigors of strict liability for defamation.").

211. Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 768–69 (1986); *see also Milkovich*, 497 U.S. at 19–20 ("*Hepps* stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations . . . where a media defendant is involved."); Jefferson Cty. Sch. Dist. No. R–1 v. Moody's Inv'r's Servs., Inc., 175 F.3d 848, 852 (10th Cir. 1999) ("[I]n defamation actions against media defendants, the First Amendment requires that a plaintiff bear the burden of proving that the statement in question was false . . . .").

212. *Hepps*, 475 U.S. at 776 ("We believe that the common law's rule on falsity—that the defendant must bear the burden of proving truth—must . . . fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.").

213. *Greenmoss Builders, Inc.*, 472 U.S. at 751.

tecting speech concerning private matters.[214] The Court explained that "not all speech is of equal First Amendment importance."[215] Speech concerning public matters is "at the heart of the First Amendment's protection."[216] Such speech inhabits "the highest rung of the hierarchy of First Amendment values."[217] Accordingly, speech regarding matters of public concern is due "special protection."[218] In contrast, speech concerning private matters is less important, and thus, its protections are not as strict.[219] Permitting state law remedies for such speech does not interfere with the "uninhibited, robust, and wide-open" discussion and "debate on public issues" nor is there any concern that possible liability might cause the press to engage in self-censorship.[220] Thus, balancing the state's substantial interest in awarding damages for a defamatory falsehood compared to the reduced First Amendment value of speech concerning purely private matters, the Supreme Court held that presumed and punitive damages may be awarded even though actual malice is not shown.[221]

The question then becomes whether the statements concern a public or a private matter. As the Supreme Court has held, in order to determine the type of speech involved, the court must review "the content, form, and context" of the speech as shown by the entire record before the court.[222] Applying these factors to the case of *Greenmoss Builders*, the Court found that the credit report did not concern a public matter.[223] The

214. *Id.* at 757–58 (finding the constitutional interest in protecting speech regarding private matters "is less important than" the interest in protecting speech concerning public matters (citing *Gertz*, 418 U.S. at 348)).

215. *Id.* at 758 & n.5 ("[The Supreme] Court on many occasions has recognized that certain kinds of speech are less central to the interests of the First Amendment than others. . . . In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech." (citations omitted)); *see also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) (noting certain types of speech are not deserving of absolute protection under the First Amendment (citing FCC v. Pacifica Found., 438 U.S. 726, 747 (1978))).

216. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978) ("[F]reedom of speech and of the press guaranteed by the Constitution embraces . . . the liberty to discuss publicly and truthfully all matters of public concern . . . ." (quoting Thornhill v. Alabama, 310 U.S. 88, 101 (1940))).

217. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (quoting Carey v. Brown, 447 U.S. 455, 467 (1980)).

218. *Greenmoss Builders, Inc.*, 472 U.S. at 759 (citing *Claiborne Hardware*, 458 U.S. at 913).

219. *Id.* at 759–60 (noting speech regarding private matters is less of a constitutional concern and even though "such speech is not totally unprotected by the First Amendment, its protections are less stringent" (citation omitted)); *see also* Oberman v. Dun & Bradstreet, Inc., 460 F.2d 1381, 1384 (7th Cir. 1972) (finding a lack of justification for providing First Amendment protection in a libel action brought by a private individual on a private matter).

220. *Greenmoss Builders, Inc.*, 472 U.S. at 760–62 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)) (finding the State's interest in providing presumed and punitive damages is substantial compared to the "incidental effect" such remedies might have on speech concerning private matters which is of "significantly less" First Amendment interest).

221. *Id.* at 760–61 ("[T]he reduced constitutional value of speech involving no matters of public concern . . . adequately supports awards of presumed and punitive damages—even absent a showing of 'actual malice.'").

222. Connick v. Myers, 461 U.S. 138, 147–48 (1983) ("Whether . . . speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.").

223. *Greenmoss Builders, Inc.*, 472 U.S. at 761–62 (finding the form, content, and context of the speech show that the "credit report concerns no public issue").

credit report contained speech that was in the specific interest of D&B, the commercial speaker, and a particular business audience.[224] The credit report was provided to five subscribers who were not permitted to further disseminate the information.[225] The Court found that the credit report did not involve any matter of public concern; there was no "strong interest in the free flow of commercial information."[226] Thus, the actual malice standard did not apply.[227]

Similarly, in *Oberman v. Dun & Bradstreet, Inc.*,[228] the Seventh Circuit found that First Amendment protection was not justified in a private matter concerning a private person.[229] Notably, the Seventh Circuit initially expressed its lack of acceptance of the notion that a credit rating is due the same protection that the Supreme Court has provided to newspapers.[230] However, assuming so for the sake of argument, the Seventh Circuit found that the private nature of this case did not justify the protection. The Seventh Circuit further explained that under Illinois law, if a "publisher does not believe in the truth of the . . . [statement], or has no reasonable grounds for believing it to be true," then the publisher's "qualified . . . privilege was abused," and the publisher may be liable.[231] A court may infer such abuse based on a lack of appropriate investigation.[232] Thus, D&B may incur liability if it failed to properly investigate before issuing its credit rating.[233]

The *Oberman* case exemplifies the divergence in viewpoints among the lower courts. Here, the Seventh Circuit did not accept the idea that a credit rating should receive the same First Amendment protection afforded to newspapers.[234] This case also illustrates the high bar of the Su-

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224. *Id.* at 762 (finding the speech at issue was "solely in the individual interest of the speaker and its specific business audience"); *see also Oberman*, 460 F.2d at 1384 (observing that the plaintiff's financial affairs delineated in the credit report were not "of any interest" to anyone other than those involved in the specific business transaction at issue, those who provide credit to his business, or those who receive "his trade paper").

225. *Greenmoss Builders, Inc.*, 472 U.S. at 762 ("[T]he credit report was made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further."); *see also* Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & "ERISA" Litig.), 511 F. Supp. 2d 742, 819 (S.D. Tex. 2005) (explaining the credit report in *Greenmoss* "was sent to only five subscribers who were under agreement to keep the information confidential").

226. *Greenmoss Builders, Inc.*, 472 U.S. at 762 (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 764 (1976)).

227. *Id.* at 761–63; *see also Oberman*, 460 F.2d at 1382–85 (finding the actual malice standard inapplicable in a libel case brought by a private person concerning a private matter).

228. 460 F.2d 1381 (7th Cir. 1972).

229. *Id.* at 1384 (finding First Amendment protection in a "case brought by a private person upon a matter not of public interest can[not] be justified").

230. *Id.* (stating that the court was "not persuaded that the credit rating of [a] business was entitled to the same treatment that the Supreme Court has afforded newspapers and magazines").

231. *Id.* at 1385.

232. *Id.*; *see also* Cook v. E. Shore Newspapers, Inc., 64 N.E.2d 751, 765 (Ill. App. Ct. 1945) ("All circumstances surrounding the transaction are proper for consideration, including the failure to make a proper investigation.").

233. *See Oberman*, 460 F.2d at 1385.

234. *Id.* at 1384.

preme Court's actual malice standard[235] relative to the "less rigorous" state law.[236] As discussed earlier in this section, the Supreme Court has stated that a "failure to investigate" is insufficient to prove reckless disregard under the actual malice standard.[237] Yet, under Illinois law, liability may be inferred from a "failure to make a proper investigation."[238]

The actual malice standard emanated from the laws of defamation and libel.[239] The defamation laws serve to protect an individual's reputation and provide for a cause of action when false statements have caused damage to that reputation.[240] The libel laws similarly provide for compensation when a published defamatory false statement has injured an individual.[241] The actual malice standard also has been applied in other types of actions for compensatory damages resulting from false statements.[242] In particular, many courts have applied the actual malice standard in various causes of action against the credit rating agencies.[243] The next section will explore the application of the actual malice standard to actions involving the credit rating agencies.

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235. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 337, 342 (1974) (acknowledging that "many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test"); *see also* St. Amant v. Thompson, 390 U.S. 727, 731 (1968) ("Concededly the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher.").

236. *See Oberman*, 460 F.2d at 1382–85.

237. *Gertz*, 418 U.S. at 332 ("[M]ere proof of failure to investigate, without more, cannot establish reckless disregard for the truth."); *see also St. Amant*, 390 U.S. at 733 ("Failure to investigate does not in itself establish bad faith." (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 287–88 (1964) ("[N]egligence in failing to discover the misstatements . . . is constitutionally insufficient to show the recklessness that is required for a finding of actual malice.")).

238. *Oberman*, 460 F.2d at 1385 (quoting Cook v. E. Shore Newspapers, 64 N.E.2d 751, 765 (Ill. App. Ct. 1945)).

239. *See generally* Cty. of Orange v. McGraw Hill Cos., 245 B.R. 151, 155 (Bankr. C.D. Cal. 1999) (noting that issues regarding false statements "traditionally arise" in actions for defamation or libel).

240. Jefferson Cty. Sch. Dist. No. R-1 v. Moody's Inv'r's Servs., 175 F.3d 848, 852 (10th Cir. 1999) (citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 11–14 (1990) ("Defamation law developed not only as a means of allowing an individual to vindicate his good name, but also for the purpose of obtaining redress for harm caused by such statements.")).

241. *Gertz*, 418 U.S. at 341–42 ("The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. . . . '[L]ibel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy.'" (quoting Curtis Publ'g Co. v. Butts, 388 U.S. 130, 152 (1967))).

242. Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & "ERISA" Litig.), 511 F. Supp. 2d 742, 811 (S.D. Tex. 2005) (explaining the actual malice rule has been applied to causes of action beyond defamation, slander, and libel, such as breach of contract and negligent misrepresentation); *Cty. of Orange*, 245 B.R. at 155 (noting the actual malice standard has been applied to causes of action other than defamation and libel (citing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) (applying the actual malice standard in cause of action regarding intentional infliction of emotional distress))).

243. *See, e.g.*, Compuware Corp. v. Moody's Inv'rs Servs., Inc., 499 F.3d 520, 525–29 (6th Cir. 2007) (applying the actual malice standard in a case involving a publicly held corporation); *Enron Corp.*, 511 F. Supp. 2d at 825 (concluding the actual malice rule applies "because the nationally published credit ratings focus upon matters of public concern, a top Fortune 500 company's creditworthiness"); *Cty. of Orange*, 245 B.R. at 156–57 (finding the actual malice standard applies to a breach of contract action and a professional negligence action against a credit rating agency).

b. Application of the Actual Malice Standard to Credit Rating Agencies

The lower courts generally have treated the credit rating agencies as publishers and their credit ratings as statements of opinion entitled to full First Amendment protection.[244] For example, in *Jefferson County School District Number R-1 v. Moody's Investor's Services, Inc.*,[245] the Tenth Circuit employed a First Amendment analysis in reviewing claims against Moody's arising from its unsolicited article referring to the "negative outlook" of bonds issued by a school district and the district's "ongoing financial pressures."[246] According to the school district, the article falsely implied that it was not a creditworthy issuer, and this "implied assertion" may be proven as false; thus, the article was not a protected expression of opinion.[247]

According to the Tenth Circuit, neither the implied assertion that the school district was not creditworthy, nor the express statements regarding the negative outlook of the bonds and the school district's ongoing financial pressures, was sufficiently specific to be provable as false.[248] Nevertheless, the court "emphasize[d] that the phrases [such as] 'negative outlook' [and] 'ongoing financial pressures' are not necessarily too indefinite to imply a false statement of fact."[249] If those phrases were combined with "specific factual assertions," then those statements may not be entitled to constitutional protection.[250] However, based on the school district's inability to identify a "specific false statement" that could be "reasonably implied" from the article and the indefiniteness of the express "phrases 'negative outlook,' and 'ongoing financial pressures,'" the credit rating agency's article was deemed "a protected expression of opinion."[251]

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244. *See, e.g.*, *Compuware Corp.*, 499 F.3d at 522 ("Moody's is a financial publisher . . . [and its] rating is a predictive opinion of a company's future creditworthiness."); *Jefferson Cty. Sch. Dist.*, 175 F.3d at 855–56 (holding that a credit rating agency's article regarding the creditworthiness of an issuer of bonds "constitutes a protected expression of opinion" under the First Amendment); *Cty. of Orange*, 245 B.R. at 154 (referring to Standard & Poor's as a "financial publisher").

245. 175 F.3d 848 (10th Cir. 1999).

246. *Id.* at 850 (noting the rating agency "had not been asked to rate the bonds" and was not paid a fee); *see also* Commercial Fin. Servs., Inc. v. Arthur Andersen LLP, 94 P.3d 106, 110 (Okla. Civ. App. 2004) (discussing *Jefferson Cty. Sch. Dist.* and explaining that "[t]he article gave the bonds and the school district's financial condition negative evaluations").

247. *Jefferson Cty. Sch. Dist.*, 175 F.3d at 850, 854.

248. *Id.* at 855 ("Like the statement of a product's value, a statement regarding the creditworthiness of a bond issuer could well depend on a myriad of factors, many of them not provably true or false.").

249. *Id.* at 856.

250. *Id.* ("If coupled with specific factual assertions, such statements might not be immunized from defamation claims by the First Amendment.").

251. *Id.*; *see also* Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990) (finding a "statement of 'opinion'" concerning public matters which does not imply an assertion of fact that may be proven as false will be fully protected under the First Amendment).

As the lower courts generally consider credit rating agencies to be publishers and their ratings to be statements of opinion, these courts generally have applied the actual malice standard in actions against the rating agencies.[252] The bankruptcy case of *County of Orange v. McGraw Hill Cos., Inc.*,[253] provides an example of the application of the actual malice rule in both a professional negligence action and a breach of contract action against Standard & Poor's.[254] As an initial matter, the district court accepted, without discussion, that Standard & Poor's merits the status of a "publisher" under First Amendment jurisprudence.[255] However, the district court acknowledged that an entity's "status as a financial publisher" does not automatically provide that entity with heightened First Amendment protection in the form of the actual malice standard.[256]

The County argued that a breach of contract action falls under the rubric of a "law of general applicability," and thus, the general laws of contract should govern this action.[257] Moreover, the County argued that the rating agency was subject to an implied duty under contract law to competently perform the analytical services upon which the rating is based and, thus, breached the agreement by providing an inaccurate rating.[258] Despite these arguments, the district court employed a First Amendment analysis in considering the breach of contract claim.[259] The court found that the debt securities were matters of "public concern" because either party was free to make the rating public.[260] As a result, the court concluded that the actual malice rule applies to the breach of contract action unless a "special circumstance" was present, that is, if the rating agency "voluntarily waived" the protections of the First Amendment.[261] Upon reviewing the agreements, the court found no evidence that the rating agency expressly waived its constitutional protections.[262]

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252. *See supra* Section I.A.3.b.

253. 245 B.R. 151 (Bankr. C.D. Cal. 1999).

254. *Id.* at 156–57 ("The actual malice standard will apply to the County's breach of contract claim . . . unless the Court finds S&P voluntarily waived its First Amendment protection. . . . [T]he actual malice standard applies to any professional negligence claim concerning S&P's protected speech.").

255. *Id.* at 154 (referring to Standard & Poor's as a "financial publisher").

256. *Id.* at 154–55; *see also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring) ("[T]he First Amendment does not 'belong' to any definable category of persons or entities . . . .").

257. *Cty. of Orange*, 245 B.R. at 156 (citing the standard of Cohen v. Cowles Media Co., 501 U.S. 663, 670 (1991) (holding "that 'the publisher of a newspaper has no special immunity from the application of general laws'" (quoting Associated Press v. NLRB, 301 U.S. 103, 132 (1937)))).

258. Compuware Corp. v. Moody's Inv'rs Servs., Inc., 499 F.3d 520, 530–31 (6th Cir. 2007) (citing *Cty. of Orange*, 245 B.R. at 154 (noting the County's argument that Standard & Poor's "assumed a duty to adequately perform the services called for in the contract")).

259. *Cty. of Orange*, 245 B.R. at 155–56 (noting the ability of either party to "publicize the rating" and, thus, finding the rating to be a matter of public concern potentially subject to the actual malice rule).

260. *Id.* at 155.

261. *Id.* at 156.

262. *Id.* ("A waiver of a constitutional right 'is not to be implied and is not lightly to be found.'" (quoting Gete v. INS, 121 F.3d 1285, 1293 (9th Cir. 1997))); *see also* Marilyn Manson, Inc.

The court noted that if the rating agency had expressly agreed to provide the County with analytical services, separate from the rating itself, such an undertaking would be viewed as a special circumstance that "might have avoided" the application of the actual malice rule.[263] However, in this case, there was no separate agreement to provide financial services; there was only an agreement to provide the rating.[264] Thus, the court held that the actual malice standard applied to the County's breach of contract claim because the rating was a matter of public concern and no special circumstances were present.[265]

Additionally, the district court held that the actual malice standard applied to the County's claim for professional negligence.[266] The court found that the County's injury resulted from the rating agency's "expressive activity"; therefore, the professional negligence action also was subject to the actual malice rule.[267]

Similarly, in *Compuware Corp. v. Moody's Investors Services, Inc.*,[268] the Sixth Circuit stated, without analysis, that "Moody's is a financial publisher."[269] The court further stated that Compuware is a public corporation and, thus, would be considered a "public figure" under a First Amendment analysis.[270] Therefore, the Sixth Circuit applied the actual malice rule in a defamation action against Moody's concerning statements in its rating report.[271] The court also noted that, in contrast to the rating report, a defamation claim could not even be recognized with respect to the actual rating.[272] As expressed by the Sixth Circuit, a "credit rating is a predictive opinion" regarding the expected creditworthiness of a company and is based upon "a subjective and discretionary weighing of complex factors."[273] As a result, the court found that the credit rating

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v. N.J. Sports & Exposition Auth., 971 F. Supp. 875, 889 (D.N.J. 1997) (explaining the waiver of a constitutional right needs to be "voluntary, knowing, and intelligent" (quoting Erie Telecomms., Inc. v. City of Erie, 853 F.2d 1084, 1094 (3d Cir. 1988))).

263. *Cty. of Orange*, 245 B.R. at 156.

264. *Id.* ("Since there is no claim or showing S&P undertook a separate duty to provide a competent rating, the only element of the County's breach of contract claim is the providing of the rating itself. Any duty to perform competently would be part of the Constitutionally—protected rendering of a rating, not a separate obligation.").

265. *Id.* ("A claim that S&P breached its duty to provide a rating in a competent manner is subject to the actual malice standard.").

266. *Id.* at 157.

267. *Id.*

268. 499 F.3d 520 (6th Cir. 2007).

269. *See id.* at 522.

270. *Id.* at 525.

271. *Id.* at 525–26.

272. *Id.* at 529 ("To the extent Compuware alleges that the *credit rating itself* was defamatory, as opposed to the facts or implications in the report, Compuware has failed to assert a cognizable defamation claim.").

273. Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs. LLC, 700 F.3d 829, 842 (6th Cir. 2012) (quoting *Compuware Corp.*, 499 F.3d at 529) (dismissing claims against credit rating agencies for negligent misrepresentation because credit ratings do not communicate a factual statement that may be proven as false and, thus, "credit ratings are not actionable misrepresentations").

does not imply any factual assertions that could be proven as false.[274] The court stated that even if the rating conveyed a factual implication, the "inherently subjective nature of Moody's ratings" determination makes it impossible to prove as false any such factual inference.[275]

The Sixth Circuit also considered a breach of contract claim in which Compuware alleged that Moody's breached the implied duty under contract law to perform the agreement in a skillful, diligent, and workmanlike manner.[276] As an initial matter, the court noted that "[o]rdinarily, 'enforcement of . . . general laws against the press is not subject to stricter scrutiny than [what] would be applied [in the case of other entities].'"[277] Moreover, the Sixth Circuit observed that the Supreme Court has never applied the actual malice rule to a breach of contract action, nor has any circuit court.[278] The only precedent in which a court applied the actual malice standard to a breach of contract claim was the California bankruptcy case of *County of Orange v. McGraw Hill Co.*, discussed earlier in this section.[279] Nevertheless, the Sixth Circuit held that the actual malice rule applied to the breach of contract action in the instant case.[280]

The Sixth Circuit found that the contract at issue involved matters that concern the First Amendment.[281] The parties contracted for Moody's to evaluate Compuware's creditworthiness and to issue a credit rating and a rating report.[282] The Sixth Circuit considered the credit rating and the contents of the rating report to be Moody's opinion.[283] Thus, the court found that the "very subject matter and corresponding duties" of the agreement implicate speech that is protected by the First Amendment.[284] Moreover, the court found the parties contracted for Moody's to provide

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274. *Id.* (citing *Compuware Corp.*, 499 F.3d at 529 (finding "no basis . . . [to] conclude that the credit rating itself communicates any provably false factual connotation")); *see also* Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990).

275. *Compuware Corp.*, 499 F.3d at 529 ("Even if [the court] could draw any fact-based inferences from this rating, such inferences could not be proven false because of the inherently subjective nature of Moody's ratings calculation.").

276. *Id.* at 531 ("Compuware contends that Moody's breached this contract by incompetently compiling, investigating, and evaluating Compuware's credit position, and by publishing an erroneous report.").

277. *Id.* at 529 (alteration in original) (quoting Cohen v. Cowles Media Co., 501 U.S. 663, 670 (1991)).

278. *Id.* at 530.

279. *See id.*; Cty. of Orange v. McGraw Hill Cos., 245 B.R. 151, 154–56 (Bankr. C.D. Cal. 1999) (applying the actual malice standard to a breach of contract claim).

280. *Compuware Corp.*, 499 F.3d at 531.

281. *Id.* ("Moody's contracted to publish a credit rating for Compuware, which . . . involves activities protected by the First Amendment.").

282. *Id.*

283. *Id.* (finding the agreement "consists of Moody's promise to provide its opinion of Compuware's creditworthiness and to publish a report of that opinion").

284. *Id.* ("Moody's opinion and its publication are matters protected by the First Amendment; thus the whole of this agreement—the very subject matter and corresponding duties—is intimately tied to speech, expression, and publication.").

"*a* credit rating;" the agreement did not expressly state that Moody's would provide *an accurate* credit rating.[285]

The Sixth Circuit found Compuware's argument, that Moody's breached the implied duty under contract law to competently perform under the contract, based in negligence.[286] As a result, the court considered this breach of contract claim to be a claim for negligence and, as such, to be essentially the same as a tort claim for defamation.[287] The Sixth Circuit further found that the harm suffered was an injury to the reputation of Compuware rather than an injury due to a lack of performance of the contract.[288] Ultimately, the court viewed Compuware's breach of contract claim as a defamation claim and held that the actual malice rule applied.[289]

The Sixth Circuit emphasized that its holding was limited to the circumstances of this case.[290] In contrast to the instant case, if the agreement provided that the parties were to perform an obligation that did not implicate protected speech, then the actual malice rule would not apply.[291] Similarly, if Compuware had alleged that the credit rating agency failed to perform an express provision of the agreement, then the actual malice rule would not be applicable.[292]

In this author's opinion, the extension of the actual malice rule to breach of contract actions against the credit rating agencies is completely unjustified and inappropriate.[293] The application of the actual malice standard in *Compuware* was "entirely unprecedented" with the exception of the *County of Orange* bankruptcy case.[294] Moreover, requiring a public figure plaintiff to show actual malice to recover on a breach of contract claim effectively eliminates the ability of that plaintiff to contract for a credit rating agency to provide an accurate evaluation of that plain-

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285. *Id.* at 531–32 ("Moody's agreed only to publish *a* credit rating; it did not agree to publish a . . . correctly appraised rating.").

286. *Id.* (arguing that "Moody's breached an implied contractual covenant to perform skillfully and diligently"); *see also* Nash v. Sears, Roebuck & Co., 174 N.W.2d 818, 821 (Mich. 1970) (noting the implied duty in all contracts for services to perform the obligations "skillfully, carefully, diligently, and in a workmanlike manner").

287. *Compuware Corp.*, 499 F.3d at 532 (seeing "no material difference between" Compuware's claim for breach of contract and a tort claim for defamation).

288. *Id.* at 532–33.

289. *Id.* at 533 (concluding Compuware's "only injuries are defamation-type harm resulting from Moody's publication of protected speech, and application of the actual-malice standard to [the] breach of contract claim is appropriate").

290. *Id.*

291. *Id.* at 533–34 ("[T]his holding would not apply to any breach of contract claim where . . . the parties [were required] to do something other than publish protected expression.").

292. *Id.* at 534 (explaining that this holding would not be applicable "if Compuware alleged that Moody's breached the express terms of the contract by, for example, failing to provide a rating at all").

293. *See id.* at 535 (Rogers, J., concurring in part and dissenting in part) ("The extension of First Amendment tort law principles to contract cases is unwarranted . . . .").

294. *Id.* at 535; *see also* Cty. of Orange v. McGraw Hill Cos., 245 B.R. 151, 156 (Bankr. C.D. Cal. 1999).

tiff's creditworthiness.[295] Instead, the actual malice standard grants the credit rating agency the right to breach the agreement so long as the rating agency did not act with malice.[296]

The Sixth Circuit noted that the actual malice standard would not apply if the credit rating agency failed to perform an express provision of the agreement and stated that "failing to provide a rating at all" would be an example of such a breach.[297] Moreover, the court stated that a party could contract for a specific result (for example, a positive result), and a breach of that express obligation would not require the application of the actual malice rule.[298] However, this line of reasoning is not relevant to agreements with credit rating agencies. A credit rating agency is not in the business of providing a specific result. Instead, a credit rating agency is in the business of evaluating the financial condition of a business and its debt securities and providing a rating that conveys the agency's assessment of the creditworthiness of that business and its debt securities.[299] Thus, following the reasoning of the Sixth Circuit, the only relevant circumstance in which a credit rating agency could be found to have breached an agreement to provide a credit rating, free of the actual malice standard, is if the agency failed to provide the rating at all; the standard contract law principle of an implied duty to use reasonable care in performing an agreement is not applicable to credit rating agencies.[300] Instead, in stark contrast to other businesses, credit rating agencies may act negligently in performing agreements without the fear of any liability.[301] The fact that a credit rating agency's business is to publish a rating

295. *See Compuware Corp.*, 499 F.3d at 535 (Rogers, J., concurring in part and dissenting in part) ("Requiring a showing of actual malice to prevail on a contract claim . . . effectively destroys the ability of public figures to . . . contract [for the other party to make accurate statements about the public figure].").

296. *See id.* (arguing that the actual malice requirement imposes into "such contract[s] the right to violate the contractual obligation as long as there is no malice").

297. *Id.* at 534 (majority opinion).

298. *Id.*

299. ROLE & FUNCTION, *supra* note 2, at 5 ("For almost a century, credit rating agencies have been providing opinions on the creditworthiness of issuers of [debt] securities and their financial obligations."); Abu Dhabi Commercial Bank v. Morgan Stanley & Co., 888 F. Supp. 2d 431, 455 (S.D.N.Y. 2012) (explaining that a credit rating agency "analyze[s] data, conduct[s] an assessment, and [provides] a *fact-based* conclusion as to creditworthiness"); Commercial Fin. Servs., Inc. v. Arthur Andersen LLP, 94 P.3d 106, 110 (Okla. Civ. App. 2004) (finding the rating agencies provided their opinions regarding the creditworthiness of the plaintiff's bonds "as professionals being paid to provide their opinions to a client").

300. *See Compuware Corp.*, 499 F.3d at 535–37 (Rogers, J., concurring in part and dissenting in part) (noting the "implied term" to perform an agreement with reasonable care and asserting that "it is not clear why the First Amendment should . . . deprive parties of the ability to contract that a certain standard of care be exercised").

301. *See id.* at 537 ("[R]equiring malice to recover for breach of contract in this case elevates the protection Moody's enjoys against breach of contract claims above what other contracting parties . . . would enjoy. . . . Under the majority's reasoning, Moody's is free to assign ratings based solely on any nonmalicious basis, and a customer would have no recourse against the company at all. Such freedom from contractual obligation is not provided generally to contracting parties.").

should not eviscerate contractual obligations that are owed to the other party and that other businesses must observe.[302]

Moreover, as the dissent noted, it does not follow that a claim for breach of the implied duty to perform a contract using reasonable care is the same as a tort claim for negligence.[303] In a tort case, the obligation to use reasonable care derives from a government-imposed duty to act in a reasonable manner.[304] In a contract case, the duty to use reasonable care is derived from the contract itself and is a duty that the parties voluntarily undertake.[305] Thus, the difference between a tort action and a breach of contract action is the source of the parties' obligations.[306] The fact that a contractual obligation uses the same terms as a duty in tort should not preclude the validity of that contractual obligation.[307]

In *County of Orange*, the court found that the actual malice standard applied to the breach of contract claim unless the plaintiff could show the presence of a special circumstance such as if the rating agency expressly waived the protections of the First Amendment.[308] One may query why the tort protections of the First Amendment are inherent in a contract and must be expressly waived; yet, the established contractual duty to perform obligations with reasonable care is completely disregarded.[309]

The freedom to contract is a fundamental legal principle. In expressing the value of the freedom to enter into contracts, Professor Farnsworth has noted, "From a utilitarian point of view, freedom to contract maximizes the welfare of the parties and therefore the good of society . . . . From a libertarian point of view, it accords to individuals a sphere of influence in which they can act freely."[310] As the Supreme Court has noted, "The parties themselves . . . determine the scope of their legal obligations" in the context of a contract.[311] If the parties did not wish to undertake the established duty under contract law to perform their obligations with reasonable care, then the parties were free to explicitly agree

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302. *See id.* at 537 ("The fact that Moody's is in the business of publishing does not eliminate any and all contractual obligations the company has towards those paying real money for its services.").

303. *Id.* at 536 ("The fact that a contract requires 'reasonable care' does not mean that a claim for breach of contract is the equivalent of a tort claim for negligence.").

304. *Id.* ("In tort cases the obligation comes from a duty imposed by the government to act reasonably on pain of paying the costs of acting unreasonably.").

305. *Id.* ("In contract cases the obligation comes from a voluntarily entered-into undertaking.").

306. *Id.*

307. *Id.* ("Contracting parties should not be precluded from entering into . . . contracts merely because the obligation is stated in terms that the tort law also uses.").

308. Cty. of Orange v. McGraw Hill Cos., 245 B.R. 151, 156 (Bankr. C.D. Cal. 1999).

309. *See Compuware Corp.*, 499 F.3d at 535 (Rogers, J., concurring in part and dissenting in part); *Cty. of Orange*, 245 B.R. at 156.

310. 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 1.7, at 25 (1990) (discussing the value of the freedom to contract).

311. Cohen v. Cowles Media Co., 501 U.S. 663, 671–72 (1991) (holding that where a reporter promised not to reveal the identity of a source and then revealed that source's identity, the First Amendment did not bar a promissory estoppel claim).

that the implied contractual provision would not be applicable.[312] Yet, the fundamental freedom to contract has been virtually eliminated in the case of contracts with credit rating agencies.[313]

The professional negligence case of *In re Enron Corp. Secs. Derivative & "ERISA" Litig.*[314] provides a further example of the misguided protections afforded by the lower courts. In this action against Standard & Poor's and Moody's for negligently assigning false and misleading credit ratings to Enron's debt securities, the court initially found the speech of a credit rating agency to be the same type of speech as that of a credit reporting agency: commercial speech.[315] The court then distinguished credit rating agencies by finding that rating agencies "do not profit from the sale of the bonds" of companies that are rated.[316] However, the court did not consider that the profit derives not from the actual sale of the bonds but instead from the fees paid to provide the rating.[317] Moreover, whether the profit is made from the sale of the bonds or from the assignment of a rating is immaterial to whether the credit rating agencies should be held liable for negligently prepared credit ratings that are false or misleading.

The court further found that the actual malice rule applied because Enron was a Fortune 500 company, and thus, the ratings involved "matters of public concern."[318] Moreover, the credit ratings were publicly distributed.[319] Despite acknowledging that protections under the First Amendment have not been universally applied to the credit rating agencies, the court applied "what appears to be a policy of heightened protection for credit reports under the First Amendment . . . even if negligently prepared."[320] Although the court found the credit rating reports to be "a combination of subjective, nonactionable evaluation and verifiable facts," the court determined that the plaintiff did not identify any factual statements that could be proven as false and did not show that the agen-

312. *Compuware Corp.*, 499 F.3d at 537 (Rogers, J., concurring in part and dissenting in part) (asserting that "[t]he parties could have explicitly contracted away [the] implied term" to perform the agreement with reasonable care).

313. *See id.* (arguing that the court should not apply "a newly created legal doctrine that effectively makes unenforceable a wide swath of perfectly legitimate contracts").

314. 511 F. Supp. 2d 742 (S.D. Tex. 2005).

315. *Id.* at 820 (noting "the long established reduced protection for commercial speech"); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762–63 (1985).

316. *Enron Corp.*, 511 F. Supp. 2d at 820.

317. *See* RICHARD SCOTT CARNELL ET AL., THE LAW OF BANKING AND FINANCIAL INSTITUTIONS 372–73 (4th ed. 2009) ("Most credit rating agencies, particularly Moody's, Standard & Poor's . . . and Fitch, earn money by charging issuers a fee in exchange for assigning a credit rating to the debt obligations marketed by the issuer.").

318. *Enron Corp.*, 511 F. Supp. 2d at 825 (asserting that the creditworthiness of a "top Fortune 500 company" is a "matter[] of public concern").

319. *Id.* at 820, 825 (explaining the credit rating reports "were not private or confidential," rather the reports were "nationally published").

320. *Id.* at 825 ("First Amendment protection for credit rating agencies as members of the 'financial press' performing 'traditional journalistic functions' is not universally acknowledged . . . .").

cies "knew or had significant suspicions" regarding the truth of their statements; thus, the plaintiff failed to prove actual malice.[321] The court further noted that under the actual malice rule, the reasonable person standard does not apply; thus, the credit rating agencies did not have a duty to investigate.[322]

Given the lack of a duty to investigate under the actual malice rule,[323] whether the credit rating agencies would have uncovered the fraud occurring at Enron[324] had the rating agencies investigated will never be known. Yet, these circumstances further belie the judicial wisdom of applying the actual malice rule to the credit rating agencies. Had the rating agencies been required to investigate, there is a possibility that the agencies would have uncovered the fraud at Enron, and many investors would have avoided significant losses.[325]

Moreover, even if the plaintiff was able to show that the rating reports contained false factual statements made with actual malice and, thus, that the credit rating agencies were not deserving of First Amendment protection, the plaintiff would face another stumbling block: the court would need to find, as a matter of law, the existence of a duty of care owed by the rating agencies to the plaintiff.[326] While acknowledging that the plaintiff's harm was a foreseeable consequence of the allegedly misleading rating reports, the court found the relationship between the rating agencies' alleged negligent misrepresentation and the harm suffered by the plaintiff was "too remote, as a matter of public policy, to impose a duty."[327] The court did not address the plaintiff's claim that it had specifically hired Standard & Poor's and Moody's to rate the bonds; instead, the court focused on the fact that the credit reports were publicly distributed.[328] The court also appeared to find it significant that the plaintiff did not purchase the bonds; rather, the plaintiff loaned money to En-

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321. *Id.*

322. *Id.* at 825–26 (noting credit rating "[a]gencies are not held to a reasonable person standard that might require investigation"); *see also supra* notes 163–69 and accompanying text.

323. *See supra* note 163 and accompanying text.

324. Alexei Barrionuevo, *Enron Chiefs Guilty of Fraud and Conspiracy*, N.Y. TIMES (May 25, 2006), http://www.nytimes.com/2006/05/25/business/25cnd-enron.html?pagewanted=all&_r=0 (reporting that Kenneth Lay and Jeffrey Skilling, chief executives of Enron, were found guilty of fraud and conspiracy following the company's "sudden collapse . . . and revelation as little more than a house of cards").

325. *See id.* (noting losses associated with the fraud at Enron resulted in "billions of dollars" in civil suits).

326. *Enron Corp.*, 511 F. Supp. 2d at 826 ("[A] crucial prerequisite for stating a negligent misrepresentation claim is a court determination that under the facts and circumstances alleged, there exists a duty of care owed to the plaintiff by the defendant."); *see also* Gomes v. Commercial Union Ins. Co., 783 A.2d 462, 469–70 (Conn. 2001).

327. *Enron Corp.*, 511 F. Supp. 2d at 826–27 (explaining that imposing a duty of care requires the court to find that the harm was foreseeable and that, on the basis of public policy, "the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in [the] case" (quoting *Gomes*, 783 A.2d at 470)).

328. *See id.* at 827 ("The credit reports were distributed to the world at large.").

ron separate from the issuance of the bonds.[329] While the court acknowledged that new regulation of the credit rating agencies may be appropriate to protect market participants, the court determined that it would not be "beneficial to society" to permit anyone who claimed reliance on rating reports and suffered a loss "in any endeavor" to recover from the credit rating agencies.[330]

However, many ancillary credit decisions are made based upon the credit rating assigned by a rating agency to a particular issuer of debt securities.[331] Whether the plaintiff purchased the bonds is immaterial to the fact that the plaintiff justifiably relied upon the credit rating in its decision to make Enron a loan to the plaintiff's foreseeable detriment.[332] Moreover, the plaintiff in this case is not just "anyone" who relied on the rating reports and incurred a loss; the plaintiff in this case specifically hired the rating agencies to provide a credit rating for the bonds issued by Enron.[333] Thus, it would appear that the plaintiff in this case had a "relationship of privity" with the credit rating agencies and, therefore, was owed a duty of care.[334]

As demonstrated above, "while there is no automatic, blanket, absolute First Amendment protection" for publications issued by the credit rating agencies, the majority of courts have historically shielded the rating agencies from liability for the allegedly fraudulent or negligent ratings disseminated in those publications.[335]

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329. *Id.*

330. *Id.* ("While new regulation of the agencies may well be in order to '[protect] the safety of the participants,' allowing anyone to sue credit rating agencies who had read the credit rating reports and claimed to have relied upon them and lost money in any endeavor that person undertook would be far more deleterious than beneficial to society as a whole." (alteration in original) (citation omitted) (quoting Jaworski v. Kiernan, 696 A.2d 332, 337 (Conn. 1997))).

331. Many loan contracts include triggers based on debt ratings assigned by the credit rating agencies. Pepa Kraft, Do Rating Agencies Cater? Evidence from Rating-Based Contracts 2 (May 3, 2011) (unpublished manuscript), https://business.nd.edu/uploadedFiles/Academic_Centers/Study_of_Financial_Regulation/pdf_and_documents/2011_conf_Pepa_Kraft.pdf ("Private loan agreements increasingly use public debt ratings as manifestations of a borrower's credit risk in order to calibrate pricing."), *reprinted in* 59 J. ACCT. & ECON. 264 (2015).

332. *See Enron Corp.*, 511 F. Supp. 2d at 809, 827 (noting the plaintiff relied on the credit information published by the rating agencies in deciding to make a loan to Enron and that the harm to the plaintiff could be considered foreseeable).

333. *Id.* at 824 (acknowledging that the plaintiff claims to have "specifically retained" the credit rating agencies to assign a rating to Enron's bond issue).

334. *See id.* at 824–25 (noting the question of whether there is a "relationship of privity" that would limit or bar the protections of the First Amendment but failing to specifically address the issue); *see also* Commercial Fin. Servs., Inc. v. Arthur Andersen LLP, 94 P.3d 106, 110 (Okla. Civ. App. 2004) (noting the plaintiff had asked the rating agencies to rate the bonds and had paid the agencies for the rating and, thus, were in privity with the rating agencies and owed a duty of care).

335. *Enron Corp.*, 511 F. Supp. 2d at 815–17; *see also* PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 96 (finding courts have shielded the credit rating agencies from liability by affording the rating agencies protection under the First Amendment).

c. When the Actual Malice Standard Does Not Apply

While the majority of courts have applied the heightened First Amendment protections of the actual malice standard in actions involving the credit rating agencies,[336] there are some cases in which the courts have rejected the actual malice rule. For example, in *Commercial Financial Services, Inc. v. Arthur Andersen LLP*,[337] the court found that the First Amendment protections reserved for journalists did not apply to claims against the credit rating agencies for negligent misrepresentation and negligence.[338] According to the court, credit ratings "fall somewhere between" opinions that are entitled to First Amendment protection and opinions that do not deserve protection.[339] The court distinguished between an editorial writer, who is entitled to full First Amendment protection with respect to speech concerning the conduct of public officials, and an attorney providing title opinions, who is "not automatically exempt" when there is a claim of negligence just because the attorney is issuing an opinion.[340]

Following this line of reasoning, the court made a "crucial distinction" between the instant case and *Jefferson County*, in which the credit rating agency was not asked to assign a rating to the bonds and was not paid a fee to rate the bonds.[341] In contrast, the plaintiff in this case had requested the credit rating agencies to provide a bond rating and had paid a fee to the rating agencies for that bond rating.[342] Thus, the court found that the rating agencies provided their opinions regarding the creditworthiness of the plaintiff's bonds "as professionals being paid to provide their opinions to a client."[343] As a result, the plaintiff and the credit rating agencies are considered to be "in privity" based on an agreement enforceable by both parties.[344] As expressed by the court, the relationship

336. *See supra* Section I.A.3.b.

337. 94 P.3d 106 (Okla. Civ. App. 2004).

338. *Id.* at 110 (finding the First Amendment does not "shield[] the agencies from potential liability").

339. *Id.* at 109.

340. *Id.* at 109–10.

341. *Id.* at 110; *see also* Jefferson Cty. Sch. Dist. No. R–1 v. Moody's Inv'r's Servs., Inc., 175 F.3d 848, 850 (10th Cir. 1999) (noting Moody's "had not been asked to rate the bonds" and had not been paid a fee).

342. *Commercial Fin. Servs.*, 94 P.3d at 110 ("[I]n the instant case the Rating Agencies [i.e., S&P, Moody's, and Fitch] *had* been asked to rate the bonds, at CFS's request and at CFS's expense.").

343. *Id.* ("If a journalist wrote an article for a newspaper about the bonds, the First Amendment would presumably apply. But if CFS hired that journalist to write a company report about the bonds, a different standard would apply.").

344. *Id.*; *cf.* Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs. LLC, 700 F.3d 829, 840–42 (6th Cir. 2012) (finding purchasers of mortgage-backed securities rated by the credit rating agencies failed to show a "special relationship" with the agencies necessary to be in privity and, thus, were not owed a duty of care); Anschutz Corp. v. Merrill Lynch & Co., 690 F.3d 98, 114–15 (2d Cir. 2012) (holding that the purchaser of securities rated by the credit rating agencies failed to state a claim for negligent misrepresentation against the credit rating agency because the purchaser did not satisfy the element of duty by showing privity of contract or a close relationship that would indicate privity).

between the plaintiff and the credit rating agencies "goes beyond a relationship between a journalist and subject, and is more analogous to that of a client and the client's certified public accountant."[345] Therefore, the court found that the credit rating agencies are not shielded from liability by the First Amendment.[346]

The court further found that the credit rating agencies, "having agreed to rate the bonds for a fee," owed a duty of care to the plaintiff, "the entity paying for the rating."[347] Thus, although the rating agencies did not agree to provide a particular rating, "it is implicit" in the "business relationship" of the parties that the agencies would determine the rating "in a non-negligent" manner.[348] The court found that the parties had "a special relationship" as delineated in dealings and communications between the parties, including a letter outlining the rights and obligations of the parties.[349] Thus, the court reasoned that, unlike the readers of a general interest newspaper or the subscribers of a financial newsletter, the rating agencies owed a duty to the plaintiff.[350]

Notably, even though the securities were issued in a private placement, the credit rating agencies had the right to disseminate the rating to the public.[351] Thus, the rating could be circulated to "a potentially limitless audience."[352] Nonetheless, the Restatement's requirement that the negligent misrepresentation must be intended for "a limited group of persons" does not bar the plaintiff's recovery.[353] As expressed by the court, "[N]o matter who else might eventually learn of the rating, the rating was clearly intended for [the plaintiff]."[354] The credit rating agen-

345. *Commercial Fin. Servs.*, 94 P.3d at 110. *But cf.* First Equity Corp. of Fla. v. Standard & Poor's Corp., 869 F.2d 175, 179 (2d Cir. 1989) (noting a credit rating agency that issues a securities newsletter falls "somewhere between" a newspaper publisher and an accountant and finding the First Amendment protections of a newspaper publisher should apply).

346. *Commercial Fin. Servs.*, 94 P.3d at 110 ("We do not believe the First Amendment shields the agencies from potential liability.").

347. *Id.* (noting the court "cannot accept the argument that having agreed to rate the bonds for a fee, the Rating Agencies owed no duty of care to CFS, the entity paying for the rating").

348. *Id.* at 111.

349. *Id.* at 110–12 ("A typical letter from a rating agency to CFS outlines the parties' relationship. It states that the rating of the certificates was being made pursuant to a request by CFS; . . . that the rating could be disseminated to interested parties[;] . . . that the agency retained the right to advise the public of the rating; . . . and that a bill for the agency's work would be sent to CFS.").

350. *Id.* at 112 ("The Rating Agencies cannot be said to have no greater duty than that owed to a reader of a general interest newspaper or a subscriber of a specialist newsletter."); *see also* Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & "ERISA" Litig.), 511 F. Supp. 2d 742, 824 (S.D. Tex. 2005) (discussing *Commercial Financial* and explaining "the special relationship of privity between the parties . . . created a duty of care not owed to a general reader or a subscriber" (citing *Commercial Fin. Servs.*, 94 P.3d at 112)).

351. *Commercial Fin. Servs.*, 94 P.3d at 111 (explaining that "(though the certificates were to be placed privately) . . . the agency retained the right to advise the public of the rating").

352. *Id.* at 113.

353. *Id.* (explaining the RESTATEMENT (SECOND) OF TORTS § 552 provides that "the tort of negligent misrepresentation is limited . . . to losses suffered 'by the person or one of a limited group of persons' who the supplier of the false information intends to supply" (quoting RESTATEMENT (SECOND) OF TORTS § 552(2)(a) (AM. LAW INST. 1977))).

354. *Id.*

cies prepared the rating at the request of the plaintiff and provided the information regarding the rating to the plaintiff.[355] Moreover, the plaintiff hired the agencies to provide the rating and paid the agencies a consideration for the rating.[356] Thus, the Restatement's tort of negligent misrepresentation is applicable to the credit rating agencies.[357]

This court did not squarely address the belief held by other courts that the rating agencies' right to disseminate the rating to the public caused the rating to be a matter of public concern and, thus, appropriate for the application of the actual malice rule.[358] Rather, this court acknowledged the possible dissemination of the rating to the public and nevertheless found that the First Amendment did not shield the rating agencies from potential liability.[359]

The court observed that the rating agencies, by providing a rating, "also serve the public interest."[360] Moreover, the court acknowledged the public policy concern that the use of a negligence standard may cause the agencies to provide ratings designed to avoid lawsuits.[361] Nevertheless, the court rejected the notion that an exception should be made to the traditional law of negligence in order to shield the credit rating agencies from liability and held that the credit rating agencies owed a duty to the plaintiff to provide an accurate rating for the securities.[362]

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355. *Id.* ("[T]he communications between the parties unquestionably show the rating was done at CFS's request, and the information concerning the rating was communicated by the agencies to CFS.").

356. *Id.* (noting comment g to the RESTATEMENT (SECOND) OF TORTS § 552 provides that "[t]he person for whose guidance the information is supplied is often the person who has employed the supplier to furnish it, in which case, if it is supplied for a consideration paid by that person, he has at his election either a right of action under the rule stated in this Section [552] or a right of action upon the contract under which the information is supplied" (quoting RESTATEMENT (SECOND) OF TORTS § 552 CMT. g (AM. LAW INST. 1977))).

357. *See id.* at 113–14 (rejecting the argument that the Restatement is not applicable); *see also* RESTATEMENT (SECOND) OF TORTS § 552(1) (AM. LAW INST. 1977) ("One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.").

358. *See, e.g.*, Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & "ERISA" Litig.), 511 F. Supp. 2d 742, 820, 825 (S.D. Tex. 2005) (applying the actual malice rule because, among other things, the credit rating reports "were not private or confidential," rather the reports were "nationally published"); Cty. of Orange v. McGraw Hill Cos., 245 B.R. 151, 155–56 (Bankr. C.D. Cal. 1999) (finding the debt securities were "matters of public concern" because either party was free to make the rating public and, thus, the actual malice rule applies).

359. *Commercial Fin. Servs.*, 94 P.3d at 110–12 (finding the First Amendment does not shield the credit rating agencies from liability).

360. *Id.* at 111.

361. *Id.* at 112 ("A legitimate concern exists that applying the negligence standard may pressure the agencies into issuing a more favorable rating than is deserved . . . out of fear of a lawsuit brought by the security's issuer.").

362. *Id.* (finding the rating agencies owed a duty to CFS "to issue the rating the securities deserved"); *see also Enron Corp.*, 511 F. Supp. 2d at 822–23 (discussing the holding in *Commercial Financial Services* "that the First Amendment does not protect rating agencies from liability for alleged inaccuracies where they were asked to rate [securities] . . . by a . . . company, . . . were paid a

Although the court in *Commercial Financial* found that the actual malice rule did not apply despite the rating agencies' right to disseminate the rating to the public, other cases in which courts found the actual malice rule to be inapplicable are limited to circumstances in which the issuer of the securities is not a public figure and the securities are intended to be sold to a limited group of purchasers.[363] *In re National Century Financial Enterprises, Inc.*[364] provides such an example of a district court's rejection of the actual malice rule.[365] The securities in this case were not issued by a public company and were sold to a targeted group of investors in a private placement.[366] Moreover, the ratings were listed only in the offering documents that were provided to the particular group of investors.[367] Thus, the ratings did not involve a matter of public concern, and the actual malice rule did not apply.[368]

In considering a claim for negligent misrepresentation alleged by the purchaser of the securities, the Southern District of Ohio also rejected the rating agency's argument that a duty does not exist unless there is a special relationship.[369] The district court explained that a special relationship is not "a formal element" of a claim for negligent misrepresentation.[370] Rather, a special relationship is more aptly a characterization of the necessary requirements of negligent misrepresentation; that is, the defendant has given "false information in a business transaction for plaintiff's guidance" and the plaintiff is a member "of a limited class for whom defendant intended to supply the information."[371] In this case, the plaintiff sufficiently pled that it was a member of a limited group of purchasers who foreseeably relied on the credit ratings.[372] The rating agency

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fee by that company, were therefore in privity with that company, and thus owed a duty of care to that company to provide accurate ratings" (footnote omitted)).

363. *See* Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs., LLC, 813 F. Supp. 2d 871, 877 n.1 (S.D. Ohio 2011) ("Recently, courts have declined to extend [First Amendment] protection at the motion to dismiss stage where the rating is allegedly the product of the issuer pays model and is meant only for a select few investors." (citing *In re* Nat'l Century Fin. Enters., Inc., Inv. Litig., 580 F. Supp. 2d 630, 639–40 (S.D. Ohio 2008); and Abu Dhabi Commercial Bank v. Morgan Stanley & Co., 651 F. Supp. 2d 155, 175–76 (S.D.N.Y. 2009))); *see also* Anschutz Corp. v. Merrill Lynch & Co., 785 F. Supp. 2d 799, 830–32 (N.D. Cal. 2011).

364. 580 F. Supp. 2d 630 (S.D. Ohio 2008).

365. *See id.* at 639–40 (finding the actual malice rule does not apply where the securities were not "a matter of public concern"); *see also* Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc., 472 U.S. 749, 762 (1985) (holding that a credit report provided to five subscribers did not concern a public matter because it was intended for a particular business audience).

366. *Nat'l Century Fin. Enters.*, 580 F. Supp. 2d at 634, 639–40 (finding the securities "were issued by a privately-held company, and . . . targeted to a select class of institutional investors").

367. *Id.* at 640 ("[T]he only place that the ratings are alleged to have appeared were in the offering materials given to the select class of investors.").

368. *Id.* at 639–40 (noting the complaint does not characterize the ratings "as a matter of public concern").

369. *Id.* at 646–48.

370. *Id.* at 647 (quoting Nat'l Mulch & Seed, Inc. v. Rexius Forest By-Prods., Inc., 2007 U.S. Dist. LEXIS 24904, at *29–30 (S.D. Ohio Mar. 22, 2007)).

371. *Id.* ("[M]isrepresentations to a person or limited category of people whom the speaker or supplier intends to benefit or guide are actionable.").

372. *Id.* at 648.

issued the credit ratings with the knowledge that the ratings would be viewed on the offering documents provided to a limited group of investors.[373]

Moreover, the district court rejected the rating agency's argument that there was no basis for justifiable reliance because the credit ratings were "predictive opinions."[374] As the Sixth Circuit has determined, opinions can be actionable if "the opinion is not factually well-grounded."[375] The *National Century* court found that the plaintiff sufficiently alleged that the credit rating agency failed to exercise reasonable care in determining whether its ratings were factually well-grounded and, thus, failed to exercise reasonable care in providing information to the plaintiff for its guidance in determining whether to purchase the securities.[376] It is important to note that under the actual malice standard applied in other cases, the credit rating agencies do not have a duty to exercise reasonable care.[377]

Similarly, in *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*,[378] the Southern District of New York rejected the argument of Moody's and Standard & Poor's that the First Amendment provides the agencies with absolute immunity.[379] This case concerned an action for common law fraud alleged by the purchasers of the securities.[380] The court found that the ratings were provided only to a "select group of investors" as part of a private placement; thus, the ratings were not a matter of public concern, and the First Amendment did not shield the agencies from liability.[381]

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373. *Id.* ("Moody's prepared the bond ratings knowing that its ratings would be seen on the offering materials given to only a select class of qualified investors, of whom [the plaintiff] was one.").

374. *Id.*

375. Mayer v. Mylod, 988 F.2d 635, 639 (6th Cir. 1993) ("[S]tatements which contain the speaker's opinion are actionable . . . if the speaker does not believe the opinion and the opinion is not factually well-grounded.").

376. *Nat'l Century Fin. Enters.*, 580 F. Supp. 2d at 648 (finding the plaintiff sufficiently pled that Moody's failed to exercise reasonable care because "if Moody's [had] used reasonable care in assigning its ratings, it would have discovered multiple violations of the Master Indenture and could not have legitimately given the [securities] the favorable ratings that it did").

377. *See, e.g.*, Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & "ERISA" Litig.), 511 F. Supp. 2d 742, 825–26 (S.D. Tex. 2005) (observing that credit rating "[a]gencies are not held to a reasonable person standard"); *see also supra* note 300 and accompanying text.

378. 651 F. Supp. 2d 155 (S.D.N.Y. 2009).

379. *Id.* at 175–76.

380. *Id.* at 163–64 (noting that plaintiffs are institutional investors that purchased the securities at issue).

381. *Id.* at 175–76 ("[W]here a rating agency has disseminated their ratings to a select group of investors rather than to the public at large, the rating agency is not afforded [First Amendment] protection." (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761–62 (1985) (holding that a credit report provided to five subscribers did not concern a public matter because it was intended for a particular business audience); and *In re* Nat'l Century Fin. Enters., Inc., Inv. Litig., 580 F. Supp. 2d 630, 640 (S.D. Ohio 2008) (finding the actual malice rule did not apply where the securities were "targeted to a select class of institutional investors"))).

Addressing the fraud claim in a separate proceeding, the district court considered whether credit ratings are statements of fact or opinions.[382] The court found that although credit "ratings are not objectively measurable statements of fact, neither are they mere puffery or unsupportable statements of belief."[383] As expressed by the court, credit ratings are "fact-based opinions."[384] A credit rating is a statement that the credit rating agency has performed an analysis and assessment of the data and made a "fact-based" determination regarding the issuer's creditworthiness.[385] If a credit rating agency assigns a credit rating that it knows is either not based on a "reasoned analysis" or lacks a factual basis, then the agency has "stat[ed] a fact-based opinion that it does not believe" is accurate.[386] Thus, the court found that the rating agencies may be held liable for common law fraud if the credit ratings were false or misleading regarding the subject matter at issue and the ratings did not accurately state the beliefs or opinions of the credit rating agency.[387] As found by the court, the plaintiffs provided sufficient evidence to permit a jury to infer that the credit ratings were both "misleading and disbelieved" by the credit rating agencies at the time they were assigned and, thus, may be found to be "actionable misstatements."[388]

Moreover, the district court found that the plaintiffs provided sufficient evidence to permit a jury to infer scienter.[389] The plaintiffs' evidence permitted an inference that the individuals on the rating committees assigned the credit ratings in a reckless manner or did not believe the assigned ratings were correct.[390] For example, recklessness could be in-

382. Abu Dhabi Commercial Bank v. Morgan Stanley & Co., 888 F. Supp. 2d 431, 453 (S.D.N.Y. 2012).

383. *Id.* at 454–55 (footnotes omitted).

384. *Id.* at 455 (emphasis removed) ("Ratings should best be understood as *fact-based opinions*.").

385. *Id.* (emphasis removed) ("When a rating agency issues a rating, it is not merely a statement of that agency's unsupported belief, but rather a statement that the rating agency has analyzed data, conducted an assessment, and reached a *fact-based* conclusion as to creditworthiness.").

386. *Id.* ("If a rating agency *knowingly* issues a rating that is either unsupported by reasoned analysis or without a factual foundation, it is stating a fact-based opinion that it does not believe to be true.").

387. *Id.* at 456; *cf.* Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1095 (1991) (finding statements of belief or opinion can be the basis for a federal securities fraud action); Mayer v. Mylod, 988 F.2d 635, 639 (6th Cir. 1993) (finding in a securities fraud action that "statements which contain the speaker's opinion are actionable under Section 10(b) of the Securities Exchange Act if the speaker does not believe the opinion and the opinion is not factually well-grounded").

388. *Abu Dhabi Commercial Bank*, 888 F. Supp. 2d at 456–58 (noting that plaintiffs had submitted "expert testimony that the ratings were not justified by the underlying facts when they were issued," statements from rating agency employees explaining how the ratings should be determined and the how the practices of the agencies did not meet the stated standard, and other statements from rating agency employees indicating concern with the "paucity of data and the adequacy of the models used to rate" the securities at issue).

389. *See id.* at 458–62 (noting the scienter requirement may be satisfied with evidence of recklessness or conscious misbehavior); *see also* Gould v. Winstar Commc'ns, Inc., 692 F.3d 148, 158 (2d Cir. 2012).

390. *Abu Dhabi Commercial Bank*, 888 F. Supp. 2d at 459–60 ("Plaintiffs have offered extensive evidence from which a jury could infer that the ratings were either disbelieved when made or issued in a manner that was 'highly unreasonable and which represent[ed] an extreme departure from

ferred from expert testimony indicating that the credit "ratings were highly unreasonable when made" and from an e-mail by a Moody's analyst stating that the model assumptions for the securities were not supported by actual data.[391] Furthermore, while a plaintiff is not required to demonstrate motive in order to prove scienter, there is evidence that the rating agencies had a monetary incentive to provide high ratings irrespective of whether those ratings were warranted.[392] Thus, the evidence indicated that the credit rating agencies "compromised the quality of their ratings in pursuit of profits."[393] In addition, as noted in the court's earlier decision, the plaintiffs sufficiently pled reasonable reliance on the credit ratings because the rating agencies were privy to information that was not publicly available.[394]

Although these courts did not apply the actual malice rule in actions against the rating agencies, none of these cases involved a public figure or the public dissemination of a credit rating; thus, these cases were generally consistent with First Amendment jurisprudence among the lower courts with respect to credit rating agencies. However, a divergence from other courts is seen in *Commercial Financial* where the rating agencies had the right to disseminate the rating to the public, and the court nevertheless found the actual malice rule to be inapplicable.

d. Statements of Opinion by Professionals

Another series of cases addresses statements of opinion by professionals. As recognized by the Supreme Court, certain statements of opinion are actionable when made by professionals.[395] In *Virginia Bankshares, Inc. v. Sandberg*,[396] the Supreme Court found that certain statements, in particular those that are commercial in nature, "are reasonably understood to rest on a factual basis that justifies them as accurate."[397] Hence, if such statements were issued without a factual basis, the state-

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the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.'" (alterations in original) (quoting Chill v. Gen. Elec. Co., 101 F.3d 263, 269 (2d Cir. 1996))).

391. *Id.* at 459.

392. *Id.* at 460–61 (noting the issuer could take its business to another agency if it did not receive the desired high rating, the fees earned by the rating agencies would be substantially less if the securities did not issue, and a statement by a Moody's analyst that "ratings on structured financial products . . . were 'cash cows.'").

393. *Id.* at 461.

394. Abu Dhabi Commercial Bank v. Morgan Stanley & Co., 651 F. Supp. 2d 155, 181 (S.D.N.Y. 2009) ("[T]he market at large, including sophisticated investors, have come to rely on the accuracy of credit ratings and the independence of rating agencies because of their NRSRO status and, at least in this case, the [r]ating [a]gencies' access to non-public information that even sophisticated investors cannot obtain.").

395. *See* Cty. of Orange v. McGraw-Hill Cos. (*In re* Cty. of Orange), No. SA CV 96-0765-GLT, 1997 U.S. Dist. LEXIS 22459, at *13 (C.D. Cal. June 2, 1997) ("[F]ederal and California state courts recognized certain statements of opinion made by professionals are actionable.").

396. 501 U.S. 1083 (1991).

397. *Id.* at 1093; *see also McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *13.

ments would be considered misleading.[398] According to the Supreme Court, certain statements of opinion may be considered factual based on the context of the statements.[399] For instance, the context may include the subject of the statement, the speaker's identity, and the likely audience of the statement.[400] As acknowledged by the Supreme Court, "An opinion is a fact . . . . When the parties are so situated that the buyer may reasonably rely upon the expression of the seller's opinion, [thus,] it is no excuse to give a false one."[401]

Consistent with Supreme Court doctrine, California federal district courts have found that where a speaker is "specially qualified" and the audience may be such to have reasonably relied on the speaker's "superior knowledge," a statement of opinion made by that speaker may be actionable fraud or misrepresentation.[402] For example, California federal district courts have found statements of opinion made by financial advisors and auditors to be actionable.[403] In *Bily v. Arthur Young & Co.*,[404] the court found an auditor who prepared an audit and audit opinion of a corporation's financial statements liable to third-party investors for negligent misrepresentation.[405] The elements of a claim of negligent misrepresentation are (i) the assertion of a fact (ii) which is false (iii) by a person who does not have a reasonable basis for believing the assertion to be true.[406] The *Bily* court noted that in certain cases, a statement of "professional opinion" is treated as a statement of fact.[407] For example, if a statement, even if couched "in the [guise] of an opinion, is 'not a casual expression of belief' but [instead] 'a deliberate affirmation of the matters stated,'" then such statement may be viewed as a factual assertion.[408] Additionally, if a person has or professes to have "superior knowledge or special information or expertise" concerning the subject of the statement and a plaintiff is such that it "may reasonably rely" on the defendant's

398. *Va. Bankshares, Inc.*, 501 U.S. at 1093 ("[T]he absence [of a factual basis] renders [certain statements made by professionals] misleading.").

399. *Id.*; *see also McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *14 ("*Virginia Bankshares* indicates the context of certain statements . . . renders some statements of opinion essentially 'factual.'").

400. *See Va. Bankshares, Inc.*, 501 U.S. at 1091–94; *see also McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *14

401. *Va. Bankshares, Inc.*, 501 U.S. at 1094 (first alteration in original) (quoting Vulcan Metals Co. v. Simmons Mfg. Co., 248 F. 853, 856 (2d Cir. 1918)).

402. Moore v. Jogert, Inc. (*In re* Jogert, Inc.), 950 F.2d 1498, 1507 (9th Cir. 1991) (quoting Borba v. Thomas, 138 Cal. Rptr. 565 (Cal. Ct. App. 1977)); *see also McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *14 (noting this exception to the general rule in California that opinions and future predictions are not actionable as fraud or misrepresentation).

403. *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *14–15.

404. 834 P.2d 745 (Cal. 1992) (en banc).

405. *Id.* at 747, 768–770.

406. *Id.* at 768.

407. *Id.* ("Under certain circumstances, expressions of professional opinion are treated as representations of fact.").

408. *Id.* (quoting Gagne v. Bertran, 275 P.2d 15, 21 (Cal. 1954)).

expertise, information, or knowledge, then the defendant's statement of professional opinion may be regarded as an assertion of fact.[409]

Although the *Bily* case is instructive regarding whether a statement of professional opinion should be considered an assertion of fact, this case did not involve a First Amendment issue because the corporation was a private company at the time the audit opinion was issued.[410] Nevertheless, a California federal district court found the reasoning underlying the professional opinion cases regarding financial advisors and auditors, such as *Bily*, is similarly applicable to the cases concerning credit ratings.[411] Accordingly, the federal district court found that credit "ratings do imply statements of fact even" when First Amendment issues are implicated.[412]

The Ninth Circuit's First Amendment analysis employed in *Unelko Corp. v. Rooney*[413] provides further enlightenment regarding whether a statement implies a factual assertion.[414] The three-part test under *Unelko* requires an assessment of whether (i) the "general tenor of the [entire work]" indicates the assertion was not one of "objective fact;" (ii) the use of "figurative or hyperbolic language" indicates the statement was not an assertion of objective fact; and (iii) the statement is provably false or true.[415] Moreover, in assessing the "general tenor" of the work, the court must evaluate the subject of the statement, the speaker's identity, and the audience of the statement;[416] these same factors are considered in the professional opinion cases[417] along with the professional status of the speaker and the relationship of the speaker to its audience.[418]

In *Unelko*, the Ninth Circuit held that a statement made by Andy Rooney on the television show *60 Minutes* was not protected opinion

409. *Id.* (citing *Gagne*, 275 P.2d at 21); *see also* Ashley v. Church (*In re* Ashley), 903 F.2d 599, 604 (9th Cir. 1990) (finding a defendant who professed to have financial knowledge made statements of fact rather than opinion).

410. *See* Cty. of Orange v. McGraw-Hill Cos. (*In re* Cty. of Orange), No. SA CV 96-0765-GLT, 1997 U.S. Dist. LEXIS 22459, at *15–16 (C.D. Cal. June 2, 1997); *Bily*, 834 P.2d at 747.

411. *See McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *16; *see also Bily*, 834 P.2d at 768–73.

412. *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *16 ("[F]or reasons similar to those developed in the professional opinion cases, it is reasonable to conclude the [credit] ratings do imply statements of fact even under the First Amendment cases.").

413. 912 F.2d 1049 (9th Cir. 1990).

414. *See id.* at 1053–55 (finding a statement made by Andy Rooney on the television show "60 Minutes" was not protected under the First Amendment).

415. *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *16–17; *see also* Unelko Corp. v. Rooney, 912 F.2d 1049, 1053 (9th Cir. 1990).

416. *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *17.

417. *See* Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1091–96 (1991); *see also McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *14.

418. *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *17; *see also Va. Bankshares, Inc.*, 501 U.S. at 1094.

under the First Amendment.[419] The Ninth Circuit found Mr. Rooney's statement that a particular item of merchandise "didn't work" may be regarded "as implying an assertion of objective fact" based on the speaker's identity, the likely audience reactions, and the content of the speech even though the general tenor of the segment was set in a humorous or satirical context.[420]

In *County of Orange v. McGraw-Hill Cos.*,[421] a federal district court applied the *Unelko* framework in a case concerning a credit rating agency.[422] The federal district court found the subject of the credit ratings was the "likely creditworthiness of [particular issues] of debt [securities]," and the audience for these credit ratings was comprised of the "issuers and potential investors" in the securities who are respectively deciding whether or not to offer the debt securities or purchase them.[423] The district court noted that when courts found similar circumstances in the professional opinion cases, the courts held the statements of opinion in those cases to be actionable.[424] Moreover, based on the *Unelko* framework, "the professional opinion cases imply the general tenor of opinions such as [Standard & Poor's] ratings is to support, not negate, the impression the rating is an assertion of fact, or at least substantially based on facts assessed by [Standard & Poor's]."[425] The rating agency requested that the County provide specific information and then employed a particular methodology to establish the credit rating; thus, the general tenor of the credit rating "implies statements of objective fact."[426]

The court noted the lack of hyperbolic or figurative language that would otherwise indicate the credit rating was not a factual assertion.[427] Finally, in assessing whether the credit ratings, which "were predictions of creditworthiness," could be proven false, the federal district court considered Standard & Poor's professional status in the municipal bond industry, the County's allegations of reasonable reliance on the credit ratings, and the professional opinion cases (including the Supreme Court's

419. *Unelko*, 912 F.2d at 1054–55 (finding "the statement 'It didn't work' is not shielded from liability" because the statement "is essentially factual"); *see also McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *18.

420. *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *18 (quoting *Unelko*, 912 F.2d at 1054).

421. No. SA CV 96-0765-GLT, 1997 U.S. Dist. LEXIS 22459 (C.D. Cal. June 2, 1997).

422. *See id.* at *18 (alleging Standard & Poor's to be "an expert" in rating municipal bonds).

423. *Id.* at *18–19.

424. *Id.* at *18–19; *see also Va. Bankshares, Inc.*, 501 U.S. at 1093–94; Bily v. Arthur Young & Co., 834 P.2d 745, 768–72 (Cal. 1992).

425. *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *19 (noting the County's allegation that "S&P knew or could reasonably anticipate reliance on the ratings it prepared" because of "S&P's superior knowledge and expertise in evaluating the creditworthiness of the proposed debt offerings"); *see also Unelko*, 912 F.2d at 1054–55.

426. *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *19–20 & n.5 (noting the County retained Standard & Poor's to issue a credit rating).

427. *Id.* at *21 (noting the second prong of the *Unelko* test); *see also Unelko*, 912 F.2d at 1053–54.

Virginia Bankshares), and concluded that "the predictive nature of the ratings does not, as a matter of law, permit S&P to escape liability."[428] Thus, the credit ratings were actionable.[429]

Anschutz Corp. v. Merrill Lynch & Co. Inc.[430] provides another example of a professional opinion case in which a federal district court found the First Amendment protections, including the actual malice rule, did not bar claims against the credit rating agencies for negligent misrepresentation.[431] This case concerned unregistered securities that could be sold only to a circumscribed group of investors.[432] The credit rating agencies argued that credit ratings are statements of opinion, and thus, the agencies cannot be liable for common law claims for negligent misrepresentation.[433] However, the Northern District of California noted that in certain cases, "expressions of professional opinion are treated as representations of fact."[434] For example, if the defendant has superior knowledge or special information or expertise concerning the matters at issue and the plaintiff is deemed to "reasonably rely" on the defendant's expertise, information, or knowledge, then the alleged misrepresentation, albeit in the form of an opinion, "may be treated as one of material fact."[435] Moreover, if the defendant does not honestly believe the statement of opinion, then such statement is actionable.[436] Thus, if the rating agencies "helped structure the securities" and, therefore, possessed superior knowledge of the securities, then the agencies' representations concerning those securities are actionable.[437] Additionally, if the rating agencies did not honestly believe the credit ratings when the agencies assigned them, then the agencies may be liable for negligent misrepresentation.[438]

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428. *McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *21 (noting the third prong of the *Unelko* test); *see also Va. Bankshares, Inc.*, 501 U.S. at 1093–94; *Unelko*, 912 F.2d at 1054–55.

429. *See McGraw-Hill Cos.*, 1997 U.S. Dist. LEXIS 22459, at *21.

430. 785 F. Supp. 2d 799 (N.D. Cal. 2011).

431. *Id.* at 824–25, 830–32.

432. *Id.* at 807 ("[The securities] at issue were not available to the public in general. Instead, because these securities were unregistered, they were available only to a limited group of 'qualified institutional buyers.'").

433. *Id.* at 823 ("The Rating Agencies' overriding argument is that their ratings cannot be subject to a common law negligent misrepresentation claim because the ratings are opinions and not statements of fact.").

434. *Id.* at 823–24 (quoting Bily v. Arthur Young & Co., 834 P.2d 745, 768 (Cal. 1992)).

435. *Id.* at 824 (quoting *Bily*, 834 P.2d at 768).

436. *Id.* at 824 (quoting Ogier v. Pac. Oil & Gas Dev. Corp., 282 P.2d 574, 580–81 (Cal. Dist. Ct. App. 1955)).

437. *Id.* at 825 (citing *Bily*, 834 P.2d at 768); *see also Ogier*, 282 P.2d at 581.

438. Anschutz Corp. v. Merrill Lynch & Co., 785 F. Supp. 2d 799, 824 (N.D. Cal. 2011) ("[Plaintiff] may bring negligent misrepresentation claims against the [r]ating [a]gencies if plaintiff alleges that the [a]gencies did not honestly entertain the opinions about the ratings at the time they were issued."); *cf.* Anschutz Corp. v. Merrill Lynch & Co. (*In re* Merrill Lynch Auction Rate Sec. Litig.), No. 09 MD 2030, 2011 WL 536437, at *12 (S.D.N.Y. Feb. 9, 2011) (dismissing negligent misrepresentation claims against credit rating agencies because plaintiff did not make a factual allegation that the credit ratings were inaccurate when they were offered).

Moreover, the court found that the plaintiff sufficiently pled that the credit rating agencies had a duty to the purchasers of the securities.[439] The rating agencies allegedly assisted in structuring the particular securities, knew that these securities needed to be "investment-grade" in order to be sold to the intended group of purchasers, and knew that sale of the securities was limited solely to that select group of purchasers.[440] Thus, the credit rating agencies specifically undertook the responsibility to provide information and guidance to the intended group of purchasers concerning the purchase of the particular securities and, therefore, may be subject to liability.[441] Further, as the rating agencies were allegedly privy to information that was not made available to the public, the plaintiff's reliance on the credit ratings could be considered to be reasonable.[442]

The district court also found that the First Amendment does not shield the rating agencies from liability.[443] In contrast to *Compuware*, *Jefferson Cnty.*, and *In re Enron*, the plaintiff in this case "specifically identified" the allegedly negligent misstatements, and there is no indication that the credit ratings are predictive opinions that are "too indefinite" to connote a statement of fact that may be proven as false.[444] Moreover, the district court rejected the rating agencies' argument that the actual malice standard applies.[445] Here, private figures issued the securities and distributed them only to a select class of investors; thus, the ratings were not a matter of public concern.[446] Notably, the court considered the credit ratings to be a form of commercial speech.[447]

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439. *Anschutz Corp.*, 785 F. Supp. 2d at 825–26 ("[A] defendant may be held liable for negligent misrepresentation 'in the dissemination of commercial information to persons who were "intended beneficiaries" of the information.'" (quoting *Bily*, 834 P.2d at 770)).

440. *Id.* at 826 (noting the securities could be marketed and sold only to "the select group of [qualified institutional buyers]").

441. *Id.* at 825–26 ("[If] a supplier of information has [specifically] undertaken to inform and guide a third party with respect to an identified transaction . . . [then] liability is imposed on the supplier." (quoting Glenn K. Jackson Inc. v. Roe, 273 F.3d 1192, 1200 n.3 (9th Cir. 2001))); *see also Bily*, 834 P.2d at 769–70.

442. *Anschutz Corp.*, 785 F. Supp. 2d at 826–27.

443. *Id.* at 830–32.

444. *Id.* at 830–31 ("[P]laintiff has specifically identified the alleged misstatements at issue, and nothing in the record at this stage suggests that the structured [securities] ratings at issue are, in fact, predictive opinions by their nature 'too indefinite' to imply a false statement of fact."); *cf.* Compuware Corp. v. Moody's Inv'rs. Servs., Inc., 499 F.3d 520, 522, 528–29 (6th Cir. 2007) (finding the credit rating did not imply any factual statement that may be proven as false); Jefferson Cty. Sch. Dist. No. R–1 v. Moody's Inv'r's Servs., Inc., 175 F.3d 848, 855 (10th Cir. 1999) (finding the credit rating agency article not sufficiently specific to be proven as false); Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & "ERISA" Litig.), 511 F. Supp. 2d 742, 825 (S.D. Tex. 2005) (finding the plaintiff did not identify any factual statements that could be proven as false).

445. *Anschutz Corp.*, 785 F. Supp. 2d at 831.

446. *Id.* at 831–32 (citing Abu Dhabi Commercial Bank v. Morgan Stanley & Co., 651 F. Supp. 2d 155, 175–76 (S.D.N.Y. 2009) (finding the actual malice standard did not apply to credit ratings for a structured security that was available only to a select group of purchasers)); *see also In re* Nat'l Century Fin. Enters., Inc., Inv. Litig., 580 F. Supp. 2d 630, 639–40 (S.D. Ohio 2008) (finding the actual malice rule did not apply where the securities were "issued by a privately-held company, and . . . targeted to a select class of institutional investors"); *cf. Enron Corp.*, 511 F. Supp. 2d at

Nevertheless, while the professional opinion cases and *Unelko* indicate that a credit rating agency does not have absolute immunity under the First Amendment for its ratings, if those ratings are disseminated to the public, then the rating agency's expression will have the First Amendment protection of the actual malice rule.[448]

B. Are the First Amendment Protections Justified?

As discussed in Section I.A.3.b, the credit rating agencies generally have been afforded protection under the First Amendment for the credit ratings assigned to debt securities.[449] While the credit rating agencies have maintained that a credit rating is "the world's shortest editorial" and, thus, entitled to First Amendment protection,[450] one may query whether this protection is warranted. For example, a report issued by the staff of the Senate Committee on Governmental Affairs has questioned whether credit ratings are truly "the equivalent of editorials" printed in a newspaper.[451] The staff found that the market appears to use credit ratings primarily as a certification of whether or not a particular security is investment grade rather than as a form of information.[452] Thus, the staff asserted that the use of credit ratings as certifications indicates that the "ratings are not the equivalent of editorials" published in a newspaper.[453] Further, as maintained by the staff, the First Amendment protections provided to the credit rating agencies "should not preclude greater accountability."[454]

Moreover, the case law has held that when the credit rating agency steps outside the traditional newsgathering activities of a journalist and instead "plays an active role in structuring" a security that it rates, then the credit rating agency is not entitled to the protections of the journal-

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825 (applying the actual malice standard because Enron was a Fortune 500 company and, thus, the ratings concerned a public matter).

447. *See Anschutz Corp.*, 785 F. Supp. 2d at 822 (noting that, in a case against the credit rating agencies for negligent misrepresentation, "California has a strong interest . . . in deterring misconduct with respect to commercial speech").

448. Cty. of Orange v. McGraw-Hill Cos. (*In re* Cty. of Orange), No. SA CV 96-0765-GLT, 1997 U.S. Dist. LEXIS 22459, at *21–22 (C.D. Cal. June 2, 1997) (noting S&P "is a publisher which renders opinions about certain debt issues and disseminates those opinions to the public[; thus,] S&P's expression is entitled to protection under the First Amendment" and the actual malice rule will apply); *see also* Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1093–94 (1991); Unelko Corp. v. Rooney, 912 F.2d 1049, 1054–55 (9th Cir. 1990).

449. *See* discussion *supra* Section I.A.

450. PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 96 (quoting Statements of Charles Brown, Fitch General Counsel).

451. *Id.* at 97 ("[T]he fact that the market seems to value the agencies' ratings mostly as a certification [of whether the security is investment grade] . . . and not as information . . . seems to indicate that their ratings are not the equivalent of editorials in *The New York Times*." (footnote omitted)).

452. *Id.*

453. *Id.*

454. *Id.*

ist's privilege.[455] Yet, in the case of structured securities in the recent financial crisis, such as mortgage-backed securities,[456] the credit rating agencies "stepped outside" the role of a newsgatherer and instead "played a[n] . . . [active] role in . . . structuring" those securities.[457] The issuers worked with the credit rating agencies in order "to ensure" that the securities were structured in a manner that would result in high ratings.[458] Inevitably, the credit rating agencies' high level of involvement in structuring mortgage-backed securities resulted in the agencies being in the incongruous "position of 'rating their own work.'"[459] While it is

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455. Am. Sav. Bank, FSB v. UBS PaineWebber, Inc. (*In re* Fitch, Inc.), 330 F.3d 104, 110–11 (2d Cir. 2003) (per curiam) (concluding the journalist's privilege is not applicable when the credit rating agency issues ratings based on "client needs" rather than as part of the traditional activities of a newsgatherer and the "level of involvement with the client's transactions . . . is not typical of the relationship between a journalist and the activities upon which the journalist reports"); *cf.* Compuware Corp. v. Moody's Inv'rs Servs., Inc., 324 F. Supp. 2d 860, 862 (E.D. Mich. 2004) (finding the journalist's privilege is applicable when the credit rating agency "did not participate in the structuring of the debt it was rating" and, thus, did not "step[] outside its role as an information gatherer").

456. *See* N.J. Carpenters Vacation Fund v. Royal Bank of Scot. Grp., PLC, 720 F. Supp. 2d 254, 258 (S.D.N.Y. 2010) (explaining mortgage-backed securities as securities whose cash flow is derived from underlying mortgage loans that are "pooled together" in the form of a security and subsequently sold on the secondary market to investors (quoting Consolidated First Amended Securities Class Action Complaint at para. 40, N.J. Carpenters Vacation Fund v. Harborview Mortg. Loan Trust, No. 08-CV-5093, 2009 WL 1455319 (S.D.N.Y. May 19, 2009))).

457. Abu Dhabi Commercial Bank v. Morgan Stanley & Co., 651 F. Supp. 2d 155, 166 (S.D.N.Y. 2009) ("Although a rating agency's role as an unbiased reporter of information typically requires the rating agency to remain independent of the issuers for which it rates notes, the [r]ating [a]gencies played a more integral role in the structuring and issuing of [structured securities]."); *Compuware*, 324 F. Supp. 2d at 862; *accord* Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs. LLC, 700 F.3d 829, 834 (6th Cir. 2012) (alleging that the credit rating agencies "assist[ed] arrangers in structuring their securities to achieve certain credit ratings"); Wyo. State Treasurer v. Moody's Inv'rs Serv., Inc. (*In re* Lehman Bros. Mortg.-Backed Sec. Litig.), 650 F.3d 167, 172 (2d Cir. 2011) (alleging that the credit rating agencies "exceeded their traditional roles by actively aiding in the structuring and securitization process"); *N.J. Carpenters Vacation Fund*, 720 F. Supp. 2d at 259 (alleging the credit rating agencies "played a substantial role in the securitization process" by assisting in the decision of which "loans were to be included in the mortgage pools underlying the [securities] and thereafter [in] the structure of [those securities]"); *In re* Nat'l Century Fin. Enters., Inc., Inv. Litig., 580 F. Supp. 2d 630, 644 (S.D. Ohio 2008) ("[W]ith asset-backed securities, rating agencies commonly instruct how the [securities] . . . should be structured in order to get the desired bond rating."); CARNELL ET AL., *supra* note 317, at 374 ("Rating agencies began to participate in an unprecedented way in the actual structuring of financings."); *see also Fitch*, 330 F.3d at 110–11 (finding the credit rating agency was not entitled to the journalist's privilege because the agency was not engaged in traditional newsgathering activities and instead was actively involved in structuring the security); *cf. Compuware*, 324 F. Supp. 2d at 862 (finding the credit rating agency was entitled to the journalist's privilege because the agency was not involved in structuring the security and, therefore, did not step outside the role of newsgatherer).

458. CARNELL ET AL., *supra* note 317, at 374 ("[C]redit rating agencies helped issuers decide how many layers of rated debt and how much of an equity cushion would be best, and, most important what sort of steps should be taken (called 'credit enhancement') to improve the rating, and hence the marketability of a particular issue. Issuers might, for example, purchase insurance, increase the size of the equity cushion, or provide more than 100% collateral . . . ."); *see also Morgan Stanley & Co.*, 651 F. Supp. 2d at 166 (noting credit rating agencies "worked directly" with the investment bank "to structure the [securities] in such a way that they could qualify for the [r]ating [a]gencies' highest ratings").

459. *See Ohio Police & Fire Pension Fund*, 700 F.3d at 834 ("[T]o attract the significant rating fees paid by [mortgage-backed securities] arrangers, the [a]gencies 'became intimately involved in the issuance of [mortgage-backed securities]' by assisting arrangers in structuring their securities to achieve certain credit ratings, turning the process into a form of negotiation and placing the

unlikely that the journalist's privilege to withhold information requested by a subpoena would be available to the rating agencies under these circumstances, the lower courts have still shielded the rating agencies from liability for fraudulent or negligent credit ratings under the guise that the ratings are opinions and, thus, fully protected speech under the First Amendment.[460]

However, the lower courts have misapplied this First Amendment protection. The lower courts have employed the *New York Times* case and its progeny to shield the credit rating agencies from liability in cases where the rating is disseminated to the public unless the plaintiff can prove actual malice.[461] One of the primary rationales for the Supreme Court's rulings was that the press will be "unduly chilled" if it has to worry about liability for damages caused by defamatory statements even if the damages were limited to actual damages.[462] However, as Justice White has stated, "[O]ther commercial enterprises in this country not in the business of disseminating information must pay for the damage they cause as a cost of doing business . . . ."[463] As noted by the Supreme Court, "The fact that dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected . . . activity does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others."[464] Moreover, the necessity of the *New York Times* actual malice rule is debatable since the press was certainly "free and vigorous" before that decision was laid down.[465] Furthermore, "[n]othing in the central rationale behind *New York Times* demands an absolute immunity from suits . . . where the plaintiff cannot make out a jury case of actual malice."[466]

These arguments ring exceedingly true in the case of the credit rating agencies. As one scholar has maintained, "If the agencies truly are private entities . . . they should be susceptible to the same sorts of

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[a]gencies in the position of 'rating their own work.'" (quoting Complaint, *supra* note 8, at paras. 56, 80)).

460. *See supra* notes 73–76 and accompanying text; *see also* discussion *supra* Section I.A.3.b.

461. *See* discussion *supra* Section I.A.3.b.

462. *See* Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc., 472 U.S. 749, 771–72 (1985) (White, J., concurring) (explaining that "the *New York Times* standard was formulated to protect the press from the chilling danger of numerous large damages awards" and noting the proposition "that even without the threat of large presumed and punitive damages awards, press defendants' communication will be unduly chilled by having to pay for the actual damages caused" by their defamatory statements).

463. *Id.* at 772.

464. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 150 (1967).

465. *See Greenmoss Builders, Inc.*, 472 U.S. at 772 (White, J., concurring) ("[I]t is difficult to argue that the United States did not have a free and vigorous press before the rule in *New York Times* was announced.").

466. *Id.*

lawsuits any similarly-situated private entity would be."[467] For example, auditors that prepare and provide opinions with respect to financial statements and security analysts that evaluate equity securities must pay for damages they cause.[468] Why should the credit rating agencies, which occupy a role very similar to auditors and security analysts,[469] be treated any differently? While the credit rating agencies have argued in recent times that holding the agencies liable for their credit ratings would have a chilling effect on the dissemination of financial information,[470] can an independent, credible argument be made that the credit rating agencies were even slightly chilled by the threat of liability prior to the *New York Times* decision? Further, when *New York Times* itself does not demand an absolute immunity in defamation cases where actual malice is not shown,[471] why do the lower courts feel obliged to provide an absolute immunity to the credit rating agencies?[472]

Moreover, the Supreme Court has recognized that newspapers and magazines are profit-making enterprises.[473] Thus, similar to other businesses that cause damage, newspapers and magazines must pay for such injury, and the injured party should not be forced to accept remedies that are "difficult or impossible" to attain "unless strong policy considerations demand."[474] While many arguments have been made regarding the important public policy concerns involved in the protection of a free press,[475] the same cannot be said regarding protection of the credit rating agencies. What exactly is the policy consideration in providing absolute

467. Frank Partnoy, *The Siskel and Ebert of Financial Markets?: Two Thumbs Down for the Credit Rating Agencies*, 77 WASH. U.L.Q. 619, 711 (1999) ("[A]gencies should not simultaneously benefit from ratings-dependent regulation and be insulated from lawsuits alleging negligence or misrepresentation.").

468. *See supra* notes 387–388 and accompanying text; *see also infra* note 523 and accompanying text.

469. *See supra* note 345 and accompanying text; *see also infra* notes 518–522 and accompanying text.

470. *See, e.g.*, *In re* Nat'l Century Fin. Enters., Inc., Inv. Litig., 580 F. Supp. 2d 630, 639 (S.D. Ohio 2008) ("Moody's argues that holding a credit rating agency liable for its bond ratings would have an oppressive effect on the publication of important financial information to the public.").

471. *See Greenmoss Builders, Inc.*, 472 U.S. at 772 (White, J., concurring).

472. *See* Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs., LLC, 813 F. Supp. 2d 871, 877 & n.1 (S.D. Ohio 2011) (noting the rating agencies' argument that credit "ratings enjoy absolute immunity under the First Amendment" and explaining that "[c]ourts have traditionally extended First Amendment protection to credit ratings of publicly-held companies, where the ratings were offered to the investing public at large as an informational service" (citing Compuware Corp. v. Moody's Inv'rs Servs., Inc., 499 F.3d 520, 525–26 (6th Cir. 2007); and Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & "ERISA" Litig.), 511 F. Supp. 2d 742, 826–27 (S.D. Tex. 2005))), *aff'd*, 700 F.3d 829 (6th Cir. 2012).

473. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 147 (1967) ("Newspapers, magazines, and broadcasting companies are businesses conducted for profit and often make very large ones." (quoting Buckley v. N.Y. Post Corp., 373 F.2d 175, 182 (2d Cir. 1967))).

474. *Id.* ("Like other enterprises that inflict damage in the course of performing a service highly useful to the public . . . [newspapers and magazines] must pay the freight; and injured persons should not be relegated (to remedies which) make collection of their claims difficult or impossible unless strong policy considerations demand." (first alteration in original) (quoting *Buckley*, 373 F.2d at 182)).

475. *See supra* notes 27, 34 and accompanying text.

immunity to the credit rating agencies? As the cases indicate, the credit rating agencies have cloaked themselves in the blanket of First Amendment protection by claiming they are publishers providing opinions of public interest.[476] However, the issuer of a security hires and pays the credit rating agencies to provide a credit rating.[477] This is a very different function than that of a newspaper. Moreover, why is the public interest in a credit rating regarding a debt security any different than the public interest regarding the evaluation of an equity security? I would argue that there is no difference. Yet, security analysts and auditors are subject to liability while the credit rating agencies are not.[478]

One commentator has argued against extending the tort of negligent misrepresentation to the credit rating agencies based on the concern that "any showing less than recklessness" would have a "potential chilling effect" on the publication of credit ratings.[479] This commentator argues that "the state's interest in compensating relying investors must give way to the first amendment's concern for the free flow of commercial information."[480] Thus, this commentator believes that our "[s]ociety must rely on the market and competition to keep rating agencies operating at their negligence threshold, not on courts and juries."[481] This contention echoes that of the credit rating agencies that have argued that "the market should be the appropriate means for ensuring the reliability of credit opinions and of rating agencies."[482] Even the courts have defended the position of the credit rating agencies by acknowledging the public policy interest in the efficient operation of the capital markets and the "significant role" played by the credit rating agencies in those markets, which at least one court believed "would be chilled by unlimited potential liability" from assigning credit ratings.[483]

However, the financial crisis has proven that the market and competition are not suitable adversaries for an oligopolistic industry[484] in which the players have been permitted to play with no rules and no conse-

476. *See* discussion *supra* Section I.A.3.b.

477. Commercial Fin. Servs., Inc. v. Arthur Andersen LLP, 94 P.3d 106, 110 (Okla. Civ. App. 2004) (finding the credit rating agencies issued a rating regarding the creditworthiness of bonds "as professionals being paid to provide their opinions to a client"); *see also infra* notes 577–78 and accompanying text.

478. *See supra* notes 12, 402–03 and accompanying text; *see also infra* note 503.

479. Jefferson Cty. Sch. Dist. No. R–1 v. Moody's Inv'r's Servs., Inc., 175 F.3d 848, 856 n.3 (10th Cir. 1999) (quoting Gregory Husisian, Note, *What Standard of Care Should Govern the World's Shortest Editorials?: An Analysis of Bond Rating Agency Liability?*, 75 CORNELL L. REV. 411, 460 (1990)).

480. Husisian, *supra* note 479.

481. *Id.*

482. Newby v. Enron Corp (*In re* Enron Corp. Sec., Derivative & "ERISA" Litig.), 511 F. Supp. 2d 742, 814–15 (S.D. Tex. 2005).

483. *Id.* at 827.

484. *See* U.S. SEC. & EXCH. COMM'N, REP. TO CONGRESS ON ASSIGNED CREDIT RATINGS 8 (2012) (estimating "that, as of December 31, 2011, approximately 91% of the outstanding credit ratings for structured finance products were determined by the three largest" credit rating agencies, Standard & Poor's, Moody's, and Fitch).

quences. Moreover, the credit rating industry is not the press. The constitutional amendment to protect a free press could not have been intended to protect an industry in which the information that is being publicly disseminated is plagued by inherent conflicts of interest as discussed in Part III.[485] The notion that credit ratings are pure expressions of opinion akin to speech regarding political matters,[486] such as the civil rights movement,[487] is clearly misguided. The state's interest in protecting relying investors (and our society's interest in protecting the economy) is stronger than the constitutional concern in protecting this type of speech.

It is not in the best interests of our society to provide credit rating agencies with First Amendment protection in the form of the actual malice rule—a standard that "poses such a high barrier that it virtually insulates the speaker from liability."[488] Even the Supreme Court has cautioned "against 'blind application'" of the actual malice rule.[489] Yet, the lower courts have engaged in such blind application of the actual malice standard[490] and, thus, inappropriately shielded the credit rating agencies from liability.

In sum, credit rating agencies should not be treated as journalists entitled to the heightened protection of the actual malice standard when hired to provide a rating even if that rating is disseminated to the public. Credit ratings are not pure statements of opinion entitled to full constitutional protection. Rather, credit ratings are a form of commercial speech that expresses a fact-based opinion; credit ratings are based on factual information and convey a factual assertion regarding the creditworthiness of the subject of the rating whether a particular security issue or a specific company. Moreover, credit ratings are statements of fact-based opinion made by professionals. Thus, credit rating agencies should be subject to liability for fraudulent or negligently prepared credit ratings that are false or misleading.

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485. *See* U.S. CONST. amend. I; *see also infra* Part III.

486. *See* Roth v. United States, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.").

487. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 (1974) ("The Times ran a political advertisement endorsing civil rights demonstrations by black students in Alabama and impliedly condemning the performance of local law-enforcement officials." (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (finding the advertisement contained expressions of opinion and provided information concerning the civil rights movement, "whose existence and objectives are matters of the highest public interest and concern"))).

488. PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 96.

489. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 148 (1967) (noting the Court has "counseled against 'blind application of *New York Times Co. v. Sullivan*' and considered 'the factors which arise in the particular context'" (quoting Time, Inc. v. Hill, 385 U.S. 374, 390 (1967))).

490. *See* discussion *supra* Section I.A.3.b.

II. THE REGULATORY PROTECTIONS

This part will first explain the business model of the credit rating agencies and the regulatory designation of certain rating agencies. This part will then examine the regulatory protections afforded to the credit rating agencies.

A. Nationally Recognized Statistical Rating Organizations

Credit rating agencies have been providing ratings regarding the creditworthiness of debt securities and the issuers of those securities for close to a century.[491] Prior to 1975, credit rating agencies gathered and employed information that was publicly available to provide unsolicited credit ratings regarding the creditworthiness of various corporations, and the agencies charged a fee to investors who wished to receive the rating.[492] Then, in 1975, the Commission designated specific credit rating agencies as "nationally recognized statistical rating organization[s]" also known as "NRSROs."[493] For example, the Commission has designated Standard & Poor's, Moody's Investors Services, Inc., and Fitch, Inc. as NRSROs.[494] Among other requirements, the credit rating agency must be "nationally recognized" in order to obtain the NRSRO designation.[495] As explained by the Commission, this requirement was intended to ensure that the agency's ratings "were credible and reasonably relied upon by the marketplace."[496] Thereafter, the credit rating agencies began working directly for the issuers of the securities; thus, the rating agencies were

491. ROLE & FUNCTION, *supra* note 2, at 5 ("For almost a century, credit rating agencies have been providing opinions on the creditworthiness of issuers of securities and their financial obligations.").

492. Abu Dhabi Commercial Bank v. Morgan Stanley & Co., 651 F. Supp. 2d 155, 164 (S.D.N.Y 2009) (noting the information was obtained from publicly available sources such as filings with the Commission).

493. Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & "ERISA" Litig.), 511 F. Supp. 2d 742, 817 n.77 (S.D. Tex. 2005) (quoting PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 105) ("[I]n 1975 . . . the SEC developed an informal procedure for designating certain rating agencies as NRSROs."); *accord* ROLE & FUNCTION, *supra* note 2, at 5 (explaining the Commission used the "no-action letter process" to recognize certain credit rating agencies as "'nationally recognized statistical rating organizations,' or 'NRSROs'"); PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 79 (explaining that, in 1975, the SEC promulgated Rule 15c3-1 requiring the securities held by broker-dealers to be rated by NRSROs); *see also* 15 U.S.C. § 78o-7 (2012) (providing for formal registration of nationally recognized statistical rating organizations); 17 C.F.R. § 240.17g-1 (2015) (discussing application procedures for registration as a nationally recognized statistical rating organization).

494. ROLE & FUNCTION, *supra* note 2, at 5; *see also* Am. Sav. Bank, FSB v. UBS PaineWebber, Inc. (*In re* Fitch, Inc.), 330 F.3d 104, 106 (2d Cir. 2003) (noting that the Commission has designated Standard & Poor's, Moody's Investors Services, Inc., and Fitch, Inc. as NRSROs).

495. ROLE & FUNCTION, *supra* note 2, at 6.

496. *Id.* at 6; *see also Morgan Stanley & Co.*, 651 F. Supp. 2d at 164 ("[T]he SEC created a special status to distinguish the most credible and reliable rating agencies . . . to help ensure the integrity of the ratings process.").

able to obtain nonpublic information to be employed in the ratings assessment and were paid directly by the issuer of the securities.[497]

The Second Circuit has observed that issuers will obtain ratings for their securities because investors rely on the assessment of creditworthiness made by the rating agency, and thus, the sale of the security will be easier if the security receives a favorable rating.[498] Moreover, the ratings assigned by the NRSROs had "regulatory significance" because, prior to the Dodd–Frank Act, many regulated institutional investors were limited in the choice of investment securities based on the ratings assigned by the NRSROs.[499]

B. Statutory Liability and Regulatory Exemption

In Section 11 of the Securities Act of 1933, Congress provided for civil liability for false or misleading statements of material fact in a registration statement.[500] Specifically, Section 11 prohibits making "an untrue statement of a material fact" in a registration statement or "omitt[ing] to state a material fact" that is required to be included in the registration statement or otherwise necessary in order to make the information included in the registration statement "not misleading."[501] Purchasers of securities issued under such false or misleading registration statements may bring a private action against certain categories of potential defendants, including anyone who was a signer of the registration statement, any director or partner of the issuer, any underwriter of the security, and certain experts.[502]

With respect to experts, the statute expressly provides for liability for accountants, appraisers, and engineers, as well as any other professional who has given consent to be named as a preparer or certifier of any portion of the registration statement or of "any report or valuation which is used in connection with the registration statement."[503] Based on the statute, a credit rating agency had potential expert liability under

497. *See Morgan Stanley & Co.*, 651 F. Supp. 2d at 164 (noting that after 1975, issuers began hiring the credit rating agencies to rate their securities and provided nonpublic information to the rating agencies); *see also infra* notes 577–78 and accompanying text.

498. Abu Dhabi Commercial Bank v. Morgan Stanley & Co., 888 F. Supp. 2d 431, 441 (S.D.N.Y. 2012) (citing *Fitch*, 330 F.3d at 106).

499. *Fitch*, 330 F.3d at 106 ("[M]any regulated institutional investors are limited in what types of securities they may invest based on the securities' NRSRO ratings."). Notably, the Dodd–Frank Act has required the removal of reliance on credit ratings from federal statutes and regulations, such as banking regulations. *See* Dodd–Frank Act, Pub. L. No. 111-203, § 939A(b), 124 Stat. 1376, 1887 (2010).

500. 15 U.S.C. § 77k (2012) (codifying Section 11 of the Securities Act of 1933); *see also* William K. Sjostrom, Jr., *The Due Diligence Defense Under Section 11 of the Securities Act of 1933*, 44 BRANDEIS L.J. 549, 549 (2006) (explaining Section 11 civil liability and the due diligence defense); Krista L. Turnquist, Note, *Pleading Under Section 11 of the Securities Act of 1933*, 98 MICH. L. REV. 2395, 2395 (2000) (discussing Section 11 pleading requirements).

501. 15 U.S.C. § 77k.

502. *Id.* § 77k(a); Sjostrom, *supra* note 500, at 549; Turnquist, *supra* note 500, at 2395.

503. *Id.* § 77k(a)(4).

Section 11 for false or misleading credit ratings that were contained in a registration statement provided the agency gave "consent [to be] named" in the registration statement as an expert.[504]

However, in 1981, the Commission issued a "new policy" in order to encourage credit ratings to be disclosed in registration statements.[505] To facilitate this policy, the Commission promulgated Rule 436(g)(1) which provided the credit rating agencies with an exemption from liability for Section 11 claims.[506] The rule provides that the credit rating for certain securities, including debt securities, assigned by an NRSRO "shall not be considered a part of the registration statement prepared or certified by a person within the meaning of [S]ection[] . . . 11 of the [Securities] Act of 1933."[507] The Commission expressly stated that the purpose of the new rule was to exclude from Section 11 civil liability "any nationally recognized statistical rating organization whose security rating is disclosed in a registration statement."[508] Thus, Rule 436(g)(1) exempted these credit rating agencies from liability for false or misleading credit ratings listed in a registration statement.[509]

Even the courts have expressly acknowledged the Rule 436(g)(1) exemption from liability for the credit rating agencies.[510] For example, the district court in *In re Enron* cited to the exemption in analyzing whether the credit rating agencies were generally subject to liability either under the case law or by federal regulation.[511] The court concluded that the Rule 436(g)(1) exemption was a further indication of the lack of authority to hold the credit rating agencies liable.[512] Moreover, in a 2002 report issued by the staff of the Senate Committee on Governmental Af-

504. *See id.*

505. Wyo. State Treasurer v. Moody's Inv'rs Serv., Inc. (*In re* Lehman Bros. Mortg.-Backed Sec. Litig.), 650 F.3d 167, 183 n.11 (2d Cir. 2011); *see also* Disclosure of Security Ratings in Registration Statements, 46 Fed. Reg. 42,024, 42,024 (proposed Aug. 18, 1981) (issuing a policy statement and proposals "to permit the voluntary disclosure of security ratings assigned by nationally recognized statistical rating organizations . . . in registration statements").

506. *See Wyo. State Treasurer*, 650 F.3d at 183 n.11 (citing SEC Written Consents Rule, 17 C.F.R. § 230.436(g)(1) (2015)); Disclosure of Security Ratings in Registration Statements, 46 Fed. Reg. at 42,028 (explaining that under Rule 436(g), "the rating organization would not be subject to civil liability as an expert pursuant to Section 11 of the Securities Act").

507. 17 C.F.R. § 230.436(g)(1).

508. Disclosure of Security Ratings in Registration Statements, 46 Fed. Reg. at 42,024.

509. *See* 17 C.F.R. § 230.436(g)(1); 15 U.S.C. § 77k(a) (2012); *see also* PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 82 ("SEC Rule 436, promulgated under the Securities Act, expressly shields NRSROs from liability under Section 11 of the Securities Act in connection with an offering of securities.").

510. *See, e.g.*, Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & "ERISA" Litig.), 511 F. Supp. 2d 742, 816–17 (S.D. Tex. 2005) ("[T]here is even a statutory exemption under the Securities Act of 1933 for Section 11 claims against credit rating agencies . . . that have been designated 'nationally recognized statistical rating agencies' or 'NRSROs.'"); *see also id.* at 817 n.77 (explaining that "[r]ule 436(g)(1) of the Securities Act of 1933, 17 C.F.R. § 230.436(g)(1) provides for exemption of liability" with respect to the credit ratings issued by an NRSRO included in a registration statement).

511. *Id.* at 815–17 & n.77.

512. *Id.* (acknowledging "the absence of authority to impose liability" with respect to the credit rating agencies).

fairs, the staff noted that the liability of the credit rating agencies "traditionally has been limited both by regulatory exemptions and First Amendment protections" provided by reviewing courts.[513]

C. Accountability and Elimination of the Regulatory Exemption

However, in the Dodd–Frank Act, Congress found that credit ratings have "systemic importance."[514] The investing public, including both institutional and individual investors as well as financial regulators, rely on credit ratings.[515] Moreover, the credit rating agencies occupy a significant role in the capital markets by promoting confidence in the markets, facilitating the growth in capital, and furthering economic efficiency.[516] Thus, the functioning and accuracy of the rating agencies "are matters of national public interest."[517]

Congress further found that credit rating agencies occupy "a critical 'gatekeeper' role" in the market for debt securities.[518] This role is "functionally similar" to the role of other "financial 'gatekeepers'" that include the auditors who prepare a company's financial statements and the security analysts who occupy a role in the equity markets that is very comparable to the role of the rating agencies in the debt markets.[519] Credit rating agencies and security analysts analyze and evaluate the relative quality of the securities in their respective markets for the benefit of clients.[520] Thus, the issuance of a credit rating is "fundamentally commercial in character" akin to the services other "financial 'gatekeepers'" provide.[521] Accordingly, Congress found that credit rating agencies, including NRSROs, "*should be subject to the same standards of liability* and oversight" that are applicable to securities analysts, investment bankers, and auditors.[522]

In particular, Congress found that the credit ratings assigned to structured securities, such as collateralized debt obligations, were "inaccurate."[523] Moreover, the "inaccuracy" of these credit ratings "contribut-

513. ROLE & FUNCTION, *supra* note 2, at 17–18 (citing PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 90 ("It is difficult not to wonder whether lack of accountability—the agencies' practical immunity to lawsuits and non-existent regulatory oversight—is a major problem.")).

514. Dodd–Frank Act, Pub. L. No. 111-203, § 931(1), 124 Stat. 1376, 1872 (2010).

515. *Id.*

516. *Id.* ("[C]redit rating agencies are central to capital formation, investor confidence, and the efficient performance of the United States economy.").

517. *Id.*

518. *Id.* § 931(2).

519. *Id.* § 931(2)–(3).

520. *Id.*

521. *Id.* § 931(3)

522. *Id.* (emphasis added).

523. *Id.* § 931(5) ("In the recent financial crisis, the ratings on structured financial products have proven to be inaccurate."); *see also* Curry, Remarks Before the American Securitization Forum, *supra* note 141, at 2 (noting the "flawed credit ratings" assigned to mortgage-backed securities "suggest[ed] that the mortgage securities in question were as safe as investment-grade corporate bonds"); Pfinsgraff, Remarks Before the Risk Magazine Credit Risk Conference, *supra* note 20, at 2

ed significantly" to the failure of investors to appropriately manage the risks of these highly complex structured securities; these investors included financial institutions such as banks that relied on these inaccurate ratings in their investment decisions.[524] Thus, Congress determined that the credit rating agencies should be subject to "increased accountability."[525]

In accordance with its mandate, Congress attempted to increase the accountability of the credit rating agencies by providing that, in a private action, "[t]he enforcement and penalty provisions of [the securities laws] shall apply to statements made by a credit rating agency in the same manner and to the same extent as such provisions apply to . . . a registered public accounting firm or a securities analyst."[526] Thus, Congress determined that credit rating agencies should be held accountable for their statements to the same extent, and in the same manner, as accountants and securities analysts.[527] Moreover, any such statements made by a credit rating agency will not be considered "forward-looking statements" under the safe harbor rules of Section 21E of the Securities Exchange Act.[528] Thus, the credit rating agencies cannot use this safe harbor to avoid liability for false or misleading statements.[529]

With the intention of providing meaningful reform, Congress concluded that Rule 436(g), which shielded the credit rating agencies

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(stating the proposition that credit rating agencies "mis-rate[d] tens of billions of subprime securitizations and their derivative [collateralized debt obligations]").

524. *See* Dodd–Frank Act § 931(5) ("[T]he mismanagement of risks by financial institutions and investors . . . in turn adversely impacted the health of the economy in the United States and around the world."); *see also* TESTIMONY OF JOHN WALSH, *supra* note 21, at attachment A, 2 ("Issues surrounding credit ratings were a significant factor in market overconfidence that contributed to subsequent losses in the markets for mortgage-backed securities in 2008-2009."); Curry, Remarks Before the American Securitization Forum, *supra* note 141, at 2 ("[I]nvestors . . . placed undue reliance on flawed credit ratings . . . ."); Letter from Mary Frances Monroe, Vice President, Office of Regulatory Policy, to Office of the Comptroller of the Currency et al., at 1 (Oct. 25, 2010), http://www.federalreserve.gov/SECRS/2010/November/20101104/R-1391/R-1391_102510_54036_533969644112_1.pdf (recognizing "that inadequacies in the issuance and use of credit ratings contributed to recent financial disruptions in the U.S. markets").

525. Dodd–Frank Act § 931(5).

526. 15 U.S.C. § 78o-7(m)(1) (2012). The Dodd–Frank Act further provides that, with respect to any state of mind that is required in a particular action, it is sufficient to plead facts that provide "a strong inference" that the rating agency "knowingly or recklessly failed" to perform a "reasonable investigation" of the facts that it relied upon in evaluating the credit risk of the security or to obtain from other sources a "reasonable verification" of the facts. *Id.* § 78u-4(b)(2)(A)–(B). Thus, in a private suit against a credit rating agency, a plaintiff will not need to plead scienter in any cause of action under the securities laws that otherwise would require this higher level of pleading, such as a fraud action under Section 10(b) of the Securities Exchange Act and Rule 10b-5. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976) (finding an allegation of scienter is required in a private cause of action under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 and defining scienter as the "intent to deceive, manipulate, or defraud").

527. *See* 15 U.S.C. § 78o-7(m)(1).

528. *See id.*; *see also id.* § 78u-5(c), (i)(1)(C) (providing a safe harbor for "forward-looking statement" defined inter alia as "a statement of future economic performance").

529. *See* 15 U.S.C. § 78o-7(m)(1); *see also id.* § 78u-5(c)(1).

from liability, would no longer have any "force or effect."[530] By repealing the Rule 436(g) exemption, Congress provided authority to hold the credit rating agencies liable under Section 11 of the Securities Act of 1933 for false or misleading credit ratings contained in a registration statement.[531] Congress's repeal of Rule 436(g) became effective July 22, 2010.[532]

D. Reestablishment of the Regulatory Shield

On the same day that the repeal of Rule 436(g) went into effect, the Commission's Division of Corporation Finance issued a no-action letter[533] regarding the disclosure requirements in a prospectus that forms part of a registration statement for the offering of asset-backed securities.[534] The Commission's asset-backed securities rule known as Regulation AB requires the issuer of asset-backed securities to disclose whether a sale or issuance of such "securities is conditioned on the assignment of a rating by one or more rating agencies."[535] If the sale or issuance of an asset-backed security is conditioned on such assignment of a credit rating, then Regulation AB requires the issuer to disclose the identity of every credit rating agency that has provided a rating as well as the minimum credit rating necessary for the sale or issuance of the asset-backed securities.[536] Regulation AB also requires the issuer to explain any arrangements for the credit rating to be monitored during the period in which the securities are outstanding.[537]

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530. Dodd–Frank Act § 939(G) ("Rule 436(g), promulgated by the Securities and Exchange Commission under the Securities Act of 1933, shall have no force or effect."); *see also* Wyo. State Treasurer v. Moody's Inv'rs Serv., Inc. (*In re* Lehman Bros. Mortg.-Backed Sec. Litig.), 650 F.3d 167, 183 n.11 (2d Cir. 2011) (noting the Dodd-Frank Act "recently nullified" Rule 436(g)).

531. *See* Act § 939(G); 15 U.S.C. § 77k(a); *see also* Letter from Martha Coakley, Mass. Att'y Gen., to Mary Schapiro, Chairman, Sec. & Exch. Comm'n 1 (Mar. 1, 2011) [hereinafter Coakley Letter], http://www.mass.gov/ago/docs/press/2011/2011-03-07-sec-letter-attachment1.pdf ("We believe that Congress rescinded the rating agencies' exemption from liability with the expectation that this would result in rating agency liability.").

532. Dodd–Frank Act § 4 ("Except as otherwise specifically provided in this Act or the amendments made by this Act, . . . this Act and such amendments shall take effect 1 day after the date of enactment of this Act."). The date of enactment of the Dodd–Frank Act was July 21, 2010; thus, the effective date of the repeal of Rule 436(g) was July 22, 2010. *See* Dodd–Frank Act pmbl..

533. *No-Action Letters*, U.S. SEC. & EXCH. COMM'N (Sept. 21, 2012), http://www.sec.gov/answers/noaction.htm ("An individual or entity who is not certain whether a particular product, service, or action would constitute a violation of the federal securities law may request a 'no-action' letter from the SEC staff. Most no-action letters describe the request, analyze the particular facts and circumstances involved, discuss applicable laws and rules, and, if the staff grants the request for no action, conclude[] that the SEC staff would not recommend that the Commission take enforcement action . . . "); *see also* Coakley Letter, *supra* note 531, at 1–2 ("Legally, no-action letters are expressions of enforcement policy. In practice, they are public statements by SEC staff often taken to imply legal interpretations and administrative action they do not contain.").

534. SEC No-Action Letter, *supra* note 19, at *2.

535. SEC Asset-Back Securities Rules, 17 C.F.R. § 229.1103(a)(9) (2015); *see also* 17 C.F.R. § 229.1120 (mandating this disclosure requirement is applicable "whether or not" the rating agencies are NRSROs); SEC No-Action Letter, *supra* note 19, at *2.

536. 17 C.F.R. § 229.1103(a)(9); 17 C.F.R. § 229.1120; SEC No-Action Letter, *supra* note 19, at *1–2.

537. 17 C.F.R. § 229.1120; SEC No-Action Letter, *supra* note 19, at *1–2.

The repeal of Rule 436(g) results in the need to obtain the consent of the credit rating agency to list its name "as an expert" in order to disclose the agency's credit rating in the registration statement.[538] However, the credit rating agencies refused to provide the necessary consent.[539] In response, the Division of Corporation Finance issued the July 22, 2010, no-action letter indicating that it "will not recommend" bringing an enforcement action against an issuer of asset-backed securities if the disclosure regarding credit ratings required under Regulation AB is not included in the registration statement.[540] This no-action letter was issued for the purpose of "facilitat[ing] a transition for asset-backed issuers" and was initially scheduled to expire on January 24, 2011.[541]

Nevertheless, on November 23, 2010, the Division of Corporation Finance issued a second no-action letter regarding the disclosure requirements under Regulation AB with respect to credit ratings.[542] In this second no-action letter, the Division of Corporation Finance extended the no-action status regarding the omission of credit rating disclosures required under Regulation AB indefinitely.[543] The Division of Corporation Finance cited to the continued unwillingness of the credit rating agencies to provide the needed consent and stated that an extension of the initial no-action letter is necessary in order to permit asset-backed securities to continue to be offered as registered securities.[544] In balancing the benefits to investors achieved through the registration of asset-backed securities under the Securities Act with the omission of the credit rating information required under Regulation AB, the Division of Corporation Finance decided to extend the initial no-action letter and permit registered offerings of asset-backed securities without the required

538. SEC No-Action Letter, *supra* note 19, at *1–2; *see also* Wyo. State Treasurer v. Moody's Inv'rs Serv., Inc. (*In re* Lehman Bros. Mortg.-Backed Sec. Litig.), 650 F.3d 167, 183 n.11 (2d Cir. 2011) ("[A]ny potential 'expert' liability requires satisfaction of the naming and consent requirements." (citing 15 U.S.C. § 77k(a)(4) (2012))).

539. *See* SEC No-Action Letter, *supra* note 19, at *1–2.

540. *Id.* at *2; *see also* 17 C.F.R. § 229.1103(a)(9) (providing disclosure requirements required under Regulation AB with respect to credit ratings); 17 C.F.R. § 229.1120 (providing additional disclosure requirements required under Regulation AB regarding credit ratings).

541. SEC No-Action Letter, *supra* note 19, at *2 ("This no-action position will expire with respect to any registered offerings of asset-backed securities commencing with an initial bona fide offer on or after January 24, 2011.").

542. *Id.* at *1.

543. *Id.* at *1 ("Pending further notice, . . . [an enforcement action will not be recommended] if an asset-backed issuer . . . omits the ratings disclosure required by Item 1103(a)(9) and 1102 of Regulation AB from a prospectus that is part of a registration statement relating to an offering of asset-backed securities."); *see also* Coakley Letter, *supra* note 531, at 6 (referring to the Nov. 23, 2010 No-Action Letter extending "the no-action position indefinitely").

544. SEC No-Action Letter, *supra* note 19, at *1 ("[W]ithout an extension of our no-action position, offerings of asset-backed securities would not be able to be conducted on a registered basis."). The Division of Corporation Finance also stated that its decision to extend the initial no-action letter was further necessitated by the time needed to accomplish the regulatory initiatives mandated by the Dodd–Frank Act. *Id.*

disclosures with respect to credit ratings.[545] Thus, with the use of an informal no-action letter,[546] the Commission continued to shield the credit rating agencies from liability in direct contravention of the express intent of Congress and the reforms enacted under the Dodd–Frank Act.[547]

In the statute, Congress clearly expressed its intent to subject the credit rating agencies to the penalty and enforcement provisions of the securities laws to the same extent and in the same manner as accountants and securities analysts.[548] Pursuant to this statutory provision and the repeal of Rule 436(g), credit rating agencies would be subject to Section 11 liability.[549] However, as a result of the no-action letter issued by the Commission, credit rating agencies are not subject to Section 11 liability, and therefore, rating agencies are not subject to the enforcement and penalty provisions of the securities laws to the same extent and in the same manner as accountants and securities analysts.[550] Thus, with the issuance of the no-action letter, the Commission has nullified the express intent of Congress.

The credit rating agencies should be subject to Section 11 civil liability for false or misleading statements in a prospectus. As noted by the courts, experts under Section 11 may be found "liable for mere negligence."[551] However, the currently in force no-action letter continues the

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545. *See id.* ("Given the . . . benefits to investor protection resulting from Securities Act registration, the Division is extending the relief issued . . . by letter dated July 22, 2010."). The Division of Corporation Finance also referred to the "current state of uncertainty" in the market for asset-backed securities as an additional reason for extending the initial no-action letter. *Id.*

546. *See* Procedures Utilized by the Division of Corp. Fin. for Rendering Informal Advice, Securities Act Release No. 6235, 21 SEC Docket 315, 320–21 & n.4 (Nov. 11, 1980), http://www.sec.gov/rules/interp/33-6253.pdf (explaining that the Division of Corporation Finance may issue no-action letters in response "to requests for informal advice concerning the application of the federal securities laws administered by it. . . . [M]any members of the public have come to rely on the informal advice provided in this manner. . . . Such letters, however, set forth staff positions only and do not constitute an official expression of the Commission's views." (quoting 17 C.F.R. § 202.1(d) (2015))).

547. *See* SEC No-Action Letter, *supra* note 19, at *1–2; Coakley Letter, *supra* note 531, at 1, 10 ("[W]e believe the SEC's decision to take no action in this area undermines recent Congressional reform and is inconsistent with Congressional intent. . . . In the Dodd–Frank Act, the clear intent of Congress was to provide investors with a much-needed requirement of rating agency competence. We are concerned that the SEC has defeated this intent."); *see also* Dodd–Frank Act, Pub. L. No. 111-203, § 931(C), 124 Stat. 1376, 1872 (2010) (finding the credit rating agencies should be held to the same standards of accountability and liability as other "financial 'gatekeepers'"); Dodd–Frank Act § 939(G) (repealing the Commission's Rule 436(g) exemption from Section 11 liability for credit rating agencies).

548. *See* 15 U.S.C. § 78o-7(m) (2012).

549. *Id.*; *Id.* § 77k(a) (providing for liability for accountants, appraisers, and engineers as well as any other professional who has given consent to be named as a preparer or certifier of any portion of the registration statement or of "any report or valuation which is used in connection with the registration statement"); Dodd–Frank Act § 939(G).

550. *See* 15 U.S.C. § 77k(a); SEC No-Action Letter, *supra* note 19, at *1–2.

551. N.J. Carpenters Vacation Fund v. Royal Bank of Scot. Grp., PLC, 720 F. Supp. 2d 254, 268 (S.D.N.Y. 2010) (quoting Lindsay v. Morgan Stanley (*In re* Morgan Stanley Info. Fund Sec. Litig.), 592 F.3d 347, 359 (2d Cir. 2010) (explaining that with the exception of issuers, "potential defendants under section[] 11 . . . may be held liable for mere negligence.")).

practice of "officially shield[ing]" the credit rating agencies from all liability under the securities laws except for fraud.[552] Therefore, consistent with the First Amendment protections provided by the courts, this regulatory exemption continues to provide the credit rating agencies with the ability to avoid liability for negligently prepared credit ratings.[553]

E. Credit Ratings and Section 11

Alas, even if the Commission were to rescind its no-action letter,[554] and even if a credit rating agency were to provide the necessary consent to list its name as an expert in the registration statement,[555] the likelihood of liability under Section 11 is uncertain. At least one court has stated that a credit rating would not be actionable under Section 11.[556] According to the Southern District of New York, "credit ratings . . . are statements of opinion, as they are predictions of future value."[557] In dismissing claims against the credit rating agencies for underwriter liability, the court found that such statements of opinion are not actionable under Section 11 of the Securities Act.[558] However, "the Supreme Court has 'rejected the argument that statements containing . . . opinions or beliefs . . . could not be a basis for' an action for securities fraud."[559] As acknowledged by the Southern District of New York, a statement of opinion is actionable if the opinion is "objectively untrue" and "not believed by the speaker."[560] Other courts have similarly found that state-

552. *See* PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 82; SEC No-Action Letter, *supra* note 19, at *1–2; *see also* Wyo. State Treasurer v. Moody's Inv'rs Serv., Inc. (*In re* Lehman Bros. Mortg.-Backed Sec. Litig.), 650 F.3d 167, 185 (2d Cir. 2011) (explaining that plaintiffs "may bring securities fraud claims against the [r]ating [a]gencies pursuant to § 10(b) of the Securities Exchange Act of 1934 . . . although liability under that section is . . . subject to scienter, reliance, and loss causation requirements not applicable to § 11 claims"). Notably, the Dodd–Frank Act permits plaintiffs to avoid pleading scienter in any action that has a state of mind requirement, such as a fraud action under Section 10(b). *See* 15 U.S.C. § 78u-4(b)(2).

553. PRIVATE-SECTOR WATCHDOGS, *supra* note 3, at 82 (noting the regulatory exemption "means that NRSROs are not held even to a negligence standard of care for their work"); *see also* discussion *supra* Section I.A.3.b.

554. *See supra* Section II.D.

555. *See* 15 U.S.C. § 77k(a).

556. *See N.J. Carpenters Vacation Fund*, 720 F. Supp. 2d at 271–72.

557. *Id.* at 271; *see also* Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs. LLC, 700 F.3d 829, 842 (6th Cir. 2012) (noting that credit ratings are "predictive opinion[s]" (quoting Compuware Corp. v. Moody's Inv'rs Servs., Inc., 499 F.3d 520, 529 (6th Cir. 2007))).

558. *N.J. Carpenters Vacation Fund*, 720 F. Supp. 2d at 271 ("'[A]ccurate statements of historical fact and statements of opinion, including statements of hope, opinion, or belief about . . . future performance . . . are non-actionable' under Section 11" (first and second alterations in original) (quoting Panther Partners, Inc. v. Ikanos Commc'ns, Inc., 538 F. Supp. 2d 662, 668 (S.D.N.Y. 2008))); *see also Ohio Police & Fire Pension Fund*, 700 F.3d at 842 (dismissing claims against credit rating agencies for negligent misrepresentation because credit ratings are opinions about the future and, thus, "are not actionable misrepresentations"); Anschutz Corp. v. Merrill Lynch & Co. (*In re* Merrill Lynch Auction Rate Sec. Litig.), No. 09 MD 2030, 2011 WL 536437, at *12–13 (S.D.N.Y. Feb. 9, 2011) (dismissing negligent misrepresentation claims against credit rating agencies because "[c]redit ratings are statements of opinion" and, therefore, not actionable).

559. *In re* Nat'l Century Fin. Enters., Inc., Inv. Litig., 580 F. Supp. 2d 630, 639 (S.D. Ohio 2008) (quoting Mayer v. Mylod, 988 F.2d 635, 638 (6th Cir. 1993)).

560. *N.J. Carpenters Vacation Fund*, 720 F. Supp. 2d at 271–72 (quoting *In re* AOL Time Warner, Inc. Sec. & "ERISA" Litig., 381 F. Supp. 2d 192, 243 (S.D.N.Y. 2004)); *see also Ohio*

ments of opinion are actionable under the securities laws "if the speaker does not believe the opinion and the opinion is not factually well-grounded."[561] The Southern District of New York did not address whether the agencies believed the ratings; thus, it appears the court assumed that credit ratings could not be "objectively untrue."[562]

According to the same court in a separate case, "[T]he fact that the [r]ating [a]gencies may have given higher—but not untruthful—ratings to retain business does not render the opinions of the [r]ating [a]gencies actionable."[563] This statement simply defies logic. If a credit rating agency gave a higher rating in order to retain business, then the rating cannot be truthful because it was not the rating the agency would have given in the absence of the monetary incentive to retain the business. Therefore, such a rating is not only "objectively untrue" but also "not believed by the speaker."[564] Such higher rating was not factually well-grounded, and the rating agency did not truly believe the rating when the agency issued it.[565]

It is uncertain whether courts would take a different view if violations of the expert prong of Section 11 (rather than the underwriter prong) were alleged against the credit rating agencies.[566] Notably, the Second Circuit has stated that the rating issued by a credit rating agency "is the sort of expert opinion classically evaluated under the 'expert' provision of [Section] 11."[567] Moreover, in a case involving Section 11 claims against the underwriters of mortgage-backed securities, the Northern District of California found that statements made by executives of Moody's and Standard & Poor's—admitting "they were aware at the time the subject ratings were made that the agencies' rating models were outdated"—were sufficient to find an "actionable misstatement" con-

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Police & Fire Pension Fund, 700 F.3d at 843 (dismissing negligent misrepresentation claims because the plaintiff "fail[ed] to allege that the . . . [rating] [a]gencies did not believe their ratings" (first and second alterations in original) (quoting Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs., LLC, 813 F. Supp. 2d 871, 883 (S.D. Ohio 2011))); *Merrill Lynch & Co.*, 2011 WL 536437, at *12 ("There is an exception to the non-actionable opinion rule in cases where the opinion holder knew the opinion was false or did not hold the opinion expressed at the time it was expressed.").

561. *Nat'l Century Fin. Enters.*, 580 F. Supp. 2d at 639 (quoting *Mayer*, 988 F.2d at 639 ("[S]tatements which contain the speaker's opinion are actionable under Section 10(b) of the Securities Exchange Act if the speaker does not believe the opinion and the opinion is not factually well-grounded.")).

562. *See N.J. Carpenters Vacation Fund*, 720 F. Supp. 2d at 271–72 (quoting *AOL Time Warner*, 381 F. Supp. 2d at 243).

563. *Merrill Lynch & Co.*, 2011 WL 536437, at *12 (dismissing claims for negligent misrepresentation).

564. *See supra* note 560 and accompanying text.

565. *Cf. Mayer*, 988 F.2d at 639 ("Material statements which contain the speaker's opinion are actionable under Section 10(b) of the Securities Exchange Act if the speaker does not believe the opinion and the opinion is not factually well-grounded.").

566. *See* 15 U.S.C. § 77k(a) (2012).

567. Wyo. State Treasurer v. Moody's Inv'rs Serv., Inc. (*In re* Lehman Bros. Mortg.-Backed Sec. Litig.), 650 F.3d 167, 183 & n.11 (2d Cir. 2011) (citing 15 U.S.C. § 77k(a)) ("[T]he issuance of a credit rating ostensibly falls within the 'expert' category of potential liability under § 11.").

cerning the process of rating the securities.[568] Furthermore, in a case concerning alleged violations of Section 10(b) of the Securities Exchange Act, the Southern District of Ohio found that credit ratings can be considered "not factually well-grounded."[569]

If credit ratings were not actionable, as the Southern District of New York found,[570] then there would be no basis for the Second Circuit's observation regarding the applicability of the expert provision of Section 11 specifically to credit ratings.[571] Moreover, there would be no reason for the Commission to have issued the no-action letter permitting the continued omission of required credit rating disclosures in a registration statement involving asset-backed securities.[572] Significantly, the Dodd–Frank Act provides that any statements made by a credit rating agency will not be considered "forward-looking statements" under the safe harbor rules of Section 21E of the Securities Exchange Act.[573] Therefore, Congress has determined that statements made by a credit rating agency should not be shielded from liability based on the notion that such statements are "predictions of future value" and, thus, non-actionable statements of opinion.[574]

In any event, since the Commission has not made any indication that its no-action letter will be rescinded, and (without a change in the law) a credit rating agency will likely never provide the necessary consent to list its name as an expert in the registration statement, we will perhaps never know whether the courts would ultimately find the credit rating agencies liable for false or misleading statements under the expert prong of Section 11 of the Securities Act.

III. CONFLICTS OF INTEREST

This part will examine the conflicts of interest inherent in the issuer-pays model of the credit rating agencies as well as the reforms provided by the Dodd–Frank Act and the Commission's implementing rules. This part will then consider whether these reforms effect any real change.

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568. *See In re* Wells Fargo Mortg.-Backed Certificates Litig., 712 F. Supp. 2d 958, 973 (N.D. Cal. 2010).

569. *In re* Nat'l Century Fin. Enters., Inc., Inv. Litig., 580 F. Supp. 2d 630, 639 (S.D. Ohio 2008) (finding the plaintiff sufficiently pled that the ratings issued by the agencies "were not factually well-grounded").

570. *See supra* notes 556–58 and accompanying text.

571. *See supra* note 567 and accompanying text.

572. *See* discussion *supra* Section II.D.

573. *See* 15 U.S.C. § 78o-7(m) (2012); *see also id.* § 78u-5(c)(1), (i)(1)(C) (2012) (providing a safe harbor for "forward-looking statement" defined *inter alia* as "a statement of future economic performance").

574. N.J. Carpenters Vacation Fund v. Royal Bank of Scot. Grp., PLC, 720 F. Supp. 2d 254, 271 (S.D.N.Y. 2010); *see also* 15 U.S.C. § 78o-7(m)(1).

A. Issuer-Pays Rating Agency Model

The credit rating agencies have been blamed for being a major cause of the financial crisis by assigning inaccurate ratings to structured securities such as mortgage-backed securities and collateralized debt obligations.[575] Conflicts of interest that are inherent in the "issuer-pays" rating agency model appear to have precipitated these inaccurate ratings.[576] Under the issuer-pays model, the rating agencies have a financial relationship with the investment banks that were the issuers of these structured securities.[577] As part of this relationship, the issuers directly paid the credit rating agencies to assign a credit rating to the debt issue.[578] As a result, monetary incentives and "pressure to improve the rating" plague the issuer-pays model.[579]

In addition, many investment banks would shop around for a rating.[580] Thus, if a credit rating agency failed to provide a rating that was high enough, then that rating agency would not receive the business.[581] As a result, the rating agencies would begin with the intention to assign a

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575. *See supra* notes 20–21, 523–24 and accompanying text.

576. *See* Schwarcz, *supra* note 122, at 15 (noting the "conflict of interest inherent in the way that rating agencies are paid"); *see also* Patrick Kingsley, *How Credit Ratings Agencies Rule the World*, GUARDIAN (Feb. 15, 2012, 3:00 PM), http://www.theguardian.com/business/2012/feb/15/credit-ratings-agencies-moodys (explaining that if a company wishes to be rated, it "must pay an agency between $1,500 and $2,500,000 for the privilege . . . [and] [i]n theory, this creates a conflict of interest, because it gives the agency an incentive to give the companies the rating they want"); Timothy W. Martin, *SEC Is Gearing Up to Focus on Ratings Firms*, WALL ST. J. (June 25, 2014, 1:29 P.M.), http://online.wsj.com/articles/sec-is-gearing-up-to-focus-on-ratings-firms-1403651968 (noting Senator Al Franken and others have stated that the issuer-pays model "gives [credit rating] firms an incentive to compromise their criteria in order to win business").

577. *See* Martin, *supra* note 576 (explaining that under the business model employed by the credit rating agencies "[i]ssuers of bond deals pay ratings firms to grade their deals").

578. CARNELL ET AL., *supra* note 317, at 372–73 ("Most credit rating agencies, particularly Moody's, Standard & Poor's . . . and Fitch, earn money by charging issuers a fee in exchange for assigning a credit rating to the debt obligations marketed by the issuer."); Schwarcz, *supra* note 122, at 15 ("Rating agencies are virtually always paid their fee by the issuer of securities applying for the rating."); *see also N.J. Carpenters Vacation Fund*, 720 F. Supp. 2d at 272 ("[T]he rating agencies were paid by the [issuing] investment banks that hired them . . . .").

579. Schwarcz, *supra* note 122, at 15 (noting the issuer-pays model "raises the possibility that the issuer will use, or the rating agency will perceive, monetary pressure to improve the rating"); *see also* Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs. LLC, 700 F.3d 829, 834 (6th Cir. 2012) (alleging that "between 2005 and 2008, this 'issuer pays' system compromised the integrity of the credit rating process"); *N.J. Carpenters Vacation Fund*, 720 F. Supp. 2d at 259 ("[T]he shopping process allowed [issuers] to pressure rating agencies to provide high ratings . . . in order to receive the profitable rating business.").

580. *See* Wyo. State Treasurer v. Moody's Inv'rs Serv., Inc. (*In re* Lehman Bros. Mortg.-Backed Sec. Litig.), 650 F.3d 167, 172 (2d Cir. 2011) ("[I]ssuing banks engaged particular [r]ating [a]gencies through a 'ratings shopping' process, whereby the [r]ating [a]gencies reviewed loan-level data for a mortgage pool and provided preliminary ratings. The banks then negotiated with the [r]ating [a]gencies regarding the . . . percentage of AAA [securities] for each mortgage pool." (citation omitted)); *N.J. Carpenters Vacation Fund*, 720 F. Supp. 2d at 259 (alleging the issuer "engage[d] in 'ratings shopping' between the rating agencies").

581. *Wyo. State Treasurer*, 650 F.3d at 172 (noting the issuer would "choos[e] the agency offering the highest percentage of AAA certificates"); *N.J. Carpenters Vacation Fund*, 720 F. Supp. 2d at 259 (explaining the issuer "would ultimately select the agency who provided the highest rating").

high rating to the security and work with the investment bank to achieve a structure that would seemingly support that rating.[582] Moreover, the credit rating agency would receive its fee only "if the desired rating issued."[583] Thus, under the issuer-pays model, the rating agencies had a patent monetary incentive to provide high ratings in order to earn their fees.[584] Presumably, a higher rating also would have a greater likelihood of ensuring that the investment bank would ask the rating agency to perform additional ratings work.

Notably, Standard and Poor's recently settled a lawsuit with the Justice Department based on allegations that "the rating [agency] had defrauded investors by issuing inflated ratings in the years preceding the financial crisis."[585] Moreover, the Government alleged that the rating agency "falsely represented" that the ratings it issued were "objective and uninfluenced by the firm's relationship with investment banks" when in fact the rating agency was influenced by the "desire to boost revenue and profits by winning business."[586]

Moreover, the rating agencies were using "flawed models" to assign ratings to structured securities, including subprime mortgage-backed securities and collateralized debt obligations.[587] According to the Office of the Comptroller of the Currency—the regulator of national banks and

582. *See Wyo. State Treasurer*, 650 F.3d at 172 (noting the process described by an officer of Moody's as first "start[ing] with a rating and build[ing] a deal around a rating").

583. *Ohio Police & Fire Pension Fund*, 700 F.3d at 834, 836 ("[T]he [credit rating agencies'] entitlement to a fee vested when their ratings issued."); *see also* Anschutz Corp. v. Merrill Lynch & Co., 785 F. Supp. 2d 799, 809 (N.D. Cal. 2011) (alleging "that the securities could not issue and the credit rating agencies would not get paid unless the [a]gencies provided a pre-determined AAA rating for the securities"); Abu Dhabi Commercial Bank v. Morgan Stanley & Co., 651 F. Supp. 2d 155, 167 (S.D.N.Y. 2009) (explaining that compensation of the credit rating agencies "was contingent upon the receipt of desired ratings for the [securities], and only in the event that the transaction closed with those ratings").

584. *See Ohio Police & Fire Pension Fund*, 700 F.3d at 834 ("At any point in this process, the arranger could reject the [credit rating] [a]gency's proposed rating."); *Anschutz Corp.*, 785 F. Supp. 2d at 809 ("[A]n alleged conflict of interest developed such that the [r]ating [a]gencies abandoned their independence and relaxed their rating criteria and procedures in order to secure the business of the investment banks in rating [highly lucrative structured] securities."); *see also supra* notes 576–79 and accompanying text.

585. John Kell, *S&P Will Pay Nearly $1.4 Billion to Settle Financial Crisis Litigation*, FORTUNE (Feb. 3, 2015, 8:48 AM), http://fortune.com/2015/02/03/standard-poors-financial-crisis/ (explaining the settlement will be paid to the Justice Department as well as to nineteen states and the District of Columbia).

586. *Id.*

587. Pfinsgraff, Remarks Before the Risk Magazine Credit Risk Conference, *supra* note 20, at 2 (explaining the view that rating agencies were using "flawed models" to rate mortgage-backed securities and collateralized debt obligations backed by subprime debt); *see also In re* Wells Fargo Mortg.-Backed Certificates Litig., 712 F. Supp. 2d 958, 973 (N.D. Cal. 2010) (finding the statements made by executives of Moody's and Standard & Poor's admitting "they were aware at the time the subject ratings were made that the agencies' rating models were outdated" was sufficient to find an "actionable misstatement" concerning the process of rating the mortgage-backed securities); N.J. Carpenters Vacation Fund v. Royal Bank of Scot. Grp., PLC, 720 F. Supp. 2d 254, 270–71 (S.D.N.Y. 2010) ("[T]he models relied on to rate the [mortgage-backed securities] were outdated and unable to accurately assess their risk . . . .").

federal thrifts[588]—the credit rating agencies' excessive reliance on the fees earned through ratings of securitized products may have played a decisive role in the agencies' continued employment of these "fundamentally flawed credit models."[589] Thus, conflicts of interest led the credit rating agencies to turn a blind eye to the sustained use of flawed credit models and ultimately resulted in the assignment of inaccurate ratings for "tens of billions" of mortgage-backed securities and collateralized debt obligations secured by subprime debt.[590]

B. Dodd–Frank Act Reforms

In the Dodd–Frank Act, Congress addressed certain conflicts of interest with respect to credit rating agencies.[591] For example, the statute grants the Commission the authority to suspend or revoke an NRSRO's registration with regard to a particular class of securities if the Commission determines that the NRSRO "does not have adequate financial and managerial resources to consistently produce credit ratings with integrity."[592]

The statute also requires the Commission to issue rules "to prevent the sales and marketing considerations . . . from influencing the production of ratings" issued by the NRSRO.[593] The statute further provides for the suspension or revocation of an NRSRO's registration if the Commission determines that the NRSRO has violated a rule issued pursuant to "this subsection" and that violation affected a credit rating.[594]

Additionally, the statute contains a "[l]ook-back requirement" whereby an NRSRO is required to establish policies and procedures to ensure that, if any employee of an entity that is the subject of a credit rating had been employed by the NRSRO and participated in the determination of the entity's credit rating during the one-year period prior to the date when any action was taken regarding the credit rating, then the

588. *See* 12 U.S.C. §§ 1–16 (2012) (granting the Comptroller of the Currency the authority to regulate national banks); *see also* 12 U.S.C. § 5412(b)(2)(B) (granting the Comptroller of the Currency the authority to regulate federal savings associations).

589. Pfinsgraff, Remarks Before the Risk Magazine Credit Risk Conference, *supra* note 20, at 2 ("Rating agencies had become overly reliant on securitization fees which may have, in part, contributed to their failure to more quickly correct fundamentally flawed credit models."); *see also Ohio Police & Fire Pension Fund*, 700 F.3d at 834 (alleging that "the desire to attract business led the [a]gencies to lower their rating standards [by using] . . . older, more forgiving debt models over more up-to-date ones that might result in the rejection of an arranger's proposed capital structure" (citation omitted)).

590. Pfinsgraff, Remarks Before the Risk Magazine Credit Risk Conference, *supra* note 20, at 2 (noting the proposition that credit rating agencies "mis-rate[d] tens of billions of subprime securitizations and their derivative [collateralized debt obligations]").

591. *See* 15 U.S.C. § 78o-7(d)(2), (h)(3)–(4), (t)(2).

592. *Id.* § 78o-7(d)(2).

593. *Id.* § 78o-7(h)(3).

594. *Id.*

NRSRO must determine whether the employee had any conflicts of interest that influenced the rating and revise the rating if necessary.[595]

C. Credit Rating Agency Reform Rules of 2014

The Commission then issued rules to implement the conflicts of interest provisions of the Dodd–Frank Act regarding credit rating agencies.[596] For example, with respect to the sales and marketing conflict, the Commission's rule prohibits an NRSRO from assigning a credit rating when an employee who is involved in monitoring or determining the credit rating, or approving or developing methodologies or procedures for assigning the credit rating, also participates in the marketing or sales of the NRSRO (or an affiliate) or is influenced by marketing or sales factors.[597] As stated by the Commission, this provision is an "absolute prohibition" of individuals involved in the sales and marketing efforts of a rating agency from also participating in any aspect of the credit rating function and vice versa.[598] Moreover, with respect to the Commission's authority to suspend or revoke an NRSRO's registration if the Commission determines the NRSRO has violated a rule issued pursuant to "this subsection" and that violation affected a credit rating,[599] the Commission interpreted the phrase "this subsection" to include any rules issued under Section 15E(h) of the Securities Exchange Act.[600] This section of the Securities Exchange Act concerns the management of conflicts of interest involving NRSROs.[601]

With respect to the "look-back requirement," the Commission's rule requires an NRSRO to "promptly determine" if any credit ratings identified in a "look-back review" to include the influence of a conflict of interest involving a former employee of the NRSRO need to be modified so that the rating "is solely a product of the documented procedures and methodologies" that the NRSRO uses to assign credit ratings and "is no longer influenced by a conflict of interest."[602] Once the determination is made, the NRSRO must "[p]romptly publish" either a modified credit

595. *Id.* § 78o-7(h)(4). The statute further provides for a board of directors in which at least one half of the directors are independent of the NRSRO. *Id.* § 78o-7(t)(2).

596. *See* Nationally Recognized Statistical Rating Organizations, 79 Fed. Reg. 55,078, 55,108 (Sept. 15, 2014) (to be codified at 17 C.F.R. pts. 232, 240, 249 & 249b).

597. *Id.* (codified as 17 C.F.R. § 240.17g-5(c)(8)).

598. *Id.* ("In practice, the Commission believes the amendment will require an NRSRO to prohibit personnel that have any role in the determination of credit ratings or the development or modification of rating procedures or methodologies from having any role in sales and marketing activities. It also will require an NRSRO to prohibit personnel that have any role in sales and marketing activities from having any role in the determination of credit ratings or the development or modification of rating procedures or methodologies.").

599. *See* 15 U.S.C. § 78o-7(h)(3).

600. Nationally Recognized Statistical Rating Organizations, 79 Fed. Reg. at 55,114 (codified at 17 C.F.R. § 240.17g-5(g)).

601. *See* 15 U.S.C. § 78o-7(h).

602. Nationally Recognized Statistical Rating Organizations, 79 Fed. Reg. at 55,117–21 (codified at 17 C.F.R. § 240.17g-8(c)(1)).

rating or an affirmation of the existing credit rating.[603] In addition, the NRSRO must provide the users of its credit ratings with information concerning the reasons for its decision.[604] Moreover, as the "look-back requirement" is contained in Section 15E(h) of the Securities Exchange Act, the Commission has the authority to suspend or revoke an NRSRO's registration if the Commission determines that the NRSRO has violated this requirement.[605]

D. Do the Reforms Effect Any Real Change?

The reforms enacted by Congress and implemented by the Commission are certainly a step in the direction of reducing conflicts of interest in the business of a credit rating agency. However, while it is important to separate the marketing and sales function from the credit rating function[606] to avoid a direct conflict of interest for individual employees, such separation is not enough to eliminate the conflicts of interest inherent in the issuer-pays model[607] of the credit rating agencies. Although an individual employee who participates in determining the credit rating of a security will not be involved in the sales and marketing function of the rating agency, that individual is still an employee of the credit rating agency, which is hired and paid by the issuer of the security. While a direct conflict of interest may no longer be present, the inherent conflicts of interest cannot be avoided.

Prior to the financial crisis, the Credit Rating Agency Reform Act of 2006 provided the Commission the statutory authority to issue rules "to prohibit, or require the management and disclosure of, any conflicts of interest," including those conflicts of interest associated with the practice of the issuer of the security compensating the NRSRO for the assignment of a credit rating.[608] However, the Commission's rules required the rating agency to do no more than disclose that the conflict exists and establish procedures and policies to manage the conflict.[609] Considering the evidence of persistent conflicts of interest involving credit ratings that precipitated the financial crisis,[610] simply disclosing and attempting to manage these conflicts is not enough to eliminate the problem.

603. *Id.* at 55,121 (codified at 17 C.F.R. § 240.17g-8(c)(2)).
604. *Id.*
605. *See* 15 U.S.C. § 78o-7(h)(3)–(4); Nationally Recognized Statistical Rating Organizations, 79 Fed. Reg. at 55,114 (codified at 17 C.F.R. § 240.17g-8(c)).
606. *See supra* notes 597–98 and accompanying text.
607. *See supra* Section III.A.
608. Credit Rating Agency Reform Act of 2006, Pub. L. No. 109-291, § 4(a), 120 Stat. 1327, 1334 (2006) (codified as 15 U.S.C. § 78o-7(h)(2)).
609. 17 C.F.R. § 240.17g-5(a)(1)–(2) (2015).
610. *See supra* Section III.A.

CONCLUSION

This Article demonstrates how the courts and the regulators have afforded the credit rating agencies protections from liability.[611] The courts have considered credit ratings to be opinions and applied the protections of the First Amendment to shield the credit rating agencies from liability in actions for fraudulent or negligently prepared ratings.[612] However, credit ratings are not pure statements of opinion similar to a newspaper editorial or a statement of opinion regarding a political matter. Rather, credit ratings are fact-based opinions made by business professionals.[613] Thus, credit rating agencies should be subject to the same liability as other commercial enterprises.

Moreover, the Commission has provided credit rating agencies with regulatory protections by shielding the agencies from liability for false or misleading statements in a registration statement.[614] Despite the express intent of Congress to hold the credit rating agencies accountable,[615] the Commission has effectively nullified those intentions.[616] These legal and regulatory protections provided to the credit rating agencies are clearly misguided, even more so in light of the conflicts of interest inherent in the issuer-pays model of the rating agencies.[617]

Accordingly, the courts should hold credit rating agencies liable for fraudulent or negligently prepared credit ratings that are false or misleading. Similarly, the Commission should honor the express intentions of Congress and hold the credit rating agencies liable for false or misleading statements in a registration statement. Finally, as long as the issuer-pays model remains the accepted standard of practice for the credit rating agencies, the inherent conflicts of interest endemic to this industry will continue to persist; thus, more is needed to eliminate the conflicts of interest inherent in the issuer-pays business model of the credit rating agencies.

611. *See supra* note 3 and accompanying text.
612. *See supra* notes 4, 12 and accompanying text; *see also supra* Section I.A.3.b.
613. *See supra* notes 9, 384–85 and accompanying text.
614. *See supra* notes 13, 505–09 and accompanying text.
615. *See supra* notes 17, 525–27, 530–31 and accompanying text.
616. *See supra* Section II.D.
617. *See supra* Section III.A.

CRIMINAL LAWS ON SEX WORK AND HIV TRANSMISSION: MAPPING THE LAWS, CONSIDERING THE CONSEQUENCES

SIENNA BASKIN, AZIZA AHMED, AND ANNA FORBES[†]

ABSTRACT

Lawmakers historically justify the mobilization of criminal laws on prostitution and HIV as a means of controlling the spread of disease. Over time, however, public health research has conclusively demonstrated that criminal laws on prostitution and HIV significantly impede the ability of sex workers to access services and to live without the stigma and blame associated with being a transmitter of HIV. In turn, mainstream public health approaches to sex work and HIV emphasize decriminalization as a way to improve the lives of sex workers in need of care, treatment, and services. Our current legal system, which criminalizes both prostitution and HIV transmission and exposure, is not in keeping with this decriminalization frame and instead compounds criminal penalties on people charged with prostitution related crimes and undermines HIV efforts.

This Article presents a public health law mapping of U.S. states that mandate HIV testing and criminalize HIV positive sex workers. The mapping demonstrates that laws on HIV transmission and exposure interact with laws on sex work to compound criminal penalties on people charged with prostitution related crimes. In keeping with public health evidence, this Article argues that decriminalization of sex work and HIV transmission and exposure is integral to effectively address the HIV epidemic. The Article seeks to contribute to a growing literature on the necessity of decriminalizing sex work by uncovering how these laws interact to undermine the HIV response.

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† Sienna Baskin, Esq. is the Managing Director of the Sex Workers Project at the Urban Justice Center, which provides legal and social services to sex workers. Aziza Ahmed is Associate Professor of Law at Northeastern University School of Law. Anna Forbes, MSS, is an Independent Consultant. Special thanks to Ali Miller, Becca Schleifer, Lara Shkordoff, Kat Thomas, Kiel Green, Abrisham Esghahi, and Rebecca Glickman. Thanks to the Yale Global Health Justice Project.

INTRODUCTION

In 2014, the *Lancet* dedicated a special issue to sex work and HIV.[1] Amongst many findings on sex work, researchers found that the decriminalization of sex work would have a greater effect on the course of the HIV epidemic than any other structural intervention in the modeled countries.[2] The study found that the decriminalization of sex work could "avert[] 33–46% of HIV infections in the next decade."[3] In keeping with this data and a larger body of public health research, international institutions call to decriminalize sex work as an effective and important means of addressing HIV, as well as increasing sex workers' health and well-being.[4] For example, in 2012, the Global Commission on HIV and the Law (hosted by the United Nations Development Programme) issued a series of recommendations to country lawmakers to create legal

1. *HIV and Sex Workers*, LANCET (July 23, 2014), http://www.thelancet.com/series/hiv-and-sex-workers.

2. Kate Shannon et al., *Global Epidemiology of HIV Among Female Sex Workers: Influence of Structural Determinants*, 385 LANCET 55, 55 (2015).

3. *Id.*

4. *See, e.g.*, GLOBAL COMM'N ON HIV & THE LAW, RISKS, RIGHTS AND HEALTH 10 (2012), http://www.hivlawcommission.org/resources/report/FinalReport-Risks,Rights&Health-EN.pdf; OFF. OF THE UNITED NATIONS HIGH COM'R FOR HUM. RTS. & THE JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS, INTERNATIONAL GUIDELINES ON HIV/AIDS AND HUMAN RIGHTS 30 (2006) [hereinafter OHCHR, GUIDELINES], http://www.ohchr.org/Documents/Publications/HIVAIDSGuidelinesen.pdf; UNAIDS, TECHNICAL UPDATE: SEX WORK AND HIV/AIDS 8–10 (2002), http://data.unaids.org/publications/IRC-pub02/jc705-sexwork-tu_en.pdf; WORLD HEALTH ORG. ET AL., PREVENTION AND TREATMENT OF HIV AND OTHER SEXUALLY TRANSMITTED INFECTIONS FOR SEX WORKERS IN LOW- AND MIDDLE-INCOME COUNTRIES: RECOMMENDATIONS FOR A PUBLIC HEALTH APPROACH 8 (2012), http://apps.who.int/iris/bitstream/10665/77745/1/9789241504744_eng.pdf.

environments that would enable successful public health programs and facilitate a decrease in HIV transmission.[5] Amongst these recommendations was a call to decriminalize all adult consensual sex, including the purchase of sex.[6] The *International Guidelines on HIV/AIDS and Human Rights*, a joint publication of the Joint United Nations Agency on HIV/AIDS and the Office of the High Commission for Human Rights, has also called for the decriminalization of sex work.[7]

Alongside the laws on sex work, in recent years, public health scholars and activists have increasingly focused on the effect that laws that criminalize transmission and exposure to HIV have on the epidemic and on the individuals living with HIV.[8] Public health scholars and advocates see these laws as increasing stigma, having the potential to deter HIV testing (thus not receiving care), and increasing the stigma of living with HIV.[9]

Despite the widespread support for decriminalizing sex work amongst public health and harm-reduction activists, there has been little work done to disentangle the complicated way that the criminal law operates to marginalize and disenfranchise sex workers living with HIV. Focusing on the United States, in which the majority of jurisdictions criminalize both sex work and exposure to HIV,[10] this Article begins to fill this gap in the literature. In keeping with current public health evidence, this Article argues for the decriminalization of sex work and HIV exposure and transmission in order to better address the safety and health needs of sex workers.

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5. *See* GLOBAL COMM'N ON HIV & THE LAW, *supra* note 4, at 10. Aziza Ahmed was on the Technical Advisory Group to the Global Commission on HIV and the Law.

6. *Id.*

7. OHCHR, GUIDELINES, *supra* note 4, at 30 ("With regard to adult sex work that involves no victimization, criminal law should be reviewed with the aim of decriminalizing, then legally regulating occupational health and safety conditions to protect sex workers and their clients, including support for safe sex during sex work. Criminal law should not impede provision of HIV prevention and care services to sex workers and their clients. Criminal law should ensure that children and adult sex workers who have been trafficked or otherwise coerced into sex work are protected from participation in the sex industry and are not prosecuted for such participation but rather are removed from sex work and provided with medical and psycho-social support services, including those related to HIV."); *see also* GLOBAL COMM'N ON HIV & THE LAW, *supra* note 4, at 10; WORLD HEALTH ORG. ET AL., *supra* note 4, at 8.

8. *See generally* Joanne Csete et al., *Vertical HIV Transmission Should be Excluded from Criminal Prosecution*, 17 REPROD. HEALTH MATTERS 154 (2009); Carol L. Galletly & Steven D. Pinkerton, *Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV*, 10 AIDS & BEHAV. 451 (2006); Ralf Jürgens et al., *Ten Reasons to Oppose the Criminalization of HIV Exposure or Transmission*, 17 REPROD. HEALTH MATTERS 163 (2009); *The Evolution of Global Criminalisation Norms: The Role of the United States*, NAM [hereinafter *Global Norms*], http://www.aidsmap.com/The-evolution-of-global-criminalisation-norms-the-role-of-the-United-States/page/1442035/ (last visited Nov. 4, 2015).

9. *See, e.g.*, Csete et al., *supra* note 8, at 154; Galletly & Pinkerton, *supra* note 8, at 451; Jürgens et al., *supra* note 8, at 163; *Global Norms*, *supra* note 8.

10. *Global Norms*, *supra* note 8.

Part I of this Article provides a brief history and background on how the criminal law became a mode of intervention for public health with regard to sex work and HIV. Part II of this Article utilizes a public health law mapping method to document laws at the intersection of HIV and criminal law.[11] Our mapping finds that, in some jurisdictions, HIV-positive persons engaging in prostitution can be charged with felony-level crimes with significant penalties attached and that procedural laws in certain states mandate or allow arrested or convicted sex workers to be tested for HIV. Part III of this Article demonstrates how the mandatory testing and punishment of sex workers who are HIV positive violates public health recommendations for addressing the HIV epidemic.

I. THE CRIMINALIZATION OF SEX WORK AND HIV TRANSMISSION

A. Criminalization of Sex Work

The vast majority of jurisdictions in the United States criminalize sex work. While the criminal prohibition against prostitution is often thought of as a permanent fixture of the criminal law in the United States, it is relatively recent and inconsistently applied.

In the late 19th and early 20th centuries laws and regulations around prostitution developed across the country with a variety of justifications, including the regulation of women's morality, the prevention of exploitation of women, and the prevention of vagrancy and nuisance.[12] With the advent of governmental and nongovernmental bodies bent on social reform, a special focus on the prevention of sexually transmitted infections (STIs) began to dominate as a goal in regulating prostitution.[13] For example, in 1918, the Chamberlain–Kahn Act gave the federal government broad powers to quarantine individuals with venereal disease.[14]

Today, laws against prostitution vary depending on the jurisdiction. In some states, simply offering to buy or sell sex is considered prostitution.[15] Other states vaguely allude to "sexual conduct," leaving what ac-

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11. This method is adapted from the Public Health Law Research LawAtlas Project. *See Laws, Maps & Data: LawAtlas*, PUB. HEALTH LAW RESEARCH, http://publichealthlawresearch.org/evidence-and-experts/law-atlas (last visited Mar. 23, 2016).

12. JESSICA R. PLILEY, POLICING SEXUALITY: THE MANN ACT AND THE MAKING OF THE FBI 11–14 (2014).

13. MARK THOMAS CONNELLY, THE RESPONSE TO PROSTITUTION IN THE PROGRESSIVE ERA 14–16 (1980). In 1913, the influential Bureau of Social Hygiene was incorporated by John D. Rockefeller, Jr. to study and prevent "those social conditions, crimes, and diseases which adversely affect the well-being of society, with special reference to prostitution and the evils associated therewith." *Bureau of Social Hygiene Archives, 1911–1940*, ROCKEFELLER ARCHIVE CTR., http://www.rockarch.org/collections/rockorgs/bsh.php (last visited Nov. 4, 2015). In 1913, the American Social Hygiene Association was formed, uniting physicians with social reformers to accomplish similar goals. *See* Kristin Luker, *Sex, Social Hygiene, and the State: The Double-Edged Sword of Social Reform*, 27 THEORY & SOCIETY 601, 609–10 (1998).

14. *See* Chamberlain–Kahn Act, Pub. L. No. 65-193, § 15, 40 Stat. 845, 886 (1918).

15. *See, e.g.*, N.J. STAT. ANN. § 2C:34-1 (2015).

tivities are and are not criminal up to city criminal court judges.[16] Currently, Nevada is the only state to allow for the legal practice of prostitution by delegating this decision largely to its county governments.[17]

How sex workers and others actually experience criminalization has less to do with the substance of the laws than with the policing and prosecutorial practices in their communities. Commercial sex is so diverse and widespread that it becomes virtually impossible to consistently police, resulting in location-specific enforcement priorities, quasi-tolerance of some forms of sex work, and corruption.[18] Criminal laws, especially those that are vague or impossible to enforce universally, are generally unevenly enforced, often with disparate impacts on communities of color and the poor.[19] People who are forced or coerced into engaging in sex work, or who are being exploited by another in sex work, are often more likely to be arrested because they have less control over where and when they work, so they cannot avoid arrest. Whether female, male, cisgender, or transgender, street-based sex workers are at greatest risk of arrest because of the public and exposed nature of their work. In addition, transgender women are frequently falsely profiled and arrested for prostitution, even if they are not engaging in prostitution and never have, due to stereotypes about transgender women always being sex workers.[20]

Arrest itself is an intensely traumatic experience with a risk of police violence, exploitation, and abuse. After arrest, sex workers are commonly held for a period of time during which they can face humiliation, violence, and discriminatory treatment because of the crime for which they were arrested. Sex workers frequently report rape and other forms of sexual violence and harassment at the hands of police and correctional officers.[21] Incarceration can involve potential deprivations of freedom, food, and medications, and it can also lead to eviction, loss of employ-

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16. *See, e.g.*, N.Y. PENAL LAW § 230.00 (McKinney 2016).

17. For a discussion on the regulation of prostitution in Nevada, see Barbara G. Brents & Kathryn Hausbeck, *State-Sanctioned Sex: Negotiating Formal and Informal Regulatory Practices in Nevada Brothels*, 44 SOC. PERSP. 307, 312 (2001). Until 2009, indoor prostitution was also legal in Rhode Island. *See* Lynn Arditi, *Bill Signing Finally Outlaws Indoor Prostitution in R.I.*, PROVIDENCE J. (Nov. 3, 2009, 2:04 PM), http://cdn.ca9.uscourts.gov/datastore/library/2013/02/26/Coyote_prostitution.pdf.

18. Laura Agustín, *Sex and the Limits of Enlightenment: The Irrationality of Legal Regimes to Control Prostitution*, 5 SEXUALITY RES. & SOC. POL'Y 73, 74 (2008).

19. *See* David Cole, No Equal Justice: Race and Class in the American Criminal Justice System 187 (1999); CHRISTOPHER HARTNEY & LINH VUONG, Nat'l Council on Crime & Deliquency, CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE US CRIMINAL JUSTICE SYSTEM 2 (2009), http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf.

20. *See* Jordan Flaherty, *Are Police Profiling Transgender Americans?*, AL JAZEERA AMERICA (Oct. 16, 2013, 9:00 PM), http://america.aljazeera.com/watch/shows/america-tonight/america-tonight-blog/2013/10/16/rise-in-transgenderharassmentviolencebypolicelinkedtoprofiling.html.

21. *Policing Sex Work*, INCITE!, http://www.incite-national.org/page/policing-sex-work (last visited Nov. 3, 2015).

ment, or loss of custody of children..[22] Sex workers who are migrants can also be identified by federal immigration enforcement agencies while incarcerated, leading to the commencement of removal proceedings, with or without counsel.[23] Arrest is costly, and sex workers can incur fines that create more economic pressure to engage in sex work.

After this period of incarceration, sex workers are brought into criminal court for their arraignment where they are formally charged. At this point, in most jurisdictions, the criminal justice system puts enormous pressure on sex workers and others charged with low-level misdemeanor crimes to forgo their rights as criminal defendants for whom the crime must be proved beyond a reasonable doubt and instead to plead guilty.[24] This results in large numbers of low-level arrests that overburden the court system and the constitutionally guaranteed public defense system, which does not have the funding or personnel to take every criminal case to trial. Sex workers who do plead guilty may be incarcerated for up to a year in some jurisdictions or offered an "alternative to incarceration," such as community service or a rehabilitation program.[25] When their cases result in a criminal conviction, whether or not they do time, sex workers can suffer collateral consequences even after the criminal case is complete. These consequences include limitations on employment options, discrimination by employers, loss of access to public benefits—including public housing—and loss of the right to sue the police if they are victims of police violence.[26] In some states, sex workers who have prior convictions of prostitution and are arrested again are subject to felony charges and mandatory jail time. Longer periods of incar-

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22. *See* Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Dec. 1, 2001), http://aspe.hhs.gov/basic-report/psychological-impact-incarceration; *see also* Ginny Shubert, NAT'L MINORITY AIDS COUNCIL & HOUSING WORKS, MASS INCARCERATION, HOUSING INSTABILITY AND HIV/AIDS: RESEARCH FINDINGS AND POLICY RECOMMENDATIONS 6–7 (2013), http://wncap.org/wp-content/uploads/2014/02/Incarceration-Report-FINAL_2-6-13.pdf.

23. *Immigration Detainers: A Comprehensive Look*, AM. IMMIGR. COUNCIL (Feb. 17, 2010), http://www.immigrationpolicy.org/just-facts/immigration-detainers-comprehensive-look. President Obama eliminated the Secure Communities Program, which enabled migrants to be transferred directly to immigration detention from local jails. Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec. to Thomas S. Winkowski, Acting Dir., Immigration & Customs Enf't et al. 2 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf. However, migrants can still be identified in jail and issued notices to appear after their release. *Id.*

24. As part of the trend towards aggressive policing of low-level misdemeanors as part of a "broken-windows" theory of order maintenance, defendants are encouraged to take a disposition at arraignment. K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 295 (2009). In 1992, it was noted that even if all misdemeanor judges spent all their time trying cases, only 2% of misdemeanor arrests could be taken to trial. HARRY I. SUBIN, THE NEW YORK CITY CRIMINAL COURT: THE CASE FOR ABOLITION 1, 4 (1992).

25. *See, e.g.*, DARIA MUELLER, CHI. COAL. FOR THE HOMELESS, TREATMENT COURTS AND COURT-AFFILIATED DIVERSION PROJECTS FOR PROSTITUTION IN THE UNITED STATES 5 (2012), www.issuelab.org/permalink/resource/14135. This report profiles 19 court projects that offer rehabilitation oriented programs to persons arrested for prostitution. *Id.* at 9.

26. Howell, *supra* note 24, at 300-313.

ceration only increase the risks and consequences mentioned above, especially for more vulnerable individuals.

B. Sex Work and HIV in North America

Existing data suggests that sex workers in the United States face a high burden of HIV. A recent study by Samuel Jenness *et al.* found that fourteen percent of the men and ten percent of the women participating in sexual exchange in New York were HIV-positive.[27] In 2006, twenty-four percent of the street-based, women selling sex who used crack cocaine in Miami were estimated to be living with HIV[28] as were twenty-six percent of male sex workers in Houston in 2007.[29] Among male-to-female transgender sex workers in Boston, one-third were estimated to be living with HIV in 2009.[30]

Criminalization of sex work has been found to be directly counterproductive to public health. Where sex workers are criminalized, they are less able to negotiate safer sex practices with clients and have less access to testing, treatment, and health care in general, making it more likely that sex workers will not know their HIV status or be able to limit their risk. The criminalization of sex work also leads directly to violence against sex workers by customers, strangers, and police, which further increases sex workers' HIV risk.[31] Condoms may be confiscated as evidence of engaging in prostitution justifying arrest.[32]

C. Criminalization of HIV Transmission and Exposure in the United States

With sex work criminalized in most U.S. jurisdictions, and many sex workers living with HIV, the issue of criminalizing HIV transmission and exposure adds another dimension to the complex criminal law

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27. Samuel M. Jenness et al., *Patterns of Exchange Sex and HIV Infection in High-Risk Heterosexual Men and Women*, 88 J. URB. HEALTH 329, 338 (2011).

28. James A. Inciardi et al., *HIV, HBV, and HCV Infections Among Drug-Involved, Inner-City, Street Sex Workers in Miami, Florida*, 10 AIDS & BEHAV. 139, 140 (2006). In one study, female street-based sex workers in Miami "most often reported acute service needs for shelter, fresh water, transportation, crisis intervention, and drug detoxification, as well as long-term needs for mental and physical health care, drug treatment, and legal and employment services." Steven P. Kurtz et al., *Barriers to Health and Social Services for Street-Based Sex Workers*, 16 J. HEALTH CARE FOR POOR & UNDERSERVED 345, 345 (2005).

29. Sandra C. Timpson et al., *Characteristics, Drug Use, and Sex Partners of a Sample of Male Sex Workers*, 33 AM. J. DRUG & ALCOHOL ABUSE 63, 63 (2007).

30. Sari L. Reisner et al., *HIV Risk and Social Networks Among Male-to-Female Transgender Sex Workers in Boston, Massachusetts*, 20 J. ASS'N NURSES IN AIDS CARE 373, 373 (2009).

31. *See* Anna-Louise Crago et al., *'The Police Beat You up, Demand Money and Will Detain You Until You Pay': Police Violence Against Sex Workers in Eleven Countries in Europe and Central Asia*, 12 RES. FOR SEX WORK 3 (2010), www.nswp.org/resource/research-sex-work-12-sex-work-and-violence; JJJ Ass'n & Zi Teng, *Fighting for Our Rights: How Sex Workers in Hong Kong Are Negotiating for More Respect and Protection*, 12 RES. FOR SEX WORK 13 (2010), www.nswp.org/resource/research-sex-work-12-sex-work-and-violence.

32. *Sex Workers at Risk: Condoms as Evidence of Prostitution in Four US Cities*, HUM. RTS. WATCH (July 19, 2012), https://www.hrw.org/report/2012/07/19/sex-workers-risk/condoms-evidence-prostitution-four-us-cities.

framework that undermines the health of sex workers. HIV criminalization refers to the use of criminal law to prosecute individuals for transmitting HIV, exposing another person to HIV, or having even protected sex without disclosing HIV status.

Laws criminalizing HIV transmission and exposure began to appear shortly after the epidemic was identified. By 1986,[33] three states passed HIV laws criminalizing exposure or transmission of HIV (Florida, Tennessee and Washington). In 1989, the American Legislative AIDS Exchange Council (ALEC), an organization of state legislators that believe in limited governments, free markets, and federalism, and often linked to conservative efforts,[34] recommended in an model statute language for an HIV Assault Law.[35] The next year, 22 states had enacted their first law criminalizing HIV transmission or exposure. Nearly eight years after AIDS was first detected, the federal government passed its first piece of legislation on AIDS, the Ryan White Care Act, named after a young boy who died after contracting HIV through a blood transfusion. The 1990 Ryan White Care Act created incentives to criminalize HIV transmission and exposure.[36] The Act stated the following:

> The Secretary may not make a grant under section 2641 to a State unless the chief executive officer determines that the criminal laws of the State are adequate to prosecute any HIV infected individual, subject to the condition described in subsection (b), who—(1) makes a donation of blood, semen, or breast milk, if the individual knows that he or she is infected with HIV and intends, through such donation, to expose another HIV [sic] in the event that the donation is utilized; (2) *engages in sexual activity if the individual knows that he or she is infected with HIV and intends, through such sexual activity, to expose another to HIV*; and (3) injects himself or herself with a hypodermic needle and subsequently provides the needle to another person for purposes of hypodermic injection, if the individual knows that he or she is infected and intends, through the provision of the needle, to expose another to such etiologic agent in the event that the needle is utilized.[37]

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33. *See* J. Stan Lehman et al., *Prevalence and Public Health Implications of State Laws that Criminalize Potential HIV Exposure in the United States*, 18 AIDS & BEHAV. 997, 998 (2014).

34. Nancy Scola, *Exposing ALEC: How Conservative Backed State Laws Are All Connected*, ATLANTIC (Apr. 14, 2012), http://www.theatlantic.com/politics/archive/2012/04/exposing-alec-how-conservative-backed-state-laws-are-all-connected/255869/.

35. MICHAEL TANNER & ALEC NAT'L WORKING GRP. ON STATE AIDS POLICY, THE POLITICS OF HEALTH: A STATE RESPONSE TO THE AIDS CRISIS 93–94 (1989), https://www.propublica.org/documents/item/726593-the-politics-of-health-1989; *see also* Sergio Hernandez, *Iowa Court Tosses Sentence in HIV Exposure Case*, PROPUBLICA (June 16, 2014, 11:00 AM), https://www.propublica.org/article/iowa-court-tosses-sentence-in-hiv-exposure-case.

36. Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No. 101-381, § 2647, 104 Stat. 576.

37. *Id.* § 2647(a) (emphasis added).

Over time, approximately thirty-three states have criminalized HIV transmission and exposure with varied rates of prosecution.[38] These laws vary from state to state, but some reach widely to include any sexual activity of an HIV-positive person, regardless of risk of exposure or actual transmission, regardless of the consensual nature of the sexual activity, or whether the sexual partner was warned of the HIV risk.[39] In addition, individuals have been prosecuted for HIV transmission and exposure in several states under general assault laws or laws criminalizing the transmission of sexually transmitted infections that are not HIV specific.[40] These laws and prosecutions have been generally decried by advocates for public health, and for the rights of people with HIV/AIDS, as contributing to stigma and discrimination, and as having a negative public health impact.[41] It has been shown that incarceration of HIV-positive people does not prevent the spread of HIV, it merely transfers risk of infections to the prison context while exposing people living with HIV to mistreatment.[42] For sex workers who face prosecution on the grounds of prostitution, the criminalization of HIV transmission and exposure can lead to harsher sentencing and entangle individuals further in the criminal justice system.

II. PENALIZING SEX WORKERS LIVING WITH HIV

In this part, we will describe how sex workers living with HIV are further penalized for their HIV status, regardless of any actual transmission or risk of transmission they pose. Laws targeting HIV-positive sex workers are sometimes nestled with antiprostitution laws in statutory codes, rather than alongside laws pertaining to HIV. While prostitution is generally considered a minor crime under state law, sex workers who are HIV positive are more likely to be charged and convicted of a felony offense because of the interaction of laws criminalizing HIV exposure, laws criminalizing sex work, and mandatory HIV testing laws.

A. Methodology

We searched state databases on Westlaw to identify which states criminalize HIV transmission and exposure and criminalize sex work

38. State-by-State Chart of HIV-Specific Statutes and Prosecutorial Tools, CTR. FOR HIV L. & POL'Y [hereinafter State Chart I], http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/State%20By%20State%20HIV%20Laws%20Chart%20updated%2010-21-13.pdf (last updated Oct. 21, 2013).

39. *See* 1 RASHIDA RICHARDSON ET AL., THE CTR. FOR HIV LAW & POLICY, ENDING & DEFENDING AGAINST HIV CRIMINALIZATION: A MANUAL FOR ADVOCATES 3–5 (2015).

40. State Chart I, *supra* note 38.

41. *See, e.g.*, Edwin Cameron, *Criminalization of HIV Transmission: Poor Public Health Policy*, 14 HIV/AIDS POL'Y & L. REV. 1, 1, 63 (2009); Jürgens et al., *supra* note 8, at 163.

42. *HIV Among Incarcerated Populations*, CDC, http://www.cdc.gov/hiv/group/correctional.html (last updated July 22, 2015); *see also* Elizabeth Kantor, *HIV Transmission and Prevention in Prisons*, HIV INSITE (Apr. 2006), http://hivinsite.ucsf.edu/InSite?page=kb-07-04-13.

while HIV positive. Further, we looked for statutes that made HIV testing mandatory for people arrested on prostitution charges.[43]

B. State Laws at the Intersection of Sex Work and HIV

Laws/ Characteristics	AL	AK	AZ [44]	AR [45]	CA [46]	CO [47]	CT [48]	DE [49]
Statute that Mandate Testing (either criminal or public health)			X	X	X	X	X	X
Prostitution Related Conduct Results in Testing			X	X	X	X	X	X
Testing Upon Charge or Conviction (Mandatory and/or Recommended Test)			X	X	X	X	X	X
Test Result Disclosure								
Person Tested *			X	X	X	X	X	X[50]
Judge/Court/Prosecuting Attorney/ State Agency					X	X	X	X
Person with Whom Defendant			X	X			X[51]	

43. *C.f.* RICHARDSON ET AL., *supra* note 39, at 270–91 (describing a sampling of prosecutions and arrests for HIV exposure in the United States from 2008–2014).
44. ARIZ. REV. STAT. ANN. § 13-1415 (2016).
45. ARK. CODE ANN. §§ 16-82-102, 16-82-101 (2015).
46. CAL. HEALTH & SAFETY CODE §§ 1603.1, 120292, 12022.85 (2016).
47. COLO. REV. STAT. §§18-3-415, 18-3-415.5 (2015).
48. CONN. GEN. STAT. § 54-102a (2016).
49. DEL. CODE ANN. tit. 11, § 1345 (2016).
50. And defendant's spouse. *Id.* § 1345(c).
51. Upon request of victim. CONN. GEN. STAT. § 54-102a.

Engaged in a Sexual Act/ Victim								
Medical Personnel/ Public Health Officials			X		X		X	
Available Health Services for Person Tested								
Defendant MUST partake in Services/ Treatment			X				X[52]	
Defendant Offered Serves/ Treatment					X			
Additional Charges/ Penalties upon Positive Test					X	X		

Laws/ Characteristics	DC 53	FL 54	GA 55	HI	ID 56	IL 57	IN 58	IA
Statute that Mandate's Testing (either criminal or public health)	X[59]	X	X		X	X	X	
Prostitution Related Conduct Results in Testing	X	X	X		X	X	X	
Testing Upon Charge or Conviction (Mandatory	X	X	X		X	X	X	

52. If court orders. *Id.*
53. D.C. CODE §§ 22-3901, 22-3902 (2016).
54. FLA. STAT. ANN. § 796.08(3) (2015).
55. GA. CODE ANN. § 16-6-13.1 (2015).
56. IDAHO CODE § 39-604 (2015).
57. 720 ILL. COMP. STAT. ANN. 5/11-1.10 (2016).
58. IND. CODE ANN. §§ 16-41-8-6, 35-38-1-10.5 (West 2016). IND. CODE ANN. § 35-38-1-9.5 requires a probation officer to obtain HIV information from the state department of health if a defendant is convicted of a "criminal sexual act."
59. D.C. CODE § 22-3902 (2016). Testing will only occur at the victim's request. *Id.*

and/or Recommended Testing)								
Test Result Disclosure								
Person Test *	X	X	X[60]			X	X	
Judge/Court/Prosecuting Attorney/State Agency	X	X			X	X[61]	X	
Person with Whom Defendant Engaged in a Sexual Act/Victim	X				X	X[62]	X	
Medical Personnel/Public Health Officials		X						
Available Health Services for Person Tested								
Defendant MUST partake in services/ treatment		X						
Defendant is Offereded Services/ Treatment	X[63]				X[64]			
Additional Charges/ Penalties upon Positive Test	X							

Laws/ Characteristics	KS	KY[65]	LA	ME	MD	MA	MI[66]	MN
Statute that Mandates Testing (either criminal or public health)		X					X	
Prostitution Related Conduct Results in Testing		X					X[67]	

60. And defendant's spouse. GA. CODE ANN. § 16-6-13.1(b) (2015).
61. Court has discretion to reveal results to anyone else. 720 ILL. COMP. STAT. ANN. 5/11-1.10.
62. 720 ILL. COMP. STAT. ANN. 5/11-1.10.
63. Counseling/referrals must be offered. D.C. CODE ANN. § 22-3902(c).
64. When the individual is incarcerated. IDAHO CODE § 39-604(6) (2015).
65. KY. REV. STAT. ANN. § 438.250 (West 2016).
66. MICH. COMP. L. ANN. §§ 333.5114, 333.5129, 791.267 (West 2016).

Testing Upon Charge or Conviction (mandatory and/or Recommended Testing)		X					X	
Test Result Disclosure								
Person Test *							X	
Judge/Court/Prosecuting Attorney/State Agency		X						
Person with whom defendant engaged in a sexual act with/ victim								
Medical Personnel/ Public Health Officials		X					X [68]	
Available Health Services for Person Tested								
Defendant MUST Partake in Services/Treatment		X					X [69]	
Defendant is Offered Services/Treatment							X [70]	
Additional Charges/ Penalties upon Positive Test		X [71]						

Laws/ Characteristics	MS	MO (d) [72]	MT	NE [73]	NV [74]	NH	NJ	NM [75]
Statute that Mandates Testing (either criminal or public)		X [76]		X [77]	X			X
Prostitution Related Con-		X [78]		X	X			X

67. There is no state law against Prostitution, but mandatory testing statute applies to local ordinances against Prostitution. MICH. COMP. L. ANN. § 333.5129.

68. Department of Health engages in partner notification. *Id.*

69. Only if convicted of promoting charges. *Id.*

70. If only arrested/charged. *Id.*

71. Only with knowledge.

72. MO. ANN. STAT. § 191.677 (West 2016).

73. NEB. REV. STAT. § 29-2290 (2016).

74. NEV. REV. STAT. §§ 201.358, 209.385 (2015).

75. N.M. STAT. ANN. § 24-2B-5.1 (2016).

76. Within the discretion of the court. MO. ANN. STAT. § 567.120.

77. Notwithstanding any other provision of law, when a person has been convicted of sexual assault pursuant to sections 28-317 to 28-320, sexual assault of a child in the second or third degree pursuant to section 28-320.01, sexual assault of a child in the first degree pursuant to section 28-319.01, or any other offense under Nebraska law when sexual contact or sexual penetration is an element of the offense, the presiding judge shall, at the request of the victim as part of the sentence of the convicted person when the circumstances of the case demonstrate a possibility of transmission of the human immunodeficiency virus, order the convicted person to submit to a human immunodeficiency virus antibody or antigen test. NEB. REV. STAT. § 29-22.

78. MO. ANN. STAT. § 567.120.

duct Results in Testing								
Testing upon Charge or Conviction (mandatory and/or Recommended Testing)		X[79]		X	X			X
Test Result Disclosure								
Person Test *				X	X			
Judge/Court/Prosecuting Attorney/State Agency		X		X	X			
Person with whom defendant engaged in a sexual act with/victim		X		X				
Medical Personnel/Public Health Officials		X[80]		X[81]				
Available Health Services for Person Tested								
Defendant MUST Partake in Services/ Treatment								
Defendant is offered services/treatment				X[82]				
Additional charges/ penalties upon positive test								

Laws/ Characteristics	NY	NC	ND[83]	OH[84]	OK[85]	OR	PA
Statute that Mandates Testing (either criminal or public)			X	X			
Prostitution Related Conduct Results in Testing				X			
Testing upon Charge or Conviction (mandatory and/or recom-				X			

79. Testing upon arrest. *Id.*

80. The department of health and senior services or local law enforcement agency, victim or others may file a complaint with the prosecuting attorney or circuit attorney of a court of competent jurisdiction alleging that a person has violated a provision of subsection 1 of this section. *Id.* § 191.677.

81. Disclosure to the Department of Health and Human Services. NEB. REV. STAT. § 29-2290.

82. Referred to services/treatment. *Id.*

83. N.D. CENT. CODE § 23-07-07.5 (2015).

84. OHIO REV. CODE ANN. §§ 3701.243, 5120-9-58 (2015).

85. "B. Any person who engages in an act of prostitution with knowledge that they are infected with the human immunodeficiency virus shall be guilty of a felony punishable by imprisonment in the custody of the Department of Corrections for not more than five (5) years..." OKLA. STAT. tit. 21 § 1031 (2016).

mended testing)							
Defendant MAY be tested							
Defendant MUST be tested				X			
Test Result Disclosure							
Person Test *				X			
Judge/Court/Prosecuting Attorney/ State Agency				X			
Person with Whom Defendant Engaged in a Sexual Act With (victim)				X			
Medical Personnel/ Public Health Officials			X	X			
Available Health Services for Person Tested							
Defendant MUST partake in services/ treatment			X[86]	**X**			
Defendant is offered services/treatment							

Laws/ Characteristics	RI [87]	SC [88]	SD [89]	TN [90]	TX	UT[91]
Statute that Mandates Testing (either criminal or public health)	X	X	X	X		X
Prostitution Related Conduct Results in Testing	X		X	X		X
Testing Upon Charge or Conviction (mandatory and/or recommended testing)	X	X	X	X		X
Defendant MAY be tested						
Defendant MUST be tested	X	X[92]	X	X		X
Test Result Disclosure						

86. N.D. CENT. CODE § 23-07-07(2).
87. 42 R.I. GEN LAWS §§ 23-6.3-7, 42-56-37 (2016).
88. S.C. CODE ANN. §§ 16-3-740, 44-29-100, 44-29-136 (2016).
89. S.D. CODIFIED LAWS §§ 23A-35B-8, 23A-35B-12 (2016).
90. TENN. CODE ANN. § 39-13-521 (2016).
91. UTAH CODE ANN. § 64-13-36 (West 2015).
92. Tested by petition and not prostitution specific. S.C. CODE ANN. § 16-3-740.

Person Tested/ Offender&	X	X	X	X		X
Judge/Court/Prosecuting Attorney/ State Agency		X				X
Person with whom Defendant Engaged in a Sexual Act With/ Victim		X	X[93]			
Medical Personnel/ Public Health Officials						X
Available Health Services for Person Tested						
Defendant Must Partake in Services/Treatment	X[94]	X[95]				X
Defendant is Offered Services/Treatment	X[96]		X	X		

Laws/ Characteristics	VT	VA 97	WA 98	WV 99	WI	WY
Statute that Mandates Testing (either criminal or public health)		X	X	X		
Prostitution Related Conduct Results in Testing		X	X	X		
Testing Upon Charge or Conviction		X	X	X		
Defendant MAY be tested						
Defendant MUST be tested		X	X	X		
Test Result Disclosure						
Person Tested/Offender*		X				
Judge/Court/Prosecuting Attorney/State Agency			X[100]	X		
Person with whom Defendant Engaged in a Sexual Act With/ Victim						
Medical Personnel/Public Health Officials		X		X		
Available Health Ser-						

93. Can petition for disclosure. S.D. CODIFIED LAWS §23A-35B-12.
94. "Shall" be treated. 42 R.I. GEN. LAWS §§ 23-6.3-7, 42-56-37 (2016).
95. If deemed appropriate. S.C. CODE ANN. § 44-29-100.
96. 42 R.I. GEN. LAWS §§ 23-6.3-7, 42-56-37.
97. VA. CODE ANN. § 18.2-346.1 (2015).
98. WASH. REV. CODE § 70.24.340 (2016).
99. W. VA. CODE §§ 16-3C-2, 16-3C-3 (2016).
100. Sentencing judge can order the test. WASH. REV. CODE § 70.24.340.

vices for Person Tested						
Defendant MUST partake in Services/Treatment		X[101]	X	X		
Defendant is Offered Services/Treatment						

C. Discussion of Laws

1. Mandatory HIV Testing of Sex Workers

At least twenty-five states now require that a person charged with, or convicted of, engaging in prostitution undergo testing for HIV, other STIs, or both.[102] States have been found to be authorized to carry out court-imposed mandatory testing for the purpose of detecting, preventing, and deterring the spread of HIV from and within high risk groups.

Court-mandated HIV testing for prostitution-related charges is neither uniform nor always clearly defined in state criminal statutes. This section will describe the range of testing provisions found, which vary in when they are imposed, and in administration and disclosure of results. This section will then examine which constitutional rights are implicated by these factors for sex workers subjected to mandatory testing.

2. When Is Mandatory HIV Testing Imposed?

HIV testing is imposed at various stages in the criminal justice process. At least nine states—Arkansas, Connecticut, Idaho, Michigan, Missouri, Nevada, North Dakota, Ohio, and Tennessee—prescribe testing when someone is merely arrested or charged with a prostitution-related offense, without a criminal conviction.[103] Some states require the judge to impose the test upon arrest, while others allow the judge to exercise discretion in whether or not to impose it.[104] For example, in Arkansas, the judge has discretion to require an individual charged with a prostitution-related crime to be tested if there is "reasonable cause to believe that the person committed the offense."[105] In Missouri, judges have discretion to mandate testing as a condition to issuing bond only if the defendant has a prior prostitution-related conviction.[106] In other states, judges simply have discretion—they *may* mandate the test—but there are no cases defining or interpreting the scope of judicial discretion for preconviction

101. "[S]hall receive counseling . . . ." VA. CODE ANN. § 18.2-346.1(A).

102. *See, e.g.*, CONN. GEN. STAT. § 54-102a(a) (2016) (stating that at the court's discretion, a venereal examination shall also be administered); *see also* Section II.B.

103. *See supra* Section II.B.

104. *See, e.g.*, ALASKA STAT. § 18.15.300(a),(c)–(d) (2016); CONN. GEN. STAT. § 54-102a(a); MICH. COMP. LAWS § 333.5129(1) (2016); N.D. CENT. CODE § 23-07.4-01(1) (2015).

105. ARK. CODE ANN. § 16-82-101(b)(1) (2015).

106. MO. REV. STAT. § 567.120 (2016).

testing. In one state, Florida, a defendant may him or herself request that testing be administered by the Department of Health.[107]

At least eighteen states—Arkansas, California, Colorado, Delaware, D.C., Florida, Georgia, Illinois, Kentucky, New Mexico, Ohio, Rhode Island, South Carolina, Tennessee, Utah, Virginia, Washington, and West Virginia—prescribe HIV testing upon a prostitution-related conviction.[108] In some jurisdictions, judges retain discretion in determining whether to mandate an HIV test while the case is still pending.[109] Some states have both arrest and postconviction testing provisions. For instance, Florida allows a person under arrest to request HIV testing but requires HIV testing for a conviction.[110] In Delaware, mandatory testing of someone convicted of prostitution may be stayed if an appeal is filed.[111]

In some states, mandatory testing is triggered when the victim makes a request. In Connecticut, D.C., Ohio, and South Carolina, we find reference to victim requests in the mandatory testing statutes.[112] In Ohio, for example, mandatory testing is imposed if an alleged victim makes a request to the court, even if the defendant is not convicted of prostitution.[113] In D.C.[114] and South Carolina[115], the testing of a person convicted of prostitution is only mandatory if a victim requests it. Some states allow parties other than victims to request and trigger mandatory testing of the defendant. Such parties may be defined as a "person with whom the defendant engaged in sexual penetration during the course of the crime,"[116] or even more broadly, as "any other person whom the court reasonably believes had contact with the accused in circumstances related to the violation that could have resulted in the transmission to that person of the human immunodeficiency virus."[117] This latter statute from Ohio could be read to mean that any former client of an accused sex worker could request that the sex worker be forced to have an HIV test.

The terminology of victim as a reference to clients of sex workers occurs because HIV-testing statutes also often apply to sexual offenses like sexual assault, where there are victims of nonconsensual sex. In Ohio, for example, the governing statute on mandatory HIV testing applies to six "sex offenses": rape, sexual battery, unlawful sexual conduct

107. FLA. STAT. § 796.08(2) (2016).
108. *See supra* Section II.B.
109. *See, e.g.*, N.M. STAT. ANN. § 30-9-5 (2016).
110. FLA. STAT. § 796.08.
111. *See* DEL. CODE ANN. tit. 11, § 1345(e) (2016).
112. *See* CONN. GEN. STAT. § 54-102a(b) (2016); D.C. CODE § 22-3902(a) (2016); OHIO REV. CODE ANN. § 2907.27(A)(1) (West 2015); S.C. CODE ANN. § 16-3-740(B) (2015).
113. OHIO REV. CODE ANN. § 2907.27(A)(1).
114. D.C. CODE § 22-3902(a) (formerly cited as D.C. CODE § 24-492 (1981)).
115. S.C. CODE ANN. § 16-3-740(B).
116. ARK. CODE ANN. § 16-82-101(c)(1) (2015).
117. OHIO REV. CODE ANN. § 2907.27(B)(1)(a).

with a minor, engaging in prostitution, solicitation or loitering for the purpose of prostitution, and engaging or soliciting for the purpose of prostitution with the knowledge of positive HIV status.[118] However, when the word victim is applied to prostitution charges, it is typically in reference to consensual sex referring instead to the individual who has been exposed to or contracted HIV.

3. Which Crimes Trigger Mandatory Testing?

States' mandatory testing provisions are triggered by a variety of crimes. In Idaho, for example, the state may order persons to be tested if they are charged with one of a list of enumerated crimes, including "any crime in which body fluid has likely been transmitted to another."[119]

In the case of prostitution, there is usually no additional requirement that there be an actual risk of exposure, transmission, or even a sexual act. For example, in Kentucky, "a person is guilty of prostitution when he engages or agrees or offers to engage in sexual conduct with another person in return for a fee."[120] This language, common to many state laws against prostitution, requires no sexual act but merely an offer or agreement to engage in a sexual act. However, most states require only an arrest or conviction of prostitution, not any additional proof of possible, potential, or actual exposure to HIV, to impose mandatory testing.[121] Some states reach even wider: in Tennessee, a person will be mandatorily tested if convicted of promoting prostitution, a crime that does not even involve sexual activity with the defendant.[122]

There are a few exceptions. In Michigan, for example, mandatory testing is only required if there is a court determination that there is "reason to believe the violation involved sexual penetration or exposure to a body fluid of the defendant," although the court still has discretion to impose testing without this finding.[123] In South Carolina, testing is only imposed if a "victim" requests it and demonstrates that "there is probable cause that during the commission of the criminal offense there was a risk that body fluids were transmitted from one person to another."[124] In Con-

118. OHIO REV. CODE ANN. § 2907.27(A)(1).

119. IDAHO CODE ANN. § 39-604(4) (2015).

120. KY. REV. STAT. ANN. § 529.020(1) (West 2016).

121. *See supra* Section II.B. An exception is the few states where testing is only mandatory where a "victim" or someone who had sex with the defendant requests the test. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1415(B) (2016); OHIO REV. CODE ANN. § 3701.243.

122. TENN. CODE ANN. § 39-13-521(e) (2016); *see also* UTAH CODE ANN. § 76-10-1311(1) (West 2015).

123. MICH. COMP. LAWS § 333.5129(1), (3) (2016).

124. S.C. CODE ANN. § 16-3-740(B)(2) (2016) (testing certain convicted offenders for Hepatitis B and HIV); *see also* State v. Houey, 651 S.E.2d 314, 318 (S.C. 2007) ("We hold that the State need not show probable cause that an offender has a disease before testing may be ordered pursuant to § 16-3-740(B), provided the statutory requirements have been met.").

necticut, a judge may impose testing only if the violation "involved a sexual act."[125]

4. How and by Whom Are Mandatory Tests Administered?

States also vary in their schemes to administer HIV tests to suspected or convicted sex workers, demonstrating an entanglement in the law between criminal codes and public health regulation. In fact, some mandatory testing laws are codified within public health statutes intended for prevention of communicable diseases, as opposed to in the penal code.[126] These statutes give judges the authority to distribute educational materials about sexually transmitted diseases, to order testing, and to perform other duties normally associated with medical professionals or governmental health agencies.[127]

Some states require that judges impose the test as part of the sentence or a condition of release, but it appears that the defendant must arrange for the test and pay for it. For example, in Colorado, the court must order the test, and the test must be carried out by "a facility that provides ongoing health care," but the defendants must pay the costs of the test, and it is unclear whether the defendants must arrange the test themselves, or if the court will order him or her to appear at a certain health facility at a certain time.[128] Delaware vaguely decrees that a person shall be ordered to undergo testing at his or her expense but it does not specify by whom, when, or where.[129] Some states, such as Florida, order that the test be performed "under direction of the Department of Health."[130] Nevada's law specifies that the test must be one approved by the State Board of Health but that it also must return results within thirty days.[131] In Washington, where the mandated testing statute is part of public health laws, the local health departments are subject to a mandate to ensure that persons convicted of prostitution are tested within seventy-two hours after a court's order.[132] Most strikingly, in Utah, if the person being tested is already confined to jail or prison, law enforcement participates directly in administering the test.[133] To comply with the statute, law enforcement must obtain the blood specimen, deliver it to the lab, and develop a "medical file" on the defendant containing the results.[134]

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125. CONN. GEN. STAT. § 54-102a(a)–(b) (2016).

126. *See supra* Section II.B.

127. Notably, MICH. COMP. LAWS § 333.5129(2), states that "the judge or magistrate responsible for setting the individual's conditions of release pending trial shall distribute to the individual the information on venereal disease and HIV infection" and, W. VA. CODE § 16-3C-2(f)(10) (2016), gives the judge to order additional tests if an HIV-related test results in a negative reaction.

128. COLO. REV. STAT. § 18-7-201.5(1)(a), (3)(a) (2015).

129. *See* DEL. CODE ANN. tit. 11, § 1345(a), (d) (2016).

130. FLA. STAT. § 796.08(2) (2016).

131. NEV. REV. STAT. § 201.356(1) (2015).

132. WASH. REV. CODE § 70.24.340(1)(b), (4) (2016).

133. *See* UTAH CODE ANN. § 76-10-1311(2)–(4) (West 2015).

134. *Id.* § 76-10-1311(3)–(5), (8)(a).

What is unclear in the statutes, especially in cases where law enforcement is directly responsible for testing, is whether the accepted standards of care in administering HIV tests are adhered to in the case of mandatory testing, protocols that include risk assessment, consent, pre- and post-counseling, and training on the part of testing personnel.

5. To Whom Are HIV Test Results Disclosed?

Once a test for HIV is performed, a separate issue arises of who has access to the test results. Normally, individuals have a respected privacy interest in their HIV test results that is protected under federal and state HIV and AIDS confidentiality statutes. For example, Florida's confidentiality statute states that all information and records relating to HIV tests conducted by the Public Health Department are treated as strictly confidential, disclosed only to the person tested.[135] Exceptions to strict confidentiality generally require informed written consent by the tested individual or a medical emergency.[136] Some states allow for disclosure to known sexual partners of the person tested.[137] Other states and territories require that people testing HIV positive be reported by name to state health departments for record-keeping purposes.[138] These name-based registries are used to develop estimates of the HIV rates in the state.

However, most states allow broader disclosure of the results of mandatory testing of suspected sex workers. In Georgia, the test result can be disclosed to the defendant's spouse with the defendant's mandated "consent,"[139] and in Michigan, the results are also subject to partner notification.[140] Mandatory partner notification of positive HIV test results may go into effect in other states, even where the HIV test was nonconsensual. In twelve states, the results can also be given to the alleged victim or other indicated person who had sex with the defendant in the course of the crime.[141]

In Virginia, the statute specifically indicates that results from a mandated HIV test are confidential and cannot be admitted to court in a proceeding related to prostitution.[142] But in at least eighteen states, the HIV test result of a person tested under these statutes is also provided to the prosecutorial agency, the court, the local police department, or other

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135. *See* FLA. STAT. § 384.29(1).
136. *See id.*
137. *See, e.g.*, S.C. CODE ANN. § 16-3-740(B)(3), (C) (2016).
138. *See supra* Section II.B.
139. GA. CODE ANN. § 16-6-13.1(b) (2015).
140. MICH. COMP. LAWS § 333.5129(1) (2016).
141. *See supra* Section II.B.
142. VA. CODE ANN. § 18.2-346.1(C)–(D) (2015). Interestingly, a test for Hepatitis C is also administered by mandate in the same circumstances, and those results can be disclosed to "sheriffs' offices, the state police, local police departments, adult or youth correctional facilities, salaried or volunteer firefighters, paramedics or emergency medical technicians, officers of the court, and regional or local jails" to prevent infection. *Id.* § 18.2-346.1(C).

government actors.[143] It is relevant to note that, where HIV testing is mandated upon arrest, the test and the disclosure of results happen even if the person is found not guilty of prostitution.

This nonconsensual disclosure may facilitate the bringing of further charges or sentences against the defendant. For example, in Florida, the results "shall be made available by the Department of Health to the offender, medical personnel, appropriate state agencies, state attorneys, and courts of appropriate jurisdiction in need of such information in order to enforce the provisions of this chapter" once the defendant is convicted and tested.[144] Likewise, in Tennessee, "For the sole purpose of determining whether there is probable cause to prosecute a person for aggravated prostitution under § 39-13-516, the district attorney general may view the record, notwithstanding subdivision (b)(2)."[145] In California, the District Attorney need not provide a reason, the Department of Health must furnish the results "upon request," though the results could be used to support further charges.[146]

The protocols for making sure this information at least stays with these designated actors are wide-ranging. In many states, it is unclear whether the test result becomes a part of the public court file. In Tennessee, the District Attorney must file a written request with the court to view the test results.[147] In Nevada, the Department of Health informs the arresting law enforcement agency of the results of the test without informing the defendant.[148] If the test is negative, law enforcement informs the court, and the court informs the defendant.[149] If the result is positive, law enforcement informs the defendant and the court, and the defendant must reappear in court to testify that he or she received those results or risk a bench warrant.[150]

In Illinois, the statute indicates that "the results . . . shall be kept strictly confidential" and must be "personally delivered in a sealed envelope" to the judge for inspection in camera.[151] The judge then has discretion to reveal the results in "the best interests of the victim and the public."[152] In several states, the public can be informed of a person's status for the stated reason of informing and protecting the public and any alleged victims from communicable diseases.[153] Where mandated tests

143. *See supra* Section II.B.
144. FLA. STAT. § 796.08(3) (2016).
145. TENN. CODE ANN. § 39-13-521(e) (West 2016).
146. CAL. PENAL CODE § 1202.6(d) (West 2016).
147. TENN. CODE ANN. § 39-13-521(e).
148. NEV. REV. STAT. § 201.356(2) (2015).
149. *Id.* § 201.356(2)–(3).
150. NEV. REV. STAT. § 201.356(2)–(4).
151. 730 ILL. COMP. STAT. 5/5-5-3(g) (2016).
152. *Id.*
153. *See, e.g.*, 730 ILL. COMP. STAT. 5/5-5-3(g); *see also* People v. Adams, 597 N.E.2d 574, 581 (Ill. 1992).

result in charges of transmission or exposure of HIV, and these charges are part of the public record, a person's HIV status is necessarily made public. This has been found to be permissible even when it results in news media broadcasting the defendant's status.[154]

6. After Testing, What Role Does the Court Play in Treatment or Counseling?

Standard protocols around HIV testing include requirements for pre- and post-test counseling and immediate linkage to treatment services upon receipt of an HIV-positive result. The criminal statutes that mandate HIV testing interact with these requirements in a variety of ways. In eight states with mandated testing of sex workers, there is no mention of providing pre- or post-test counseling, treatment, or referrals in the statutes.[155] While such protocols may be followed as a matter of course when testing is administered by state departments of health or other regulated providers, it is not clear whether such services are further funded or guaranteed to defendants. In ten states, the statute contains a requirement to at least offer services.[156] In five states—Florida, Kentucky, New Mexico, Ohio, and West Virginia—courts are vested with the power to mandate services, treatment, or both.[157] In New Mexico, the court may view the results and "shall sentence any diseased defendant to submit to medical treatment until he is discharged from treatment as noninfectious."[158]

7. Constitutionality of Mandated Testing

Defendants have argued that taking blood to administer an HIV test mandated by the state is a "search" as understood by the Fourth Amendment because it intrudes upon the defendant's bodily integrity and gathers information in which the defendant has a reasonable expectation of privacy.[159] Thus, it is analogous to a blood alcohol test performed by the state, found to be a search in *Skinner v. Railway Labor Executives' Association.*[160] As the Supreme Court held in *Skinner*,

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154. *See In re* Application of MULTIMEDIA KSDK, INC., 581 N.E.2d 911, 913–14 (Ill. App. Ct. 1991).

155. *See* ARK. CODE ANN. § 16-82-101 (2015); COLO. REV. STAT. § 18-7-201.5 (2015); CONN. GEN. STAT. § 54-102a (2016); DEL. CODE ANN. tit. 11, § 1345 (2016); GA. CODE ANN. § 16-6-13.1 (2015); NEV. REV. STAT. § 201.356; N.D. CENT. CODE § 23-07-07.5 (2015); UTAH CODE ANN. § 76-10-1312 (West 2015).

156. *See* CAL. PENAL CODE § 1202.6(d) (West 2016); D.C. CODE § 22-3903(b) (2016); IDAHO CODE ANN. § 39-604(6) (2015); 730 ILL. COMP. STAT. 5/5-5-3(g); MICH. COMP. LAWS § 333.5129(2) (2016); N.M. STAT. ANN. § 24-2B-5.1(B) (2016); 11 R.I. GEN. LAWS § 11-34.1-12(b) (2016); TENN. CODE ANN. § 39-13-521(e) (West 2016); VA. CODE ANN. § 18.2-346.1(A) (2015); WASH. REV. CODE § 70.24.340(4) (2016).

157. *See supra* Section II.B.

158. N.M. STAT. ANN. § 30-9-5. It is unclear how this statute would apply in the case of HIV, where there is no known cure or treatment that results in a patient being "noninfectious."

159. *See, e.g.*, State v. Houey, 651 S.E.2d 314, 316 (S.C. 2007).

160. *See* Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 616 (1989).

> In light of our society's concern for the security of one's person, it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests.[161]

Searches and seizures must be "reasonable" under the Fourth Amendment. Whether a search violates the Fourth Amendment is a question of balancing the intrusion on privacy interests versus the state's interests in doing this search.[162] There are situations beyond the normal scope of law enforcement that warrant an exception to the normal requirements of probable cause for practicality reasons. In these circumstances, where the court is determining if there are "special governmental needs," courts balance the state's need against the scope of the intrusion on the individual.[163] Mandatory HIV-testing requirements have been found constitutional in a variety of circumstances under the exception of "special government needs."[164] State statutes that mandate HIV testing for a person charged with, or convicted of, a crime in which sexual contact is an essential element have been found to be constitutionally valid, even where there is no "probable cause" to believe that the defendant is actually infected with HIV. For example, in *In re J.G., N.S., and J.T.*,[165] the court sought to compel HIV testing for the defendant who was accused of aggravated assault.[166] The New Jersey Superior Court, Appellate Division held that the mandatory testing statute did not violate federal or state search and seizure clauses.[167] In *In re Juveniles A, B, C, D, E*,[168] the Washington Supreme Court held that the statute mandating HIV testing of juvenile sexual offenders did not violate the Fourth Amendment.[169] In California, a statute mandating HIV testing of arrested persons where there is probable cause to believe that a transfer of bodily fluid could have occurred between the accused and a public safety officer was found constitutional when applied to a person who bit a police officer.[170] Although the court recognized that that there was no probable cause to believe that the defendant was HIV positive and that the likelihood of HIV transmission by biting was negligible, the court found the application of the statute constitutional because of the special govern-

161. *Id.*
162. *See* Payton v. New York, 445 U.S. 573, 586–90 (1980).
163. Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665 (1989).
164. *Houey*, 651 S.E.2d at 316.
165. 674 A.2d 625 (N.J. Super. Ct. App. Div. 1996).
166. *Id.* at 627.
167. *Id.* at 626, 634.
168. 847 P.2d 455 (Wash. 1993).
169. *Id.* at 463.
170. Johnetta v. Mun. Court, 267 Cal. Rptr. 666, 685 (Cal. Dist. Ct. App. 1990).

ment need.[171] This need was identified as the state's interest in protecting the health and safety of its employees in the line of duty.

Mandatory HIV testing for those arrested for prostitution asks the Fourth Amendment for even more leniency. These searches invade a defendant's bodily integrity and retrieve the most private information without a warrant and without a showing of probable cause that the person has HIV, transmitted HIV, or even engaged in an activity capable of transmitting HIV. These statutes apply where there is no "victim," let alone a protected category of persons like police officers, who may be at risk. However, in the few constitutional challenges to prostitution-related mandated testing statutes, they, too, have been found constitutional.

In *Love v. Superior Court*,[172] the California mandatory-testing statute was challenged under the Fourth Amendment.[173] This statute mandates testing and HIV education upon conviction for prostitution, and the results can be disclosed to the District Attorney.[174] The court identified the special government need by looking outside the statute to other legislative materials identifying HIV as an urgent public health matter, and testing and counseling as one means of stopping its spread.[175] The court took judicial notice of a 1986 publication by the federal Department of Health and Human Services, which advised testing prostitutes and instructing them to discontinue prostitution if HIV positive.[176]

The petitioner in *Love* questioned whether HIV prevention was really the special governmental need served by the testing statute, claiming that, instead, the goal was to collect evidence to be used against the defendant in the future.[177] The California Court of Appeals found that the testing requirement was not a search for evidence because it required an "AIDS prevention education program" to provide "at a minimum" information about the disease and "resources for assistance."[178] Instead, the court categorized it as a public health measure intended to prevent the spread of HIV. The court reasoned that mandatorily testing individuals who are sex workers is needed as a deterrent mechanism to prevent this group from engaging in "acts known to spread the disease."[179] Accordingly, mandatory HIV testing is permissible in California for soliciting to engage in prostitution, even though the crime does not involve sexual contact. This is justified by the argument that such testing addresses the

171. *Id.* at 671, 679, 685.
172. 276 Cal. Rptr. 660 (Cal. Dist. Ct. App. 1990).
173. *Id.* at 662.
174. *Id.* at 663.
175. *Id.* at 663–64.
176. *Id.* at 664 & n.5.
177. *Id.* at 664.
178. *Id.* (quoting CAL. PENAL CODE § 1202.6(d) (1990)).
179. *Id.* (noting petitioners' challenge of the mandatory HIV testing for prostitution-related charges claimed that the statute was a violation of their U.S. constitutional Fourth Amendment rights).

issue of informing "high risk" groups about their status "for their own protection and that of those to whom they could transmit the virus."[180] Although the test reveals private medical information, the court found that the fact that these results are only disclosed to the District Attorney, and only for purposes of bringing higher charges, renders this intrusion minimal.[181] Disclosure of test results to the prosecutor also fulfills the legislature's legitimate aim "to control the spread of AIDS, in part by providing a deterrent to prostitution activity by one who knows he or she is infected with the AIDS virus."[182]

In *People v. Adams*,[183] two women convicted of prostitution filed motions challenging the constitutionality of the Illinois statute requiring them to undergo mandatory testing for HIV.[184] The defendants raised constitutional claims, including "that the statute violated their rights to privacy, to freedom from unreasonable searches and seizures, and to . . . equal protection."[185] They also challenged the testing requirement as a sentence, claiming it was cruel and unusual punishment in violation of the Eighth Amendment.[186] They presented expert witnesses who testified that the criminalization of HIV exposure was an ineffective means of stopping the spread of HIV.[187] The trial court determined that the testing procedure represented an illegal search and seizure.[188] The trial judge found that the personal intrusion required by the testing was unreasonable because the statute did require the state to articulate an "individualized suspicion" that the person was HIV positive before mandating the test and because the state failed to prove that the intended social benefits to the state outweighed the privacy intrusion.[189] The court also found the statute denied the defendants equal protection under the Fourteenth Amendment.[190]

The State appealed, and the Supreme Court of Illinois issued a thorough opinion fatal to the defendants' claims. The court reviewed the history of mandatory testing as applied to sex offenders and IV drug offenders, which had been held to be constitutionally valid.[191] Then, it examined the mandatory testing statute as a means of advancing a special government need of preventing HIV and safeguarding the health of the public by targeting "at risk" populations for testing.[192] While the defendants

180. *Id.*
181. *See id.* at 664–66.
182. *Id.* at 665.
183. 597 N.E.2d 574 (Ill. 1992).
184. *Id.* at 576.
185. *Id.* at 603.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 579.
190. *Id.* at 576.
191. *Id.* at 607–09.
192. *See id.*

argued that public health experts have shown this to be an ineffective means of curtailing HIV, and that their convictions involved no sexual acts, the court nevertheless claimed that the statute fell under the state's broad police powers to advance public health.[193] Ironically, the court used the urgency of the HIV epidemic as a weapon against the defendants, stating that this interest outweighed the need for a warrant, probable cause, or even any articulable suspicion that the defendants were HIV positive. The language used by the court continually demonized sex workers as spreaders of disease, saying that the state's interest was one of "self defense" against such diseased individuals.[194] Without evidence, it claimed that nonconsensual testing and disclosure would lead to treatment and a slowing of the spread of disease.[195] It also implied that it would be too impractical for a judge to have to articulate an individual suspicion, as there are rarely grounds to suspect someone is infected with HIV beyond their "membership in a high-risk group."[196] The court went further to judge the intrusion of an HIV test to be "relatively slight" in light of the reduced privacy interests of offenders after conviction.[197] The court concluded that the statute did not constitute an unreasonable search and seizure.

B. Criminalization of Sex Work While HIV Positive

Approximately thirty-two states, two territories, and the federal law currently criminalize either exposure to or transmission of HIV.[198] Fourteen of these jurisdictions specifically criminalize, or have heightened penalties for, persons who are HIV positive and are charged with a prostitution-related offence.[199] These jurisdictions include California, Colorado, Florida, Georgia, Kentucky, Missouri, Nevada, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah, and Guam.[200] Sex workers discovered to be HIV positive may also be charged under more general laws that criminalize HIV exposure through sexual activity, even if

193. *Id.* at 609–10.

194. *See id.* at 607; *see also* Jacobson v. Massachusetts, 197 U.S. 11, 27 (1905) ("Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.").

195. *Adams*, 597 N.E.2d at 607.

196. *Id.* at 609.

197. *Id.* at 608.

198. State-by-State Chart of HIV-Specific Statutes and Prosecutorial Tools, CNTR. FOR HIV L. & POL'Y [hereinafter State Chart II], http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/State%20By%20State%20HIV%20Laws%20Chart%20updated%2010-21-13.pdf (last updated Oct. 21, 2013).

199. *Id.*

200. *See* CAL. PENAL CODE § 12022.85(a) (West 2016); COLO. REV. STAT. § 18-3-415.5(5)(b) (2015); FLA STAT § 796.08(5) (2016); GA. CODE. ANN. § 16-5-60(c) (West 2015); KY. REV. STAT. ANN. § 529.090(2)–(4) (West 2016); MO. REV. STAT. § 567.020(2) (2016); NEV. REV. STAT. § 201.358(b) (2015); OHIO REV. CODE ANN. § 2907.24 (West 2015); OKLA. STAT. tit. 21, § 1031 (2016); 18 PA. CONS. STAT. § 5902(a)(4) (2016); S.C. CODE ANN. § 44-29-145(2) (2016); TENN. CODE ANN. § 39-13-516(a) (2016); UTAH CODE ANN. § 76-10-1309 (West 2015); 9 GUAM CODE ANN. § 28.10(b)(3) (2015).

no prostitution-related HIV exposure offense exists. Additional states where a sex-related HIV exposure crime exists are Arkansas, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Mississippi, New Jersey, North Carolina, North Dakota, Virginia, and Washington.[201] States that have both mandatory testing of sex workers and laws specifically raising penalties for prostitution while HIV positive are California, Colorado, Florida, Georgia, Kentucky, Missouri, Nevada, Ohio, Pennsylvania, Tennessee, and Utah.[202]

1. What Are the Elements of Prostitution-While-HIV-Positive Crimes?

In most states, it is enough to offer or agree to engage in sexual conduct to be charged with prostitution. In other states, loitering in a public space with the intent of offering to engage in sexual conduct can result in a prostitution charge. For example, in Pennsylvania, the definition of prostitution includes being "an inmate of a house of prostitution or otherwise engag[ing] in sexual activity as a business; or . . . loiter[ing] in or within view of any public place for the purpose of being hired to engage in sexual activity."[203] Because of how prostitution is policed, many people arrested for prostitution are arrested either after police observe the individual loitering in an area known for prostitution or after an undercover officer secures an agreement or offer to exchange sexual conduct for a fee.[204] Thus, many arrests for prostitution occur without any sexual conduct occurring.

In some states, the prostitution-while-HIV-positive statute makes explicit that even if there is only an offer to engage in sexual conduct, it is enough to charge the defendant with the HIV exposure crime. For example, in Colorado, while the prostitution statute usually requires some act in furtherance of the agreement or offer to engage in sexual conduct for a fee, the HIV-criminalization statute specifies that "[a]ny person who performs *or offers or agrees to perform* any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse . . . in exchange for money or any other thing of value," with knowledge of being infected with HIV is guilty of the crime of "prostitution with knowledge of being infected with acquired immune deficiency syndrome."[205] Similarly, in Florida, one can be convicted of a third-degree felony if one "[c]ommits *or offers to commit* prostitution" with knowledge of one's HIV positive status.[206] An offer to commit prostitution does not include any sexual contact or any HIV exposure risk. At least eight of the fifteen

201. State Chart II, *supra* note 198.
202. *See id.*; *supra* Section II.B.
203. 18 PA. CONS. STAT. § 5902(a)(1)-(2).
204. *See, e.g.*, CAL. PENAL CODE § 653.22 (West 2016).
205. COLO. REV. STAT. § 18-7-201.7(1) (2015) (emphasis added).
206. FLA. STAT. § 381.004(5) (2016) (emphasis added).

states that have prostitution-while-HIV-positive crimes explicitly impose liability without sexual contact.[207] One exception is Ohio, where you must actually "engage in sexual activity for hire" to be charged or convicted of prostitution while HIV positive.[208]

In line with the trend of other HIV criminalization statutes, frequently no actual transmission of HIV is required. One state, Tennessee, after defining its crime of "aggravated prostitution" broadly to include "engag[ing] in sexual activity as a business or [being] an inmate in a house of prostitution or loiter[ing] in a public place for the purpose of being hired to engage in sexual activity," further specifies that "[n]othing in this section shall be construed to require that an infection with HIV has occurred in order for a person to have committed aggravated prostitution."[209]

Some states also increase penalties for other prostitution-related crimes if the defendant is HIV positive, most often those crimes that penalize clients of sex workers. For example, in Kentucky, a defendant faces the same penalty whether convicted of prostitution or "procuring" another to commit prostitution if he or she is HIV positive and meets the other elements of this crime.[210] In California, a person may be charged with a felony HIV-exposure crime if he or she is HIV positive and faces charges under Section 647(b), a disorderly conduct statute used to penalize both sex workers and clients of sex workers.[211] Clients of sex workers are also liable if HIV positive in states including Colorado,[212] Florida,[213] Kentucky,[214] Oklahoma,[215] and South Carolina,[216] although different

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207. *See, e.g.*, GA. CODE ANN. § 16-5-60(c)(3) (West 2015); KY. REV. STAT. ANN. § 529.090(1) (West 2016). California, Colorado, Florida, Missouri, Ohio, Pennsylvania, Tennessee, Utah, Missouri, Oklahoma, and South Carolina's HIV criminalization statutes also simply require committing "prostitution," but in these states, either prostitution is not defined in the statute, or soliciting for prostitution is defined separately. *See* CAL. PENAL CODE § 266h(a); COLO. REV. STAT. § 18-3-415.5(5); FLA. STAT. § 796.08(2)–(3); MO. REV. STAT. § 567.020(1)–(3) (2016); NEV. REV. STAT. § 201.354(1) (2015); OHIO REV. CODE ANN. § 2907.24(A)–(C) (West 2015); OKLA. STAT. tit. 21, § 1028(f) (2016); 18 PA. CONS. STAT. § 5902(a)(1)–(4); S.C. CODE ANN. § 44-29-145(2) (2016); TENN. CODE ANN. § 39-13-511(6) (2016); UTAH CODE ANN. § 76-10-1302(1)(a)–(c) (West 2015).

208. OHIO REV. CODE ANN. § 2907.25(B), (C)(2).

209. TENN. CODE ANN. § 39-13-516(a), (c).

210. KY REV. STAT. ANN. § 529.090 (West 2016).

211. CAL. PENAL CODE § 647(b) ("Who solicits or who agrees to engage in or who engages in any act of prostitution. A person agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in prostitution. No agreement to engage in an act of prostitution shall constitute a violation of this subdivision unless some act, in addition to the agreement, is done within this state in furtherance of the commission of an act of prostitution by the person agreeing to engage in that act. As used in this subdivision, 'prostitution' includes any lewd act between persons for money or other consideration."); *see also* State Chart II, *supra* note 198.

212. COLO. REV. STAT. § 18-7-205.7(2).

213. FLA. STAT. 796.08(5)(b) (2016).

214. KY REV. STAT. ANN. § 529.090.

215. OKLA. STAT. tit. 21, § 1029 (2016).

216. S.C. CODE ANN. § 16-15-90(1)–(11) (2016).

penalties may attach to clients of sex workers than to sex workers.[217] However, in Missouri, Nevada, Ohio, and Oklahoma, only sex workers are liable for the HIV-exposure crime, and clients of sex workers face no similar penalty if HIV positive.[218] In Georgia, clients of sex workers are only liable if they solicit an act of "sodomy" but not if they solicit an act of vaginal sexual intercourse.[219] Interestingly, in Florida, a person who "[p]rocures another for prostitution"—a crime brought against clients of sex workers—must be proven to have not only procured or intended to engage in sexual activity but to actually have "engage[ed] in sexual activity in a manner likely to transmit the human immunodeficiency virus."[220] Thus, a different and much higher standard for conviction is established for clients of sex workers than for sex workers.

While sex work itself is not a crime for those working in registered brothels in Nevada, sex work while HIV positive by those same individuals is a class B felony.[221] Individuals need not be proven to have engaged in sexual conduct but only to have been employed as a prostitute.[222] In addition, Nevada imposes liability on third-party managers of HIV-positive sex workers. Owners of houses of prostitution that employ a person with knowledge that the person has tested positive for HIV are are civilly, but not criminally, liable for damages if that person does in fact transmit HIV to another.[223]

2. Interaction with Mandatory Testing

Ten states have both mandatory testing of sex workers and laws specifically raising penalties for prostitution-while-HIV-positive.[224] Proving that sex workers have knowledge of HIV status, and thus can be charged with the higher crime, could be facilitated by the existence of mandatory testing statutes, and some states explicitly connect the operation of these statutes. In Utah and California, the law provides a mechanism for the outcome of a mandatory test to result in an additional charge against the defendant upon subsequent prostitution arrests.[225] In Califor-

217. In Colorado, patronizing a sex worker while HIV positive is a class 6 felony, while prostitution while HIV positive is a class 5 felony. COLO. REV. STAT. §§ 18-7-201.7(2), 18-7-205.7(2).

218. *See* State Chart II, *supra* note 198.

219. GA. CODE ANN. § 16-5-60(c)(4) (2015).

220. FLA. STAT. 796.08(5)(b) (2016).

221. NEV. REV. STAT. § 201.358(b) (2015).

222. *Id.*

223. *Id.* § 41.1397.

224. California, Colorado, Florida, Georgia, Kentucky, Missouri, Nevada, Ohio, Tennessee, and Utah. *See* CAL. PENAL CODE § 12022.85(a) (West 2016); COLO. REV. STAT. 18-3-415.5(5)(b) (2015); FLA. STAT. §796.08(5); GA. CODE ANN. § 16-5-60(c)(3); KY. REV. STAT. ANN. § 529.090(2)–(4) (West 2016); MO. REV. STAT. § 567.020(2) (2016); NEV. REV. STAT. § 201.358(b); OHIO REV. CODE ANN. § 2907.24(2) (West 2015); OKLA. STAT. tit. 21, § 1031(B) (2016); S.C. CODE ANN. § 44-29-145(2) (2016); TENN. CODE ANN. § 39-13-516 (2016); UTAH CODE ANN. § 76-10-1309 (West 2015); *supra* Section II.B.

225. CAL. PENAL CODE § 12022.85(a); UTAH CODE ANN. § 76-10-1309.

nia, the statute provides that if a person charged with prostitution has been previously convicted of that charge,

> [A]nd in connection with one or more of those convictions a blood test was administered pursuant to Section 1202.1 or 1202.6 [the mandatory testing provision] with positive test results, of which the defendant was informed, the previous conviction and positive blood test results, of which the defendant was informed, shall be charged in the accusatory pleading. If the previous conviction and informed test results are found to be true by the trier of fact or are admitted by the defendant, the defendant is guilty of a felony.[226]

Thus, the HIV testing results actually form part of the criminal charge against a person subsequently charged with prostitution and create a presumption of knowledge on the defendant's part, giving rise to a felony conviction.

In Utah, HIV positive defendants are eligible for a felony sentence enhancement if they commit prostitution, solicitation, or patronizing and have either actual knowledge of their status or have previously been convicted of prostitution, solicitation, or patronizing.[227] The state may assume that the person was informed of their status through mandatory testing after their first charge. In Nevada, regulated sex workers are required to undergo regular HIV tests by the Board of Health and are given routine notifications of their test results. In this state, even if you are not proven to have actual knowledge of your status, if you were given notice under the statutory scheme, you are deemed to have knowledge and can be charged with prostitution-while-HIV-positive. [228]

In all of the remaining states, there is no automatic upgrade to the prostitution-while-HIV-positive charge upon a second arrest.[229] However, of these eight remaining states, six provide for notice to the District Attorney, other prosecutorial agency, or arresting law enforcement agency when a mandatory test returns a positive result.[230] It is a safe assumption that the results are provided in order to facilitate an enhanced charge the next time the individual is arrested, or even in the instant case. In Colorado, the statute explicitly states that test results are revealed to the District Attorney who "shall keep the results of such . . . test strictly confidential" unless the results of such test indicate the presence of "the hu-

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226. CAL. PENAL CODE § 647(f).

227. UTAH CODE ANN. § 76-10-1309.

228. NEV. REV. STAT. § 201.538(1).

229. *See, e.g.*, COLO. REV. STAT. § 18-3-415.5; FLA. STAT. § 775.0877; GA. CODE ANN. § 16-5-60; KY. REV. STAT. ANN. § 529.090; MO. REV. STAT. § 567.020; OHIO REV. CODE ANN. § 2907.24; 18 PA. CONS. STAT. § 5902 (2016); S.C. CODE ANN. § 44-29-80; TENN. CODE ANN. § 39-13-521.

230. COLO. REV. STAT. § 18-3-415.5(2)–(3)(a); FLA. STAT. § 775.0877(2); KY. REV. STAT. ANN. § 529.090(1); NEV. REV. STAT. § 201.356(1)–(2); S.C. CODE ANN. § 44-29-80; TENN. CODE ANN. § 39-13-521(b)(2)(A)–(G).

man immunodeficiency virus (HIV) that causes acquired immune deficiency syndrome" and it is necessary for the purposes of "pleading and proving the mandatory sentencing provisions."[231]

While it is unclear whether, in California, one can be charged with the prostitution-while-HIV-positive crime upon a first arrest for prostitution, it is clear that this could happen in any other state, as long as knowledge of HIV status (where required) is proven. Mandatory testing and notice of the result is only one way to document that the individual had knowledge of their HIV status.

3. What Penalties Are Imposed?

Penalties for committing prostitution-while-HIV-positive vary from state to state, but they generally expand and exceed the penalties normally available for the underlying prostitution-related crime, and in most states they carry a felony-level charge.[232] In Kentucky, committing either prostitution or procuring a prostitute while HIV positive is a class D felony, which carries a possible penalty of five years.[233] In Missouri, the crime of prostitution is raised from a class B Misdemeanor to a class B Felony if the defendant has knowledge of his or her HIV status, raising the possible sentence of incarceration from a term not to exceed six months to between five and fifteen years.[234] In Nevada, prostitution-while-HIV-positive is a class B Felony with a minimum penalty of two years, a $10,000 fine, or both.[235]

Also, prostitution-while-HIV-positive is categorized under the prostitution statutes, as a degree of prostitution, in only four of the fifteen jurisdictions with prostitution-related HIV exposure crimes. These four are Missouri, Ohio, Pennsylvania, and Utah.[236] In the remaining nine jurisdictions, the HIV-exposure crime is separate from the prostitution statute.[237] This means that the defendant can be charged both with prostitution and with the HIV-exposure crime. For example, in South Carolina, the statute "Penalty for exposing others to Human Immunodeficiency Virus" imposes a felony charge on anyone who has sexual intercourse with another with knowledge of HIV status, including consensual private sexual activity, prostitution, and forced sexual intercourse, or rape.[238]

231. COLO. REV. STAT. § 18-3-415.5(2)–(3)(a).
232. *See* State Chart II, *supra* note 198.
233. KY. REV. STAT. §§ 532.060(2)(d), 529.090(3).
234. MO. REV. STAT. §§ 558.011(2),(6), 567.020(2).
235. NEV. REV. STAT. § 201.358(b).
236. *See* MO. REV. STAT. § 567.020; OHIO REV. CODE ANN. § 2907.24 (West 2015); 18 PA. CONS. STAT. § 5902 (2016); UTAH CODE ANN. § 76-10-1309 (West 2015).
237. *See, e.g.*, S.C. CODE ANN. § 44-29-145 (2016).
238. *Id.*

Thus, this crime can be charged alongside the underlying crime of prostitution, increasing the overall penalties possible for this individual.[239]

The 2007 case *People v. Hall*[240] illustrates how charges are compounded. Panchita Hall was approached by an undercover vice officer.[241] After negotiating a price and agreeing on services, the police officer signaled to another police officer to arrest Hall.[242] Hall testified at trial that she contracted HIV when she was raped in 1996.[243] Hall was charged with felony prostitution because she had a prior conviction for prostitution after having tested positive for HIV, and she was also charged with unlawful sex while infected with the HIV virus.[244] Hall was acquitted on the charge of unlawful sex while infected with HIV when the court determined that the State did not prove that Hall intended to infect the undercover office with HIV.[245] However, Hall was sentenced to three years in prison on the felony prostitution charge.[246] In addition, the trial court sentenced Hall to three additional years as term enhancements.[247] The appellate court affirmed the decision of the trial court.[248]

In addition to incarceration, additional penalties are suggested, or mandated, in some states. For example, in Colorado, the judge may, in sentencing someone for "prostitution with knowledge of being infected with acquired immune deficiency syndrome," order that such person submit to drug treatment or mental health treatment at their own expense, in addition to any sentence for probation or incarceration.[249] In Tennessee, those convicted of the prostitution-while-HIV-positive charge are required to register on the sex offender registry.[250]

CONCLUSION

There is no evidence to suggest that a carceral approach to sex work or to HIV transmission helps to address the HIV epidemic. Nor does a punitive approach address the needs of sex workers vulnerable to contracting HIV, protect the public health, or address the needs of sex workers living with HIV. Instead, it compounds criminal penalties on people charged with prostitution-related crimes and undermines HIV efforts.

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239. *See id.* § 44-29-145 (2014).
240. No. B190199, 2007 WL 2121912 (Cal. Ct. App. July 25, 2007).
241. *Id.* at *1.
242. *Id.*
243. *Id.* at *2.
244. *See id.* at *1.
245. *Id.* at *3.
246. *Id.*
247. *Id.*
248. *Id.* at *6.
249. COLO. REV. STAT. § 18-7-201.7(1), (3)(a)–(b) (2015).
250. *See* TENN. CODE ANN. §§ 39-13-516(a), 40-39-201(b)(5), 40-39-202(20)(A)(iii) (2016); Carol L. Galletly & Zita Lazzarini, *Charges for Criminal Exposure to HIV and Aggravated Prostitution Filed in the Nashville, Tennessee Prosecutorial Region 2000–2010*, 17 AIDS & BEHAV. 2624, 2625 (2013).

Rather than rely on a punitive approach, it is necessary to invest in strategies that actually promote HIV prevention and reduce HIV transmission among sex workers and their sexual partners, while promoting effective treatment and the human rights of sex workers living with HIV. Documented public health experiences demonstrate that, to date, the most effective strategy for increasing consistent condom use and reducing HIV risk among sex workers is community empowerment-based, peer-mediated HIV prevention programming.[251]

Despite this evidence, the possibility of creating comprehensive programs that address the needs of sex workers, and especially sex workers living with HIV, are not possible in our current legal system that primarily aims to prosecute and punish. Effectively curbing the spread of HIV, and ensuring that those living with HIV have adequate access to care and treatment, requires shifting away from criminal law responses to the epidemic.

251. *See, e.g.*, Andrea Wirtz et al., Johns Hopkins Bloomberg Sch. of Pub. Health, Epidemiology, Address at the XIX International AIDS Conference, Modeling the Impacts of a Comprehensive Community Empowerment-Based, HIV Prevention Intervention for Female Sex Workers in Generalized and Concentrated Epidemics: Infections Averted Among Sex Workers and Adults (July 26, 2012), http://pag.aids2012.org/Abstracts.aspx?AID=18831.

SYSTEMATIZING PUBLIC DEFENDER RATIONING

IRENE ORITSEWEYINMI JOE[†]

ABSTRACT

Under-resourced public defenders have little choice but to respond to overwhelming caseloads by prioritizing certain clients—picking which cases will receive comprehensive defense representation and which will not. This practice, termed "triage" given its similarities to medical care in emergency rooms and army battlefields, is a necessary part of current public defender practice. But how public defenders are deploying the practice is problematic and undermines the very goal public defenders seek to advance. More specifically, the common public defender triage strategy of focusing on a particular understanding of the Sixth Amendment's effective assistance of counsel mandate actually limits the ability of public defenders to provide effective assistance of counsel. This "perversity effect" of public defender triage practice has gone unnoticed in both the criminal procedure literature and the literature on the legal profession.

This Article puts this problem into sharp relief by examining four very different public defender attorney distribution schemes: DuPage County, Illinois; Orleans Parish, Louisiana; Santa Barbara County, California; and the Atlanta Judicial Circuit, Georgia. Across these disparate offices, I show how the public defender triage system's formalistic approach to right to counsel compromises the overall ability of public defenders to provide effective assistance of counsel. This Article uncovers the need for a more comprehensive approach to triage, and charges public defender institutions with making resource allocation decisions more effective by elevating them from the individual public defender to the institutional level.

† Binder Teaching Fellow, UCLA School of Law. Sincerest thanks to Ingrid Eagly, Barbara Fried, Joanna Schwartz, and Brandon Weiss for providing feedback on every draft of this Article from the initial uninformed idea to submission. Thanks to Darryl Brown, Devon Carbado, Beth Colgan, Scott Cummings, Luz Herrera, Gwendolyn Leachman, Richard Leo, Hiroshi Motomura, Margo Pollans, and Richard Re for extraordinarily helpful comments. The author appreciates the guidance of E. Tendayi Achiume, Chaz Arnett, R. Richard Banks, David Binder, Dorothy Brown, Guy-Uriel Charles, and Angel Harris. This Article benefited from suggestions during workshops at UCLA School of Law, Duke University School of Law, UC Irvine School of Law, and Loyola Law School Los Angeles. Thanks to the attorneys of Gideon's Promise for assistance identifying the subject offices.

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INTRODUCTION

Public defender Colleen Polak spends a typical workday running up and down a set of courthouse stairs—"in and out of four [different Missouri state] courtrooms."[1] Ms. Polak's physical exertion is necessary for her to simultaneously represent clients in ten different legal matters.[2] She works weekends in the hopes of providing each of her clients with effective defense representation, but she acknowledges that she makes difficult prioritization decisions that leave some clients without the attention they deserve.[3]

Public defender Ed Olexa's typical caseload for his Pennsylvania Public Defender Office results in a quadruple booking on one particular court morning.[4] This means he represents four clients who are scheduled

1. Erik Eckholm, *Public Defenders, Bolstered by a Work Analysis and Rulings, Push Back Against a Tide of Cases*, N.Y. TIMES, Feb. 19, 2014, at A10
2. *See id.*
3. *Id.*
4. John Rudolf, *Pennsylvania Public Defenders Rebel Against Crushing Caseloads*, HUFFINGTON POST (June 16, 2012, 11:18 AM), http://www.huffingtonpost.com/2012/05/30/pennsylvania-public-defenders_n_1556192.html. Olexa works for the Luzerne County Defenders Office, which is considered "one of the most troubled [public defender offices] in the state" of Pennsylvania. *Id.* His caseload of 120 clients at a time, most of whom face felony charges, is described as a typical caseload for the office in "a 2011 report commissioned by the Pennsylvania legislature." *Id.*

to appear at the same time before four different judges.[5] Not only does Olexa have to decide between enjoying an evening off the night before court or organizing his case files, but he also has to choose which of the four clients' matters he will prioritize when the court sessions begin in the morning.[6]

When the Supreme Court issued its opinion in *Gideon v. Wainwright*,[7] guaranteeing counsel for the nation's poor defendants, it could not possibly have foreseen that such difficult resource allocation decisions would become a permanent fixture in public defender offices throughout the nation.[8] At the time *Gideon* was decided, there were only about 150,000 defendants facing felony charges in need of representation.[9] In the fifty years that have passed since the decision was handed down, the number of individuals embroiled in the criminal justice system has ballooned to such a level that there are approximately 2.2 million people in prison, on probation, or on parole.[10] There has not been a similar increase in funding, so public defenders are constantly tasked with representing more individuals than their limited resources support. The prevalence of excessive caseloads supports the common understanding that this nation is suffering from an indigent defense crisis.[11] The public defender function, made up of the institutions and the public defenders themselves, was created to ensure fairness in the criminal justice system.[12] Insufficient resourcing, however, has created a public defender system that is commonly described as unfair, struggling, and even broken.[13] Public defender stakeholders wage a constant battle for resources and often find their cries unheard by state legislators.[14]

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5. *Id.*

6. *See id.* Olexa comments, "My choice last night was to watch 'American Idol' or get my files in order." *Id.*

7. 372 U.S. 335 (1963).

8. *See id.* at 335 (providing in the case syllabus that "Sixth Amendment to federal Constitution providing that in all criminal prosecutions the accused shall enjoy the right to assistance of counsel for his defense is made obligatory on the states by the Fourteenth Amendment, and that an indigent defendant in criminal prosecution in state court has right to have counsel appointed for him").

9. Heather Baxter, *Gideon's Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, 2010 MICH. ST. L. REV. 341, 349.

10. *See* Anthony Zurcher, *Report: US Prison Rates an 'Injustice,'* BBC NEWS: ECHO CHAMBERS (May 2, 2014), http://www.bbc.com/news/blogs-echochambers-27260073. In 1973 there were approximately 200,000 Americans in prison, and by the year 2009 there were about 1.5 million Americans in prison and approximately 750,000 more housed in local jails. *Id.*

11. *See, e.g.*, Linda Chiem, *Fla. High Court Says Public Defenders Can Shed Caseload*, LAW360 (May 23, 2013, 4:23 PM), http://www.law360.com/articles/444476/fla-high-court-says-public-defenders-can-shed-caseload; John P. Gross, *The Truth About How Public Defenders Handle Excessive Caseloads*, NAT'L ASS'N FOR PUB. DEF. (Jan. 22, 2015), http://publicdefenders.us/?q=node/673.

12. *See* Richard Klein, *The Role of Defense Counsel in Ensuring a Fair Justice System*, NAT'L ASS'N CRIM. DEF. LAW. (June, 2012), https://www.nacdl.org/champion.aspx?id=24996.

13. *See* NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 50–52 (2009) [hereinafter JUSTICE DENIED], http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf. Even the nation's former chief prosecutor, Attorney General Eric Holder, has commented on the system's failure to

Often forgotten in the justifiable movement for adequate resources is that public defenders and their institutions also wage a simultaneous battle in managing their responsibilities with the available resources. These defenders try to ease the burden of compliance by adopting resource distribution schemes that reflect what they deem are their most important obligations. The order of priority given to these obligations is critical because the resulting schemes determine whether limited resources are effective or not.[15] Decisions about which client matters are given attention first, which client matters are given attention at all, and everything in between are comparable to triage decisions that physicians use in emergency rooms or on army battlefields. Unlike in the medical field, however, individual public defender triage practice is not guided by a formal prioritization scheme.[16] Instead, individual public defenders, like Colleen Polak and Ed Olexa, as well as the public defender institutions that manage attorneys like them, process clients using primarily ad hoc decisions focused on complying with the Sixth Amendment mandate for effective assistance of counsel.[17] On its surface, this practice seems to be all that is required and necessary for indigent defense stakeholders. A closer look at the costs associated with such a single-minded focus for the distribution of limited resources reveals a very different reality.

As this Article demonstrates, despite their best intentions, the triage schemes that public defenders use to manage the burden of providing effective assistance of counsel, despite inadequate resourcing, compound the problems by creating an environment where arbitrary decisions and resource fatigue continue to limit access to the attorney resource. This point is particularly salient because public defenders handle the vast majority of criminal cases, as high as 80% in some jurisdictions.[18] The meaning of the Sixth Amendment lives or perishes at the fingertips of public defenders facing overwhelming caseloads with insufficient re-

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provide effective assistance of counsel. Eric Holder, Att'y Gen., Attorney General Eric Holder Speaks at the American Bar Association's National Summit on Indigent Defense (Feb. 4, 2012) (transcript available at http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120204.html) ("Across the country, public defender offices and other indigent defense providers are underfunded and understaffed. . . . [T]he basic rights guaranteed under Gideon have yet to be fully realized.").

14. *See, e.g.*, Jennifer Burnett, *Justice in Jeopardy: Budget Cuts Put State Public Defense Systems Under Stress*, CAPITOL IDEAS, July–Aug. 2010, at 16–17; Bill Rankin, *Georgia Legislative Proposals Could Gut Public Defender Reforms*, S. CTR. FOR HUM. RTS (Mar. 1, 2015), https://www.schr.org/resources/georgia_legislative_proposals_could_gut_public_defender_reforms.

15. Resource exhaustion is a serious concern for any organization saddled with limited resources.

16. L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2632–33 (2013).

17. *Id.* at 2631–33; John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1221–22 (1994).

18. *See, e.g.*, Editorial, *Federal Oversight on Public Defense*, N.Y. TIMES (Sept. 7, 2013), http://www.nytimes.com/2013/09/08/opinion/sunday/federal-oversight-on-public-defense.html (explaining that Orleans Public Defenders is responsible for 80% of the criminal cases in Orleans Parish).

sources. This Article provides new insight on the procedures these attorneys currently use to meet the constitutional and professional obligations of their practice.

Part I of this Article details the constitutional and professional rules public defenders and public defender administrators must abide by when managing their overwhelming caseload with insufficient resources. Part II discusses the individual and institutional responses to the inadequate resourcing plaguing public defender services. Part III provides concrete examples with an analysis of four different public defender institutions and the way each distributes its attorney expertise resource. Part IV provides an explanation of the consequences that result from the triage schemes the institutions use and identifies the institution with the most satisfying, albeit less than ideal, approach. This approach provides a bandage, rather than a panacea, for system funding decisions, but it remains a critical consideration for those seeking to improve the administration of public defender resources.

I. GUIDING COUNSEL IN UNDER-RESOURCED REGIMES

In *Gideon*, the Supreme Court reasoned that the Sixth Amendment guarantee of the effective assistance of counsel was fundamental and essential to a fair system of justice.[19] The Court noted that government agents use substantial resources to prosecute individuals and that our nation's "noble ideal[s]" of fairness could be achieved only if the state provides the "guiding hand of counsel at every step of the proceedings" to those defendants who cannot afford it.[20] In this real world of insufficient funding, however, public defender resources rarely keep pace with the resources dedicated to the government's prosecutorial function.[21] In the more than fifty years that have passed since the *Gideon* decision, many federal, state, and local governments have struggled with providing the quality of representation guaranteed under the Court's interpretation of the Sixth Amendment in *Gideon* and its resulting progeny. State fund-

19. Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963). The Court used its opinion in *Powell v. Alabama*, 287 U.S. 45 (1932), regarding the historical data of the right to counsel to support its finding. *Gideon*, 372 U.S. at 342–43, 345.

20. *Gideon*, 372 U.S. at 344–45 (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932)).

21. *See, e.g.*, ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 1, 3 (2002) [hereinafter ABA PRINCIPLES], http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf ("There [should be] parity between defense counsel and the prosecution with respect to resources . . . ."); THE SPANGENBERG GROUP, A COMPREHENSIVE REVIEW OF INDIGENT DEFENSE IN VIRGINIA 34 (2004), http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/va-report2004.pdf ("Average pay in the offices is $64,000 for [prosecutors] and $46,000 for assistant public defenders."); *see also* Lawrence Herman, *Gideon and the Golden Thread*, 99 IOWA L. REV. 2015, 2030 (2014) (advocating for creation of a State Department of Justice that would ensure parity between public defenders and prosecutors with regards to pay, staff services, and other tools necessary for investigation and representation); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 225–30 (2004) (arguing for resource parity).

ing decisions on the staff and resources necessary to ensure effective representation vary widely from state to state, and the general standard of practice for all poor persons facing criminal charges has failed to keep pace with the growing complexity and volume of criminal litigation in many jurisdictions.[22]

According to national guidelines, public defenders should only handle "150 felonies; 400 misdemeanors; 200 juvenile [delinquency matters]; 200 mental health cases; or 25 appeals" each calendar year.[23] In the nation's largest 100 counties, public defenders routinely handle an average of 530 cases annually, which can consist of cases exclusive to one genre or a mixed caseload.[24] This finding means that, on average, even if a defender works every single day without taking breaks for weekends or holidays, that defender cannot devote even one full day each year exclusively to each case on her docket.

Although larger counties are often the focus of national attention, the public defender crisis is no less dire in smaller counties. For example, individual public defenders in the fifty-seven New York counties outside New York City averaged 680 cases in the year 2013, more than 150% of

22. *See* Darryl K. Brown, *Epiphenomenal Indigent Defense*, 75 MO. L. REV. 907, 909–10 (2010). States have full authority to reduce already limited funds dedicated to indigent defense services through a variety of practices because there is minimal constitutional regulation. *See id.* at 908. States will often cover state budget shortfalls for other agencies by setting low hourly rates for attorneys who represent indigent clients, requiring attorneys to provide pro bono services to the poor, imposing fee caps on certain types of cases, reducing the amount available for expert assistance, or even redefining the criteria for qualifying for indigent defense services in order to reduce the amount of persons who are held to be in need of public defender services. *See id.* at 928–29. Change of party control or key committee leadership can also affect discretionary funding of public defender programs. *Id.* at 929. Indigent defense has been described as epiphenomenal because "it is [the] secondary effect of . . . political events and variations [in state funding], rather than a stable function of constitutional and statutory mandates that closely tie it to the criminal justice system's other components." *Id.* at 908. Until dependence on uncontrollable funding mechanisms changes, "indigent defense . . . will [always] have long periods of inadequate service [and] systemic crises that are [only] periodically interrupted by reform efforts . . . prompted by litigation or intervention . . . [by] state bar associations, [legislatures or] state judiciaries." *Id.* Brown's conclusion is that legislatures should establish some type of parity between the funds allocated to law enforcement, the prosecutorial function, and the probation or incarceration methods. *See id.* at 925–28. If his conclusion were adopted, indigent defense systems would be more stable and, as a result, more effective. Many of the resource issues plaguing indigent defense systems would also cease to exist.

23. JUSTICE DENIED, *supra* note 13, at 66. The National Advisory Commission on Criminal Justice Standards and Goals established these guidelines in a 1973 report. *Id.* As noted in the above reference, these caseload numbers are dated, the numbers "were never empirically based" and were intended "for a public defender's office and not necessarily for each individual attorney in that office." *Id.* (quoting NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, COURTS 43 (1973)). These numbers do remain the accepted guideposts for public defender practice. *See id.* at 66–67. The caseload limits ascribed have been adopted by the American Council of Chief Defenders, a section of the National Legal Aid and Defender Association that includes the heads of public defender programs throughout the United States. AM. COUNCIL OF CHIEF DEFS., AMERICAN COUNCIL OF CHIEF DEFENDERS STATEMENT ON CASELOADS AND WORKLOADS 3 (2007).

24. SCOTT WALLACE & DAVID CARROLL, NAT'L LEGAL AID & DEF. ASS'N, THE IMPLEMENTATION AND IMPACT OF INDIGENT DEFENSE STANDARDS 4–5 (2003).

the recommended limit for the highest caseload allowance.[25] Smaller counties, with numbers such as those in the New York studies, are included in systemic litigation efforts in order to convey to a statewide authority that public defense practice throughout a particular state fails to meet acceptable representation standards.[26] Because the Sixth Amendment only requires effective assistance of counsel, and not the optimal assistance of counsel that an attorney could provide to one client if the attorney had unlimited resources, litigation meant to increase funding for public defender systems has proven inconsistently successful.[27] Public defenders faced with these finite and limited resources must then limit the amount of effort and work they put into individual cases so they can accommodate the needs of their other clients. Both the individual attorneys and public defender institutional leadership make these decisions regarding resource rationing, focusing on the attorney's management of cases at the micro-level of client representation.

A. The Theory Guiding Public Defender Triage Practice

Legal scholarship has proposed solutions to the problems inherent in public defender triage practice by identifying principles for the scope of public defender representation and developing theoretical frameworks for individual attorneys to make triage decisions more fairly.[28] The avail-

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25. Michael Virtanen, *Report Details NY Indigent Defense Caseloads*, WASH. TIMES (Sept. 24, 2014), http://www.washingtontimes.com/news/2014/sep/24/report-details-ny-indigent-defense-caseloads/.

26. Press Release, N.Y. Civil Liberties Union, Settlement Begins Historic Reformation of Public Defense in New York State (Oct. 21, 2014) [hereinafter NYCLU Press Release], http://www.nyclu.org/news/settlement-begins-historic-reformation-of-public-defense-new-york-state (acknowledging that the five New York counties chosen for the class-action lawsuit, "Ontario, Onondaga (Syracuse), Schuyler, Suffolk and Washington[,] . . . were chosen because their public defen[der] systems" differ in the size of the communities they serve but were all emblematic of the problems with New York state's public defense mechanism).

27. *See* Rodger Citron, Note, *(Un)* Luckey v. Miller*: The Case for Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481, 486–87 (1991); Vidhya K. Reddy, *Indigent Defense Reform: The Role of Systemic Litigation in Operationalizing the Gideon Right to Counsel* 19 (Wash. Univ. Sch. of Law, Working Paper No. 1279185, 2008).

28. *See, e.g.*, Carol S. Steiker, *Gideon at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2700–01, 2704–10 (2013) (providing strategies for moving political actors who control monetary policies, the organization and administration of indigent defense services, and the substantive criminal law to allocate the resources and make the institutional changes necessary to fix failing systems). The institutional changes Steiker addresses concern training and oversight of public defenders and improving the norms associated with indigent defense practice. *See id.* at 2704–10; *see also* Jonathan A. Rapping, *National Crisis, National Neglect: Realizing Justice Through Transformative Change*, 13 U. PA. J. L. & SOC. CHANGE 331, 333 (2009–2010) (setting forth that "meaningful indigent defense reform" is only possible if system actors recruit and train "a new generation of public defenders [who are] equipped with the tools . . . to resist [the] pressures" of the existing inadequate culture of representation and are able to remain in the job long enough to become defender leaders); Robin G. Steinberg, *Beyond Lawyering: How Holistic Representation Makes for Good Policy, Better Lawyers, and More Satisfied Clients*, 30 N.Y.U. REV. L. & SOC. CHANGE 625, 627–28 (2006) (arguing that "holistic" representation, a client-centered and community-oriented approach to criminal defense, is an effective and critical solution for broken criminal justice systems). *See generally* John B. Mitchell, *In (Slightly Uncomfortable) Defense of "Triage" by Public Defenders*, 39 VAL. U.L. REV. 925 (2005) [hereinafter Mitchell, *Defense*]; John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215 (1994) [hereinafter Mitchell, *Redefining*] (provid-

able scholarship attempts to provide an ethical framework for individual public defenders to use when rationing resources.[29] The majority of this limited scholarship informs public defender systems about the most appropriate way for individual attorneys to conduct a triage practice, and a more limited amount has been written on the effect of triage on client rights.[30] There is even less scholarship available suggesting that public defenders must reject triage or risk providing unconstitutional and unprofessional representation to indigent persons.[31] Although this scholarship has enhanced the conversation about public defender triage, it fails to fully consider the role an institution assumes in effecting individual public defender triage decisions. Legal scholarship is mostly silent about the institutional design of public defender offices and how an administration's allocation of limited resources might contribute to the further reduction of those resources.[32]

Part of the difficulty with establishing particular triage schemes among clients is that such an activity so clearly calls into question the Sixth Amendment mandate to provide effective assistance to all clients. The very nature of choosing to provide one particular client resources to which that client is entitled at the expense of another client suggests that attorneys are failing to comply with professional and ethical requirements of competent and effective advocacy. Despite this problem, legal scholarship has set forth suggested protocol for public defender administrators and individual public defenders to consider.

One of the most comprehensive resource-rationing guidelines for public defenders identifies three types of individual client representation: (1) messenger representation—"merely convey[ing] [any plea offers] from the prosecution without any real analysis or counseling;" (2) pattern representation—"quickly categorizing cases legally, factually, strategically, and predictively by [finding] certain . . . recurring patterns" from previous cases; and (3) focus representation—pushing the rules and creating deeper narratives for a client's defense.[33] The support for this triage model arises from the claim that the Sixth Amendment permits pattern

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ing a theoretical framework for individual public defenders to use when rationing resources amongst clients with competing significant claims and arguing that public defenders should prioritize serious cases, followed by cases that implicate the system protection function of the criminal defense attorney, and finally cases to which the defender has a personal attraction).

29. For a focus on institutional behaviors, see Darryl K. Brown, *Defense Attorney Discretion to Ration Services and Shortchange Some Clients*, 42 BRANDEIS L.J. 207, 215 (2004) (proposing resource allocation rules that are guided by the twin principles of priority to factual innocence and a harm-reduction principle).

30. *See infra* notes 33–40 and accompanying text.

31. *See infra* notes 41–45 and accompanying text.

32. *See* Brown, *supra* note 29, at 213–14 (discussing institutional design in his article regarding rationing defense entitlements); *see also* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 895–906 (2009) (discussing institutional design from a prosecutorial view); *cf.* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 42 (2010).

33. Mitchell, *Redefining*, *supra* note 28, at 1292–93, 1302.

representation and, in some situations, messenger representation for an individual client and that the public defender's dilemma comes forth in choosing which clients or cases receive focused representation.[34] It concludes that priority should go first to cases that are deemed "serious" because of harsh and unjust punishments or collateral consequences, then to cases involving the defenders primary historical purpose of protecting the system and "making the screens work," and lastly, to cases that resonate with the individual defender for personal reasons.[35] Proponents of this triage scheme argue that the order of priority is reflective of both the historical purpose and current best use of the public defender function.[36]

Criticism of this proposed representation scheme focuses on the central truth that each client is entitled to effective representation and that the proposed scheme does little to prevent unfair bias from taking root in a defender's practice.[37] If every indigent person is entitled to the effective assistance of counsel, a public defender will find it difficult to properly and formally decide, at the outset of a case, which clients will receive the focused type of representation, without relying, to some extent, on unconscious bias.[38] In other words, formal triage schemes may help reduce public defender frustration and wholly deficient representation by helping public defenders feel like professionals, but they do little to reduce the potential for bias to affect arbitrary decisions and thus ren-

34. *See id.* at 1292–94, 1302.

35. *Id.* at 1288–90. Examples for this first category include clients who a defender believes are innocent or clients who are facing capital punishment. If the defender's limited resources allow, then the defender should take cases that inculpate the public defender's historical purpose because they involve suppression issues or state misconduct. The least priority for any remaining resources would go to cases that resonate with the individual public defender for personal reasons. *See id.* at 1302. These would include cases where the defender has formed an attachment with a client because the defender views the defense work as helping the client turn his or her life around.

Other forms of scholarship discuss the appropriateness of triage in terms of how resources can be distributed fairly. All ethical theories for justifying and guiding ethical choices of distribution fall under the single, large concept of distributive justice. Distributive justice differs from other justice aims by ensuring that people receive a "fair share" of the available goods. *See* JOHN RAWLS, A THEORY OF JUSTICE 259 (1971). Theories of distributive justice are concerned with how to fairly allocate scarce resources among individuals with competing needs or claims and how the total amount of goods to be distributed can be distributed in a manner that produces a just pattern. *See id.* at 265–67. Because any goods, and in fact primary goods, include basic liberties and opportunities, distributive justice principles are useful in finding solutions to the problems that plague under-resourced systems. Procedural justice focuses on the process in which goods are delivered, requiring that a fair process is used in deciding what is distributed. *See id.* at 84–86. Restorative justice, also known as corrective justice, focuses on returning something back to the way it should be. Retributive justice focuses on what constitutes a fair and proportional punishment. *See id.* at 313–14. This Article does not include a robust analysis of distributive justice theory or a discussion of the other forms of justice but does adopt the proposition that indigent defendants are entitled to a fair share of resources under the Sixth Amendment. This Article then focuses on how limited resources can be distributed more fairly.

36. Mitchell, *Redefining*, *supra* note 28, at 1220–22.

37. *See* Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U.L. REV. 911, 918–20 (2005).

38. *See id.* at 916.

der the process unfair for clients.[39] Whether a client appears innocent to a defender, or whether the defender believes the state engaged in misconduct against a client from a particular type of community, will depend heavily on that defender's perception of innocent behavior or unacceptable police conduct in certain environments.[40] These criticisms might be the reason no public defender office in the nation has formally adopted this resource-rationing scheme.[41] Formally adopting this sort of scheme may reduce the anxiety or stress that individual public defenders feel when having to make informal triage decisions on their own, but it also provides a clear case for review for any enterprising litigant looking to challenge his conviction or quality of representation.

Avoiding the inevitable influence of bias in prioritization decisions is the basis of another body of scholarship suggesting that public defenders should never engage in triage.[42] This scholarship suggests that public defenders should stop searching for acceptable strategies to provide clients with less than what they are constitutionally entitled to, and instead, inform the court when they are unable to provide counsel without incorporating triage decisions in their practice.[43] Monroe Freedman, a preeminent legal ethics scholar, set forth this analysis and conclusion in his article, *An Ethical Manifesto for Public Defenders*.[44] Although social science had not popularized the term "implicit bias" at the time of publication, Freedman draws on the formative literature by arguing a central problem of any triage scheme is that lawyers will make decisions about which clients will receive which level of representation through a lens that is affected by the lawyer's own background and preconceived notions.[45] Such behavior or actions would undermine the role of the public

39. Conversely, other scholars stress the need for defenders and defender leaders to refrain from ranking cases based on the perception of factual innocence. *See, e.g.*, Richardson & Goff, *supra* note 16, at 2644. "Given the limited time defenders have to prioritize cases, innocence determinations [could] only be speculative [guesses] based on inadequate information"—exactly the type of circumstances where implicit bias takes root. *Id.* These scholars argue that triage standards ought to be based instead upon criteria that are objectively measurable and not subject to interpretation. *See, e.g., id.* In other words, defender offices could "prioritize cases based on custody status, with in-custody clients being given priority." *Id.* Alternatively, cases could be prioritized randomly or based upon speedy trial deadlines. *Id.* Public defender institutions would then supplement these triage schemes with established accountability measures that would not rely on individual attorney subjective judgments and would drastically reduce the potential of implicit bias. *See id.* at 2645.

40. For community explanation see Grizzard, *The Dominant White Response to Baltimore Shows Why Black Residents are Justified in their Anger*, DAILY KOS (Apr. 28, 2015, 11:30 AM), http://www.dailykos.com/story/2015/04/28/1380944/-The-Dominant-White-Response-to-Baltimore-Shows-Why-Black-Residents-are-Justified-in-their-Anger; see also Jon Swaine, Oliver Laughland & Jamiles Lartey, *Black Americans Killed by Police Twice as Likely to be Unarmed as White People*, GUARDIAN (June 1, 2015, 8:38 AM), http://www.theguardian.com/us-news/2015/jun/01/black-americans-killed-by-police-analysis; and *The Counted: People Killed by Police in the US*, GUARDIAN, http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database (last visited Dec. 29, 2015) (interactive map).

41. *See* Richardson & Goff, *supra* note 16, at 2632.

42. *See, e.g.*, Freedman, *supra* note 37, at 914.

43. *See, e.g., id.* at 919–21.

44. *See id.*

45. *Id.* at 916.

defender in establishing a fair process for indigent persons charged with criminal offenses. Freedman suggests that public defenders instead use professional disciplinary rules to avoid any triage methods.[46]

Of most import to Freedman's analysis is the lawyer's duty to investigate a case. Freedman argues that if a lawyer is unable to fulfill his obligation to investigate a case or charge, then the lawyer is ethically required to reject the appointment.[47] If the lawyer is ordered to maintain representation by either his supervisor or the court, then the lawyer should notify the appropriate disciplinary board.[48] The lawyer should also put forth on the record his inability to give competent representation because of the conflict of interest inherent to an overwhelming caseload.[49] The lawyer should then go no further than to inform the client of any plea offers made by the prosecution, without advising the client whether to accept, fully explaining to the client the lawyer's limited involvement and detailing all the lawyer would have done should he have not been conflicted out of the representation.[50]

The scholarly insight to both engage in formal triage, and to refrain from triage by refusing to represent those clients that would require prioritization decisions by the defender, explore the micro-level triage decisions about every public defender's representation of their individual clients. The insight overlooks the central role of the administrative allocation of these limited resources. There are triage schemes that are better suited towards maintaining and supporting a fair distribution of limited resources because they focus on what injects or maintains fairness for the clients of a public defender institution.[51] Choosing certain clients to receive focused representation is unfair to those that receive only pattern or messenger representation, especially considering how easy it would be for unconscious bias to affect those decisions.[52] Refusing to represent

46. *See id.* at 918–21.

47. *See id.* at 919–21.

48. *Id.* at 921.

49. *Id.* at 921–22.

50. *See id.* at 922.

51. For suggested triage schemes that focus on a fair distribution of the limited resources, see Mitchell, *Redefining*, *supra* note 28, For another suggested triage scheme that would reduce the incidence of implicit bias, see Richardson & Goff, *supra* note 16,

52. *See* Mitchell, *Redefining*, *supra* note 28, at 1280–81; *see also* Michelle Maiese, *Distributive Justice*, BEYOND INTRACTABILITY (June 2013), http://www.beyondintractability.org/essay/distributive-justice. Defining the class that receives a particular resource can prove rather difficult. With regards to the resources of a public defender office, the class can be the attorney, the clients, the investigators, the social workers, or any other types of administrative or support staff. Even if one was to limit the class to the clients receiving representation, i.e. resources, from the public defender offices, such a classification may not be simplistic enough to evaluate distributive justice outcomes. In addition to the general class of all clients, clients can be further grouped based on a number of different factors including, but not limited to, (1) the number of charges the clients faces, (2) the type of charge the client faces, (3) if the client has a codefendant, (4) the severity of the potential punishments that the client faces, and (5) whether or not the client is a multiple offender and to what level of multiple offender status the client can be assigned. Many public defender offices place clients in class groups based on the com-

any client is also problematic in that it prevents those clients who would benefit from pattern or messenger representation from receiving even that little representation.[53] Also, with regards to either suggested solution, it is difficult for public defenders to know upon case assignment if their caseload is overwhelming or if they will need to engage in triage to manage a client's case. Often, the amount of work that is necessary for a particular case does not become evident until the case is complete, and public defenders and public defender institutions may overcorrect, at the outset, to the detriment of scores of clients who will have to wait for disposition of their cases.[54] The proposals in legal scholarship regarding triage practice fail to consider what should be the fundamental goals of public defender practice—providing effective assistance, preserving the limited resources where possible, and ensuring fairness in the criminal justice system for the nation's poor defendants. The constitutional and professional rules that govern public defender representation provide support for considering each of these fundamental goals.[55]

B. The Rules Governing Public Defender Triage Practice

Individual attorneys, and the public defender institutions that house many of them, do not have unbounded freedom to determine the methods and means of their triage practice. Rather, they must comply with a number of constitutional and professional rules that guide the standard of practice. Although the U.S. Constitution provides a basic framework, state constitutions provide the legal and structural definitions for the delivery of defense services for individual states.[56] The American Bar Association (ABA) provides context for these legal definitions by providing overarching standards to which indigent defense must ascribe.[57]

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plexity of each particular case. *See, e.g.*, ERNIE LEWIS & DAN GOYETTE, REPORT ON THE EVALUATION OF THE OFFICE OF THE ORLEANS PUBLIC DEFENDERS 27–28 (2012), http://lpdb.la.gov/Serving%20The%20Public/Reports/txtfiles/pdf/Report%20on%20the%20Evaluation%20of%20the%20Office%20of%20the%20Orleans%20Public%20Defenders.pdf. Different public defender offices, however, hold differing assessment of what levels of severity should be assigned to which class of cases. These public defender offices then assign more experienced attorneys to represent clients who have more complex cases. *See, e.g.*, *id.* For purposes of this Article, the class will be defined as the general class of "all clients" assigned to the individual public defender office. This definition is being used in order to avoid the differing penalty assessments a public defender office may give to the class of cases they receive.

53. *See* Mitchell, *Defense*, *supra* note 28, at 930.

54. It may seem better for the system to overcorrect for situations involving life and liberty such as a public defender representation, but the costs of continuing engagement for indigent defendants cannot be ignored. Missed time at work or with family and the stress of not having a resolution are difficult to measure but can have a profound effect on an individual's quality of life and can sometimes be avoided with pattern or messenger representation.

55. For a thorough discussion of the constitutional and professional obligations for public defender practice, see discussion *infra* Section I.B.

56. *See, e.g.*, 7 ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, GUIDE TO JUDICIARY POLICY: REPRESENTATION UNDER THE CJA § 210 (2015); ALA. CODE § 15-12-5 (2015); IOWA CODE § 815.9–11 (2015); LA. REV. STAT. ANN. § 15:147(A) (2013).

57. STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES § 5-1.1–5-1.6 (AM. BAR ASS'N 3rd ed. 1992).

1. Federal and State Constitutional Requirements

While *Gideon* may have secured the right to counsel for the nation's indigent defendants, it did not provide guidance for state or local governments to use in establishing, funding, or training the responsible attorneys. As a result, public defender services are provided in a variety of ways. Some states responded to *Gideon*'s mandate by leaving the issue up to the local courts, and these courts, in large part, fulfilled their task by coordinating with private attorneys on an ad hoc basis to serve indigent clients.[58] This type of system is commonly referred to as the "assigned counsel model."[59] Other states responded by creating statewide or local offices of public defenders.[60] The remaining states opted to contract with individual lawyers, legal partnerships, or nonprofit legal organizations under formal arrangements—usually a fee per case or lump fee for agreeing to assume responsibility for all cases.[61]

Regardless of the type of indigent defense system a state uses, there is always one particular individual, occupying a particular office, who is authorized to develop, oversee, and manage indigent defense services.[62] This person, or a similarly situated person, is responsible for keeping the service-delivery mechanism financed and advancing the agency's goals in an efficient and effective manner. This person will also dictate the distribution scheme for certain limited resources, whether it be financing, administrative assistance, or anything else associated with the representation of an indigent defendant.[63] In a widely decentralized court-appointed system, for example, state court judges control the funds used to finance indigent defense services.[64] Although the judges control the purse, someone within the court administrative office is usually responsible for overseeing the quality and type of attorneys assigned cases, managing the available funds, and providing the funding mechanism with reports about the needs and performance of the indigent defense delivery services.[65] This administrator will usually use some system, not necessarily previously determined, to decide which cases receive what type of resources and how much of the resources are dedicated to a particular function.[66] These decisions will also ordinarily be guided by statutory or constitu-

58. Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 32–33 (1995).

59. *See id.*

60. *Id.* at 36.

61. *Id.* at 34.

62. *See id.* at 33, 37–40.

63. *See id.*

64. *See id.* at 40–41.

65. Such reports and formal standards are required whenever services are financed through public funds. *See, e.g.*, Jessa DeSimone, Comment, *Bucking Conventional Wisdom: The Montana Public Defender Act*, 96 J. Crim. L. & Criminology 1479, 1505–07 (2006) (describing the fiscal reports and standards required under the Montana Public Defender Act).

66. *See id.* at 33.

tional authority but will also be subject to the professional and ethical rules adopted by a particular state.

2. Professional and Ethical Rules for Legal Practice

Federal and state constitutional rules only provide an outline, or minimal standard, for the adequate provision of services. It is up to the ABA and other professional organizations to provide context to the frame by detailing more specific requirements for the behavior and practice of their members. In 1983, the ABA adopted the Model Rules of Professional Conduct (Model Rules) which, although frequently amended, is the set of professional and ethical rules most used and adopted by state bar associations.[67]

Public defenders are required to follow the same professional and ethical standards promulgated by their governing state bar association as other attorneys. Thus, in any jurisdiction that is following the Model Rules, public defenders must comply with the preamble, setting forth that attorneys must be zealous advocates, and Rule 1.1, prescribing competence.[68] Competence is defined by the ABA as the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[69] These Model Rules are simply reflecting the historical understanding of the lawyer's role as a professional who is both retained but also a necessary representative for the individual.[70] Subsequent to *Gideon*, the Court cautioned that "if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and . . . judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts."[71]

The ABA's Providing Defense Services guidelines focus more specifically on defense representation.[72] It considers limiting outside control over the defender program its primary goal and orders defender programs to refrain from accepting workloads that interfere with rendering quality

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67. MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 1983); Jessica R. John, Note, *I Gotta Get Out of this Case: Withdrawal from Representation as a Public Defender*, 10 B.U. PUB. INT. L.J. 152, 155 (2000).

68. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 1983).

69. *Id.*

70. *See* ABA Comm'n on Advertising, *A Re-Examination of the ABA Model Rules of Professional Conduct Pertaining to Client Development in Light of Emerging Technologies*, ABA (July 1998), http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_ethics_in_lawyer_advertising/ethicswhitepaper.html (describing how changing technology affects legal marketing).

71. McMann v. Richardson, 397 U.S. 759, 771 (1970).

72. These guidelines were approved by the ABA House of Delegates in August 1990, published in 1992, and are considered the black letter law standards for criminal justice. For a description, see *Quick Guide to National Standards for Indigent Defense*, NAT'L LEGAL AID & DEFENDER ASS'N, http://nlada.net/library/articles/quick-guide-national-standards-indigent-defense (last visited Sept. 17, 2015).

legal representation.[73] These standards have not been adopted by any state regulatory agencies, so they are not clearly enforceable rules for public defender institutions to use as either a shield or sword in managing their caseloads.[74] Instead, these institutions must develop their own schemes for managing overwhelming caseloads fairly and effectively, and use the standards as persuasive authority. The manner in which public defenders practice triage, detailed in the following part, differs by jurisdiction.

II. PUBLIC DEFENDER APPROACHES TO TRIAGE PRACTICE

Because of the lack of resources, public defenders develop schemes for providing indigent defense that enable them to more closely comply with the constitutional, statutory, professional, and ethical rules placed on their practice. The nature of criminal defense representation is that a limitless amount of time and effort could hypothetically be dedicated to each individual case. An ideal criminal defense attorney would successfully seek out numerous opportunities to interview opposing witnesses, investigate the backgrounds of these witnesses and the area in which the charged offenses allegedly occurred, conduct extensive legal research, litigate every potential constitutional and statutory issue before the court, obtain substantial funds for expert witness testimony, thoroughly prepare the defense's own witnesses, and engage in extensive plea negotiations.[75] Attorneys would also have sufficient time to develop a relationship with each individual client so they could obtain important information from the clients to assist in the trial preparation, pretrial release, and plea-bargaining efforts.[76]

Given that legal resources are predominantly finite and limited, such an idealized version of public defender practice is unrealistic.[77]

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73. STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES § 5-5.3 (AM. BAR ASS'N 3rd ed. 1992).

74. *See* Spangenberg & Beeman, *supra* note 58, at 37–41. Strategic decisions regarding office organization are thought to have the potential to drastically change a consistently criticized criminal justice system into one that is more reflective of the values espoused by the 4th, 5th, 6th, and 14th Amendments. It is this fact that led the American Bar Association to include structural guidance in its *Ten Principles of Defense Delivery*. *See* ABA PRINCIPLES, *supra* note 21, at 2.

75. *See* Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 631 (1986); Richardson & Goff, *supra* note 16, at 2632.

76. *See* Todd A. Berger, *After* Frye *and* Lafler*: The Constitutional Right to Defense Counsel Who Plea Bargains*, 38 AM. J. TRIAL ADVOC. 121, 155–56 (2014). This type of client-involved representation has gained popularity under the moniker "client-centered" representation. *See* DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 17–18 (1991). Client-centered representation can best be summed up as having four requirements: "1) the duty of zealous and loyal representation [for the client]; (2) the duty to advocate for the client's [case]; (3) the duty to thoroughly study and prepare; and (4) the duty to communicate with the client. Jonathan A. Rapping, *You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL'Y REV. 161, 164 (2009).

77. The harsh reality is that resource constraints are a pervasive problem for all facets of the criminal justice system. Prosecutors, judges, and corrections officials also struggle with fulfilling

Even in resource-rich environments, dedicating resources, such as time and effort, to one client limits the amount of those resources available for another client. Thus, any legal representation, even for civil lawyers and private criminal defense attorneys, naturally involves a certain degree of targeted distribution.[78] For overwhelmed public defenders who have very little control over their caseloads or client allocations, this targeted distribution practice becomes something more akin to triage or rationing by which some clients receive very little, if any, defense representation so that others can receive an amount deemed sufficient to adequately handle their case.[79]

The lack of adequate funding leads to a dearth of available resources and public defender systems, where even the most committed and skilled of public defenders are faced with the difficult task of repre-

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their obligations despite insufficient resources. Even privately funded defense attorneys must prioritize the work they conduct on behalf of a client. These other system players differ from indigent defense providers in the solutions they have available to combat funding problems. Corrections officials often successfully petition for increased funding through support of "tough on crime" legislators. Private attorneys can choose whether to accept new clients or certain responsibilities for a particular client. Judges control their dockets and can decide how and when they expend effort towards their workload each day. Prosecutors exercise the most control in the criminal justice system because they decide how many cases are pending at a given moment. Prosecutors can also use different case acceptance schemes for limiting or reducing their caseloads. Prosecutors can employ one of six different charging policies or philosophies in exercising their duties: "(1) a transfer policy [where there is no screening of the facts alleged in a charging instrument and the case is simply prosecuted upon receiving information from the police]; (2) a unit policy [where individual assistant prosecutors make decisions on which cases go forward in a] highly decentralized [and independent manner]; (3) a legal sufficiency policy [where] (charges are [only] filed if the elements of a crime are [clearly] present [in the allegations]); (4) a system efficiency policy [where] (charges are filed if the elements . . . are present without any obvious problems, [this approach] emphasizes early dispositions and continuous docket movement); (5) trial sufficiency policy [where] (charges are only filed if conviction at trial is very likely); and (6) a defendant rehabilitation policy [where] (cases are prosecuted only if a defendant [is determined to be unsuitable] for rehabilitation or treatment. Mitchell, *Redefining*, *supra* note 28, at 1269 n.172 (5th, 10th, 12th, and 14th alterations in original). Differences in charging policies affect the rates of case acceptance or dismissal and the resulting overall caseload that a prosecutor is responsible for managing. *See id.*

78. There is a small but significant body of scholarship regarding triage in the civil poverty law context. *See, e.g.*, Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529 (1995) (describing "the shortcomings of legal work on behalf of the poor" resulting from large caseloads and inadequate resources); Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475 (1999) (suggesting ethical principles for screening potential clients); *see also* Marshall J. Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. REV. 281, 360–61 (1982).

79. *See, e.g.*, Mitchell, *Defense*, *supra* note 28, at 926; Mitchell, *Redefining*, *supra* note 28, at 1241–42. In the public defender realm, triage often involves lawyers who are "forced to spend their own money or to . . . ignor[e] some issues, lines of investigation, and defenses because of the lack of adequate compensation and resources." Stephen B. Bright, *Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty are at Stake*, 1997 ANN. SURV. AM. L. 783, 790. The medical community has three terms commonly used to refer to the distribution of medical resources to patients: (1) triage, (2) rationing, and (3) allocation. Kenneth V. Iserson & John C. Moskop, *Triage in Medicine, Part I: Concept, History, and Types*, 49 ANNALS EMERGENCY MED. 275, 275 (2007). Allocation is "the broadest of the 3" and "describes the distribution of both medical and nonmedical resources and does not necessarily imply that the resource being distributed is scarce" or cannot accomplish all of its required objectives. *Id.* Rationing "implies that the available resources are not sufficient to satisfy all needs or wants" and that "some system or method is being used to guide this distribution." *Id.* Triage "refer[s] to any decision about allocation of a scarce . . . resource." *Id.*

senting significantly more people than the available resources make entirely possible.[80] Individual public defenders and public defender administrators recognize that their exorbitant caseloads do not absolve them from using every tool at their disposal to advance a fair criminal process for their clients. State criminal courts in many overburdened systems closely mirror the chaos that is present on army battlefields.[81] The courtrooms are filled with people constantly streaming in or standing about, and the public defenders have an endless flow of cases and people to manage.[82] Public defenders use triage to make this chaos more manageable. The attorneys identify which cases or clients are most "deserving" of their attention and quickly obtain plea agreements or proceed to trial less than ideally prepared for the others.[83] This action frees or reserves the limited resources at the attorney's disposal for the case the attorney has prioritized. In other words, this public defender triage practice can deny certain clients core defense functions, such as factual investigation into guilt or innocence, in order to focus attention on the clients the individual public defender or the public defender office deems more of a priority. Triage occurs at both the individual and institutional levels, each with their own unique characteristics as described below. Individual public defenders and public defender institutions use a variety of factors to guide their triage practices, but they have yet to adopt a model that takes into account legal, resource-based, and bias-reducing requirements.

A. Individual Attorney Triage

Although triage has become an accepted policy and procedure in the medical community, there is currently "no systemic ethic or approach for guiding" triage in public defender practice.[84] Instead, individual public

80. Former Attorney General Eric Holder ascribed the deficiencies in public defenders to funding as well when he commented that the failure of the nation to fully realize the mandates under *Gideon* are due in large part to the reality that "[a]cross the country, public defender offices and other indigent defense providers are underfunded and understaffed." Holder, *supra* note 13.

81. *See* Mitchell, *Redefining*, *supra* note 28, at 1242.

82. Mitchell, *Redefining*, *supra* note 28, at 1240–41. Misdemeanor courts in Florida routinely process with a guilty plea "in three minutes or less." John R. Emshwiller & Gary Fields, *Justice is Swift as Petty Crimes Clog Courts*, WALL ST. J. (Nov. 30, 2014, 10:33 PM), http://www.wsj.com/articles/justice-is-swift-as-petty-crimes-clog-courts-1417404782. District court judges in Detroit have an average of "100 misdemeanor cases on [their] docket" each day, about "one every four minutes." *Id.* "In a Houston courtroom," defendants would approach the judge "in groups of . . . nine" to enter a plea and receive a sentence, some "in less than 30 seconds." *Id.*

83. Richardson & Goff, *supra* note 16, at 2632. Whether or not a client is more "deserving" depends primarily on the defender's personal assessment. *See* discussion *supra* Section I.B (discussing implicit bias in public defender triage); *see also* Mitchell, *Redefining*, *supra* note 28, at 1241.

84. Mitchell, *Redefining*, *supra* note 28, at 1247; Richardson & Goff, *supra* note 16, at 2632. Charts providing a continuum of triage scenarios and rules for administering medical attention are studied and learned by medical students and then followed by these students when they become licensed doctors. *See* Iserson & Moskop, *supra* note 79, at 276. Triage has become an accepted policy and procedure in the medical context when it comes to emergency caregiving and other environments deprived of abundant, or even adequate, resources. The presence of these policies and training demonstrate the amount of attention medical researchers have paid to discerning the best method of providing services as consistent with the Hippocratic Oath as possible when overwhelming need and limited resources render strict adherence to the Hippocratic Oath impossible. *See* Erich

defenders incorporate triage into their practice informally and, often, on an ad hoc basis.[85] The informal nature of this resource-rationing creates ethical and professional practice problems and undermines the historical purpose of the defense attorney. Individual public defenders like those identified in this Article's introduction, Polack and Olexa, engage in specific triage decisions whereby they focus their attention on particular clients at the expense of others. They have little choice but to do so when they are faced with multiple clients in need at the same time. These types of prioritization decisions are problematic because they do not consider all of the fundamental goals of the public defender and, thus, limit the fair process for the individual clients.

B. Institutional and Organizational Design

Public defender institutions customarily respond to overwhelming caseloads in one of three ways. A public defender office can decline any appointments that bring its caseloads up to a level that would render effective assistance of counsel impossible.[86] There has been some judicial and legislative support for this type of action in states where the public defenders office declined appointment of cases upon reaching a number the office considered untenable.[87] Such action, however, is usually met with opposition, or even outright rejection, by a court or funding authority.[88] For example, the Missouri Supreme Court recently held "that the [Missouri Public Defender] [C]ommission has the authority to declare [itself] unavailab[le]" for case appointment if caseloads are excessive.[89] Within three days of the court's opinion, the Missouri Association of

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H. Loewy, *Oaths for Physicians – Necessary Protection or Elaborate Hoax?*, 9 MEDGENMED 7, 7 (2007). Although the Hippocratic Oath is not a legal requirement, almost 98% of doctors swear to it or a similar code of professional and personal conduct when graduating from medical school. *See id.*; Robert D. Orr et al., *Use of the Hippocratic Oath: A Review of Twentieth Century Practice and a Content Analysis of Oaths Administered in Medical Schools in the U.S. and Canada in 1993*, 8 J. CLINICAL ETHICS 377, 379 (1997). Regardless of the specific title of the oath, it provides general and moral guidance for each graduate during his or her practice of medicine. *See* Loewy, *supra*. Although the Sixth Amendment cannot properly be considered a discretionary oath, the oaths medical students take upon graduation to preserve life whenever possible do place an ethical and moral mandate on their practice much like the guarantee of effective assistance of counsel places on public defenders.

85. Triage occurs when micro-allocation decisions are made about specific individuals on the direct representation or contact level. *See* Tremblay, *supra* note 78, at 2482. There is a large body of literature concerning the rationing of resources defined as triage, but the literature is primarily concerned with the healthcare industry.

86. *See* Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 501.

87. *See, e.g.*, Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES (Nov. 8, 2008), http://www.nytimes.com/2008/11/09/us/09defender.html?_r=0 (providing that public defender offices in seven states were refusing to accept new case appointments or suing to limit them).

88. *See id.*; *see also* Pub. Def., Eleventh Judicial Circuit of Fla. v. State, 115 So.3d 261, 264–65 (Fla. 2013).

89. David Carroll, *MO Supreme Court Rules that Public Defense Commission Can Decline Cases*, SIXTH AMEND. CTR. (Aug. 7, 2012), http://sixthamendment.org/mo-supreme-court-rules-that-public-defense-commission-can-decline-cases/.

Prosecuting Attorneys responded with a press statement declaring that the public defender system is not in a caseload crisis, using a U.S. Department of Justice report as support for its assertion that the court's decisions were erroneous.[90]

"A second approach [public] defender [institutions can use when faced with overwhelming caseloads] is to bring a civil rights action alleging that, due to excessive caseload[s]," the program cannot provide effective assistance of counsel.[91] Despite the prevalence of complaints about public defender institutions, few public defender institutions have exercised this option.[92] Although the last fifteen years have witnessed massive institutional change to correct system-wide public defender deficiencies, very few have been the result of civil rights litigation. Since the year 2000, twelve states have enacted new legislation governing the provision of indigent defense services: "North Carolina in 2000; Oregon and Texas in 2001; Georgia in 2003; Virginia in 2004; Montana, North Dakota, and South Carolina in 2005; . . . Louisiana in 2007;" Alabama in 2011; and New Mexico and Michigan in 2013.[93] Ten of the twelve states experienced new legislation that established a statewide commission agency, headed by either a state public defender or state director with authority over all indigent defense services in the state.[94] The remaining two, Georgia and Texas, enacted statutes that created commissions with

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90. *See* Mo. Ass'n of Prosecuting Att'ys, Statement of MAPA President Bob McCulloch in Response to Supreme Court of Missouri Opinion in Public Defender Case (Aug. 3, 2012), http://sixthamendment.org/wp-content/uploads/2012/08/MAPA-Response-to-Public-Defender-Caseload-Decision.pdf; *see generally* State ex. rel. Mo. Pub. Def. Comm'n v. Waters, 370 S.W.3d 592 (Mo. 2012).

91. Mounts, *supra* note 86, at 502.

92. *See id.* at 502–03; *see, e.g.*, NYCLU Press Release, *supra* note 26 (describing New York litigation); discussion *infra* notes 96, 128 (describing Georgia litigation).

93. Norman Lefstein, *The Movement Towards Indigent Defense Reform: Louisiana and Other States*, 9 LOY. J. PUB. INT. L. 125, 126 (2008) (footnotes omitted); *see also* David Carroll, *A Birds-Eye View of Independent Commissions in the 50 States*, SIXTH AMEND. CTR. (Apr. 9, 2013) [hereinafter Carroll, *50 States*], http://sixthamendment.org/a-birds-eye-view-of-independent-commissions-in-the-50-states/; David Carroll, *Alabama Reforms Spark Expanded Use of Public Defender Model*, SIXTH AMEND. CTR. (Feb. 22, 2013), http://sixthamendment.org/alabama-reforms-spark-expanded-use-of-public-defender-model/; David Carroll, *Michigan Passes Public Defense Reform Legislation*, SIXTH AMEND. CTR. (June 19, 2013), http://sixthamendment.org/michigan-passes-public-defense-reform-legislation/. "Prior to [the year] 2000, twenty-eight states [had] enacted legislation that established . . . [a] statewide entity responsib[le] for [governing or providing] indigent defense services." Lefstein, *supra*, at 125. Five of these states enacted their legislation in the 1990s: "Arkansas, Louisiana, Nebraska, Oklahoma and South Carolina." *Id.* at 125 & n.3. Alaska, Connecticut, Hawaii, Indiana, Iowa, Kansas, Kentucky, Nevada, Maryland, Massachusetts, Minnesota, Missouri, New Hampshire, New Mexico, Ohio, Wisconsin, Wyoming, West Virginia, and Vermont enacted their legislation in the 1970s and 1980s. *Id.* at 125 & n.4. The remaining twenty-two states had a state appellate commission or agency with authority over indigent defense services "or, in some cases, no statewide structure . . . [for] indigent defense." *Id.* at 126. Eight of the twenty-eight states with indigent defense legislation enacted before the year 2000 had state commissions or boards that exercised "only partial authority over indigent defense services." *Id.* The entity created by legislation in the remaining twenty states had full authority over the provision of indigent defense services in the state and all but one of these state indigent defender systems "was headed by a [single] staff person with the title of state public defender." *Id.* For additional state information, see Carroll, *50 States*, supra.

94. *See* Carroll, *50 States*, *supra* note 93.

only partial authority over indigent defense services.[95] This renewed effort to improve criminal defense services for the poor in these states can be attributed to a number of different instigators, but in large part, studies on the shortcomings of each state's indigent defense system and litigation, or the threat of litigation, caused legislatures to recognize that the systems in their jurisdictions needed thorough and extensive reform.[96]

Some public defender offices use a third approach to overwhelming caseloads, which is "more [aptly] described as a nonresponse."[97] This approach to exorbitant caseloads is simply "making do," and "depend[s] on [S]ixth [A]mendment challenges on appeal or collateral relief . . . to remedy any specific instances of ineffective representation."[98] It is this third response that is the focus of this Article. Academics develop standards and guidelines for providing effective assistance of counsel, despite the prevalence of extraordinarily high caseloads.[99] Practitioners develop personal guidelines for managing caseloads and will sometimes document the actions or resources that are missing from their representation to aid their clients in any resulting appellate briefs.[100] These responses prove disappointing, however, because of the difficulty in prevailing on

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95. *Id.*

96. For example, the state of Georgia's most recent reform efforts can be traced to a 1988 Eleventh Circuit decision in *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988). At the time of the litigation in *Luckey*, Georgia used a county-based system of indigent defense. *See id.* at 1013. In *Luckey*, the Eleventh Circuit recognized that the *Strickland-Cronic* standard for reversal of individual conviction was "inappropriate for a civil suit seeking prospective relief" because the Sixth Amendment protects rights that are not necessarily conveyed through the outcome of a particular trial. *Id.* at 1017. The appellate court held that the appropriate standard was to look at "the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law." *Id.* (quoting *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)). The Eleventh Circuit declined to exercise its equitable jurisdiction to hear the case on the grounds of *Young* abstention, which prevents federal courts from issuing rulings that would interfere with ongoing state criminal prosecutions, but the portion of the ruling concerning prospective relief led to a wave of injunction-centered Section 1983 civil class action suits. *Id.* at 1015–16.

These suits, which arose in a number of states including Georgia, Montana, and Louisiana, sought broad reform of state and local indigence systems alleging that indigent defendants were denied constitutionally guaranteed counsel because of a number of deficiencies like excessive caseloads, lack of resources and support staff, inadequate facilities, and lack of standards and oversight. None of these lawsuits resulted in a detailed injunctive order by a court, but they did assist in moving states down the road towards reform. For example, the 1999 Consent Order issued with Fulton County, GA, encouraged threats of other lawsuits in Georgia. Reddy, *supra* note 27, at 21. In 2003, the Georgia State Legislature responded in part to legislative efforts by passing the Georgia Indigent Defense Act. *Id.* at 21–22. Similarly, *White v. Governor Martz*, was filed in 2002 asserting a claim against Montana's indigent defense system. No. CDV 02-133, 2002 Mont. Dist. LEXIS 1897, at *2 (1st Jud. Dist. Ct. of Mont. Dec. 3, 2002). The American Civil Liberties Union agreed to postpone the lawsuit until the state of Montana could pursue a legislative solution. *See* Reddy, *supra* note 27, at 49. The suit was withdrawn when the state passed the Montana Public Defender Act in 2005. *Id.*

97. Mounts, *supra* note 86, at 502.

98. *Id.* Public defenders use a variation to the nonresponse option by making an affirmative record in a systematic fashion of each individual case where ineffective representation has occurred. *Id.*

99. *See* discussion *supra* Section I.A.

100. *See* discussion *supra* Section II.A.

Sixth Amendment claims. These responses have resulted in little systemic, long-lasting relief.[101]

1. Limiting the Public Defender Responsibility

Some of the public defender offices that use a making do approach to insufficient resources have either semi-formally or formally incorporated triage principles into their institutional organization and design. The historical focus on institutional design triage for public defender offices has been on either limiting the types of cases an office will accept responsibility for or restricting the degree of representation by individual attorneys. These solutions have proven ineffective for a number of reasons. First and foremost, funding allocations closely follow the decisions that public defender administrators make, limiting the extent of their responsibility.[102] An indigent defendant is still entitled to state-funded representation, even when an institutional defender office declines to assume responsibility for that client's case.[103] The state must still pay for that client's representation, whether or not the client receives representation from a local nonprofit or a private attorney selected by the courts. Payment for this representation will come from the funds allocated to the indigent defense function.[104] Thus, declining to represent certain types of cases or charged offenses does little to reduce the strain on the limited

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101. *See* EMILY M. WEST, INNOCENCE PROJECT, COURT FINDINGS OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN POST-CONVICTION APPEALS AMONG THE FIRST 255 DNA EXONERATION CASES 1 (2010), http://www.innocenceproject.org/files/Innocence_Project_IAC_Report.pdf. This 2010 report examines the role of ineffective assistance of counsel claims in the first 255 people exonerated through DNA evidence. *Id.* at 3. There are now 334 exonerated persons, but the report does not include an analysis of the 79 people exonerated since the report was commissioned. *See The Cases: DNA Exoneree Profiles*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases-false-imprisonment (last visited Jan. 1, 2016). Of these first 255 DNA exonerations, 54 raised ineffective assistance of counsel claims (about 1 in 5). WEST, *supra*, at 3. Approximately 81% of these ineffective assistance of counsel claims were rejected. *Id.* Only 7 of the 54 who raised such claims had their ineffective assistance of counsel claims granted (6 had convictions reversed and 1 received new counsel). *Id.* In 3 of the remaining 51, the reviewing court found that the performance was deficient but not prejudicial or remanded the case to lower courts for further review. *Id.* There has been great variation in the substance of the ineffective assistance of counsel claims brought by these exonerated persons, but the most common claim asserted in the appellate briefings was failure to present defense witnesses, failure to have some type of expert testing done, failure to object to prosecutor's evidence, and failure to interview witness in preparation for trial or cross examine witnesses. *Id.* at 4.

102. *See* HOLLY R. STEVENS ET AL., THE SPANGENBERG PROJECT, STATE, COUNTY AND LOCAL EXPENDITURES FOR INDIGENT DEFENSE SERVICES FISCAL YEAR 2008 5 (2010), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fy08.authcheckdam.pdf.

103. There is an argument amongst the attorneys that constitute the public defense bar that a client cannot ever permanently waive his right to state funded counsel. *See, e.g.*, Jack Healy, *Utah Court Strips Criminal of Right to Counsel, and Some Lawyers Object*, N.Y. TIMES, Jan. 29, 2015, at A18.

104. The state has an obligation to provide counsel to indigent defendants risking incarceration with few exceptions. Each state has the freedom to decide how it will dispense the funds allotted to fulfill that obligation but they must still fulfill the mandate. There has been concern about how states fund certain methods. *See* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS 9 (2013), https://www.nacdl.org/reports/gideonat50/rationingjustice/.

resources. It simply encourages the funding authority to reallocate the funds deemed necessary for representation of those cases or charged offenses from the public defender organization to the newly obligated mode of representation.[105]

For example, some offices, such as the Orleans Public Defenders in New Orleans, Louisiana, respond to limited funding by declining to handle juvenile cases and farming that responsibility out to a regional nonprofit.[106] This differs from other public defender offices in the same state, such as the Baton Rouge Public Defenders Office in Baton Rouge, Louisiana, which handles both adult and juvenile cases.[107] As a consequence, the state funding authority distributes the funds deemed necessary for juvenile representation to the organizations that assumed responsibility for juvenile representation, whether it was the nonprofit in the case of Orleans or the Baton Rouge Public Defender Office example.[108] Declining to represent certain types of cases in response to insufficient funding actually proves an ineffective solution to triage needs because the public defender institution loses the funding that would ordinarily be dedicated to that legal responsibility.[109] Shrinking the pool of available resources

105. *Cf.* Stephen J. Schulhofer & David D. Friedman, *Reforming Indigent Defense: How Free Market Principles Can Help to Fix a Broken System*, POL'Y ANALYSIS, Sept. 1, 2010, at 11–13 (suggesting that states provide various options for fulfilling its mandate to provide counsel to the nation's poor defendants).

106. LEWIS & GOYETTE, *supra* note 52, at 3, 6.

107. LA. PUB. DEF. BD., LPDB 2014 ANNUAL BOARD REPORT 382 (2015), http://lpdb.la.gov/Serving%20The%20Public/Reports/txtfiles/pdf/2014%20LPDB%20Annual%20Report.pdf; *About Us*, EAST BATON ROUGE OFF. PUB. DEFENDER, http://www.ebrpublicdefender.org/contact/ (last visited Jan. 1, 2016).

108. *See id.* at 19, 52–53. The same analysis holds true for capital cases. Until the year 2013, the Orleans Public Defenders also declined to assume responsibility for representing indigent people charged with capital offenses. *See* LEWIS & GOYETTE, *supra* note 52, at 6. Capital cases that arose in the parish were handled by a statewide nonprofit organization. *Id.* The Baton Rouge Public Defenders did assume responsibility for capital cases and the difference in funding amounts reflected that as the capital funds were taken from a different pot of money. It is true that both juvenile and capital cases require specialized skills. Recent Supreme Court case law has used newly available research on adolescent development to require additional responsibilities of both lawyers and courts dealing with juveniles facing certain adult charges. *See, e.g.*, Michael Barbee, Comment, *Juveniles Are Different: Juvenile Life Without Parole After* Graham v. Florida, 81 MISS. L.J. 299, 317 (2011). Supreme Court jurisprudence underscores the claim that "death is different." *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 188 (1976) ("[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice."); Furman v. Georgia, 408 U.S. 238, 286–87 (1972) (Brennan, J., concurring) (explaining that the death penalty is a "unique punishment in the United States"). The American Bar Association has also issued death penalty guidelines requiring defense attorneys to possess a certain level of experience or ability in order to assume responsibility for a death penalty case. *See generally* ABA, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003). Individual states may also adopt their own more guidelines. *See, e.g.*, State Bar of Tex., *Guidelines and Standards for Texas Capital Counsel*, 69 TEX. B.J. 966 (2006). These national and state-specific standards are such that newer public defender offices may not have any attorneys with the necessary skill to handle those types of cases.

109. The LPDB Annual Board Report provides the funding information for the 42 separate public defender districts in Louisiana. *See* LA. PUB. DEF. BD., *supra* note 107, at 19, 52–53. The allocation of funds to each district differs by the responsibilities for which each district assumes responsibility.

the institution can draw from to meet its constitutional and professional obligations only makes compliance harder.

There has been an increased call for public defender offices to focus their limited resources on one particular class of cases as a means of effectively dealing with insufficient resources.[110] These various triage suggestions usually encourage public defender administrators to focus their limited resources on felony charges, usually capital cases, or on those clients who are likely innocent, at the expense of misdemeanor charges.[111] There is "a small but vibrant literature" suggesting the opposite as a means to "crash the system" or call attention to the unfairness of mass incarceration and inadequate funding by encouraging every indigent defendant to challenge the charges against them to the fullest extent possible.[112] The same problem presents itself for offices that might choose either of these methods as triage schemes to improve the quality of their practice. Every indigent person, whether facing misdemeanor or felony charges, is entitled to state- or local-funded representation, and the public defender funding authority will undoubtedly distribute the resources in the manner it sees fit to the organizations or entities that assume responsibility for these excluded cases.[113]

2. Retracting the Scope of Representation

There are also significant drawbacks to limiting the scope of defense representation as a method of triaging cases. Best practices encourage a more comprehensive legal practice than those that limit the representation to a certain level or quality.[114] Shifting to a model of representation that is incompatible with the model deemed best for the client implicates a public defender's constitutional and professional obligations. For example, some offices make triage decisions about whether they will

110. *See* Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 808 (2004) [hereinafter Brown, *Rationing*]; Brown, *supra* note 29, at 207–08.

111. *See* Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 467 (2007) (arguing that counsel in misdemeanor cases do not provide as significant of a benefit to their clients as counsel in felony cases and that state should reduce counsel appointment in misdemeanor cases to save available resources for felony cases).

112. Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1096–97 (2013). Critics have responded to this and similar proposals by claiming they are unrealistic and tantamount to trading the best interests of both the clients facing felony charges and those facing misdemeanors for the hope of system reform. *See id.* Not only would felony clients not receive any assistance but also some misdemeanor clients would be better served through a quick guilty plea. *See id.*

113. The Louisiana Public Defender Board, the statewide regulatory agency for indigent defense in the state of Louisiana, has promulgated a Restriction of Services Protocol that outlines how public defender institutions facing limited resources should reduce their responsibilities. *See, e.g.*, Press Release, La. Pub. Def. Bd., Calcasieu Parish Implements Service Restriction, http://lpdb.la.gov/Serving%20The%20Public/Media/txtfiles/pdf/Recent%20Media/July%2027%2012%20-Calcasieu%20PDO%20Restricts%20Services.pdf (last visited Jan. 1, 2016) (identifying the withdrawal from 400 felony cases as the least harmful to the continuation of public defender services within the jurisdiction).

114. For a discussion of holistic advocacy and vertical representation, see, *infra* Section II.B.2.

be a holistic office, which means looking beyond the criminal charge to other challenges a client faces that may affect their quality of life or chances of reoffending, or whether they will be an office that only focuses on the criminal charge at hand.[115] The Bronx Defenders in New York is perhaps the most well known example of a holistic public defender office.[116] The "innovative, holistic, and client-centered" advocacy that the Bronx Defenders practice includes criminal defense services, civil legal services, social work support, and immigration advocacy.[117] Other offices in New York operate under different parameters, choosing to focus their efforts on the criminal charge directly affecting the client.[118] Holistic representation is certainly more expensive and many offices limit their representation to the criminal charge at hand in acknowledgment of their limited resources.[119]

Holistic representation, however, is gaining awareness and popularity as an effective, albeit costly, solution to the troublesome growth of the criminal justice system.[120] Mass incarceration has become a source of constant news attention as both legislators and citizens become aware that the cost of incarceration is both financially and morally untenable.[121] Communities are decimated by the lack of stable parenting available

115. Orleans Public Defenders trains and requires their attorneys representation in a holistic manner. *See Our Work*, ORLEANS PUB. DEFENDERS (May 22, 2015), http://www.opdla.org/what-we-do/our-work. Their client-centered advocacy model includes a client services coordinator as well as community partners to assist in improving client's life experience. *See id.* The Baton Rouge office limits their practice to the criminal charge and any issues that relate specifically to the criminal charge. The costs of operation at both offices differ drastically but are not clearly divided among funds dedicated to the criminal charge and those dedicated to the more expansive client-centered advocacy.

116. *See generally* DAVID FEIGE, INDEFENSIBLE: ONE LAWYER'S JOURNEY INTO THE INFERNO OF AMERICAN JUSTICE (2006) (describing the first few years of his employment with the Bronx Defenders in New York).

117. *Our Mission and Story*, BRONX DEFENDERS, http://www.bronxdefenders.org/who-we-are/ (last visited Sept. 18, 2015).

118. Any of the five counties cited in the recent ACLU lawsuit regarding the state of New York indigent defense could be examples of public defender offices that do not practice holistic advocacy. *See* NYCLU Press Release, *supra* note 26.

119. Holistic advocacy has expanded in the last decade. For an example of another innovative public defender office that practices holistically. *See Our Vision and Mission*, NEIGHBORHOOD DEFENDER SERV. HARLEM, http://www.ndsny.org/index.php/about-us/our-vision-and-mission/ (last visited Sept. 18, 2015). The director of the office, Robin Steinberg, travels to educate other public defenders on the benefits of holistic advocacy and provide guidelines for implementing holistic advocacy in their individual jurisdictions. *See Robin Steinberg*, BRONX DEFENDERS, http://www.bronxdefenders.org/staff/robin-steinberg/ (last visited Jan. 1, 2016).

120. *See* Robin Steinberg, *Heeding Gideon's Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961, 963 (2013).

121. *See, e.g.*, Editorial, *End Mass Incarceration Now*, N.Y. TIMES, May 25, 2014, at SR10; Adam Gopnik, *The Caging of America: Why Do We Lock up So Many People?*, NEW YORKER (Jan. 30, 2012), http://www.newyorker.com/magazine/2012/01/30/the-caging-of-america; Elizabeth Gudrais, *The Prison Problem*, HARV. MAG. (Mar.-Apr. 2013), http://harvardmagazine.com/2013/03/the-prison-problem; Chris Hedges, *Why Mass Incarceration Defines Us as a Society*, SMITHSONIAN MAG. (Dec. 2012), http://www.smithsonianmag.com/people-places/why-mass-incarceration-defines-us-as-a-society-135793245/.

because of incarceration.[122] Children often find themselves subject to the welfare or delinquency system because a parent is absent due to recurring, or a significant length of, incarceration.[123] Any public defender office that declines to practice holistically in order to manage limited resources may find itself expending more resources in the long term as it deals with both reoffending clients and the children who may follow in their parents' footsteps.[124] Additionally, even if an offender's child does not require indigent criminal defense services in the future, a broken home may require more state support in other noncriminal justice related areas, such as housing, unemployment, or medical care.[125] All of these methods of state-supported care further reduce state budget amounts available for resourcing indigent defense.

The ABA has also encouraged holistic advocacy as a model of representation for effective public defense delivery systems.[126] The ABA holds the primary responsibility for establishing the legal profession's ethical standards.[127] Declining to practice holistically may help an office and its attorneys more easily provide the cursory or surface-level representation that is facially required to pass constitutional muster, but it will make it fall short in meeting any other description of defense advocacy that includes collateral circumstances and community improvement. Nonholistic advocacy also calls into question whether or not a defender office is complying with the ABA's requirements for effective and competent advocacy.[128]

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122. *See* Robin Steinberg, *Addressing Racial Disparity in the Criminal Justice System Through Holistic Defense*, CHAMPION, July 2013, at 51.

123. *See* Katy Reckdahl, *Mass Incarceration's Collateral Damage: The Children Left Behind*, NATION (Dec. 16, 2014), http://www.thenation.com/article/mass-incarcerations-collateral-damage-children-left-behind/.

124. Participatory defense, defense representation that includes input and effort by family members and communities, has grown in popularity because of the role it may play in reducing recidivism. Janet Moore et al., *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1281–83 (2014–2015).

125. *See* Reckdahl, *supra* note 123.

126. Holistic advocacy has become a frequent part of ABA publications and conference seminars. *See, e.g.*, *Four Pillars of Holistic Defense*, CTR. FOR HOLISTIC DEF., http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/FourPillars_HolisticDefense.authcheckdam.pdf (last visited Sept. 6, 2015); Am. Bar Ass'n Standing Comm. on Pro Bono & Pub. Serv. et al., *Request for Proposals*, ABA, http://www.americanbar.org/content/dam/aba/events/legal_services/2014/04/equal-justice-conference/2015_rfp_guidelines.authcheckdam.pdf (last visited Sept. 6, 2015); Dan Wiessner, *Reuters Legal: ABA Urges Criminal Defense Lawyers to Embrace Holistic Approach*, BRONX DEFENDERS (Aug. 7, 2012), http://www.bronxdefenders.org/bxd-in-the-news-aba-urges-criminal-defense-lawyers-to-embrace-holistic-approach-reuters-legal/.

127. *See Center for Professional Responsibility*, ABA, http://www.americanbar.org/groups/professional_responsibility.html (last visited Jan. 2, 2016).

128. Some judicial districts have implemented solutions to the excessive caseload problems that make the criminal justice system unfair for poor defendants that have proven just as startling as the caseload averages. Courts in Mississippi and Georgia, for example, have recently faced significant media attention for incorporating solutions that are not consistent with the Sixth Amendment's mandate for effective assistance of counsel. *See* Campbell Robertson, *In a Mississippi Jail, Convictions and Counsel Appear Optional*, N.Y. TIMES, Sept. 25, 2014, at A15; Bill Rankin, *Lawsuit Tar-*

The same can be used for public defender institutions that respond to insufficient resources by practicing horizontal representation, as opposed to vertical representation. In horizontal representation, also referred to as "stage" representation, defenders are assigned to courtrooms rather than cases, and the attorney in a particular courtroom is responsible for any matters appearing in court on that day.[129] Some offices incorporate horizontal representation by limiting each defender to one stage of the proceeding, having "defender[s] . . . handle only one particular function, such as interviewing [a client or conducting a bail] or preliminary hearings."[130] In an office that practices horizontal representation, a client will have contact with a minimum of two attorneys and can often receive representation by up to a half a dozen, or more, attorneys during the course of the criminal case.[131] Vertical representation differs from horizontal representation in that the client is represented by the same attorney throughout the entire criminal case, sometimes even on appeal.[132]

Horizontal representation is common in public defender jurisdictions, but vertical representation is more beneficial to an individual client. The continuity in representation that is a hallmark of vertical representation allows the client and attorney to build trust and openly communicate.[133] Horizontal representation can also lead to serious errors or even incompetent representation because it discourages personal responsibility and rests on the quality of transferred notes and other case information from attorney to attorney.[134] Similar to the discourse surrounding holistic representation, the ABA has promulgated that model public defender systems use vertical representation in their practice, and to do otherwise is a detriment to the client and the client's right to the effective assistance of counsel.[135] Even the Bureau of Justice Assistance, under the

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gets Georgia Public Defender Office, ATLANTA J.-CONST., (Jan. 7, 2014, 5:38 PM), http://www.ajc.com/news/news/local/lawsuit-targets-georgia-public-defender-office/ncfWm/. These districts have been charged with engaging in "assembly line justice" whereby groups of defendants enter guilty pleas en masse or judges are allowed to remain on the bench even though they unconstitutionally withhold defense counsel from incarcerated clients for weeks in order to reduce the strain on public defender resources. *See* Robertson, *supra*; Rankin, *supra*. Judge Gordon explains his practice denying counsel to indigent defendants until after an indictment as a tool to prevent the public defenders from spending time and money investigating a case that may not even go forward. *See* Robertson, *supra*. The four counties named in the Georgia lawsuit were accused of processing adult defendants and allowing juveniles to go unrepresented in court proceedings. *See* Rankin, *supra*.

129. *See* Malcolm C. Young, *Providing Effective Representation for Youth Prosecuted as Adults*, BUREAU JUST. ASSISTANCE BULL., Aug. 2000, at 3, https://www.ncjrs.gov/pdffiles1/bja/182502.pdf.

130. Mounts, *supra* note 86, at 484.

131. *Id.*

132. Anne Bowen Poulin, *Strengthening the Criminal Defendant's Right to Counsel*, 28 CARDOZO L. REV. 1213, 1254 (2006).

133. *See id.* at 1254–55

134. *Id.* at 1255.

135. ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES § 5-6.2 (AM. BAR ASS'N 3rd ed. 1992). The majority of state public defender programs have written policies establishing at least some level of vertical representation. As per the 2007 census, 71 percent of the county-based public defender offices provided primarily vertical representation for clients in felony,

premise that vertical representation would not be possible in every jurisdiction, advised that each juvenile defender office attempt to incorporate some degree of vertical representation in its practice by assigning "[a] student, intern, or social worker . . . to [each] juvenile" client who would then be knowledgeable enough to brief any newly assigned attorneys.[136] Choosing to practice horizontal representation as opposed to vertical representation may reduce the need for individual public defenders to use triage to manage their caseload, but it also contradicts the best practices outlined by the governing authorities of the criminal justice system and places clients at risk of subpar, or even completely deficient, defense representation. Individual public defenders, and the institutions that house them, look to the constitutional and professional rules that are outlined in Section I(B) for governing principles.[137] As demonstrated in the previous section, limited resources force public defenders to engage in triage practice, but the way it is currently done at the individual and organizational levels leads to serious problems that implicate attorney burnout and arbitrary decision-making.[138]

Navigating the difficult terrain of providing quality representation in an environment that only guarantees funding for effective representation can be incredibly frustrating for enterprising public defender systems.[139] Not only does the individual defender lose the autonomy that is considered the hallmark of professionals by becoming a victim to forces outside of her control, but both the defender and the defender system also limit the effect individual practice can possibly have on criminal law and procedure. Much has been written about an indigent client's perception of their free lawyer as being of a lesser quality, or less beholden to the client, than a lawyer the client would pay.[140] Public defenders are also at risk of adopting the same mindset when they informally incorporate tri-

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noncapital cases. DONALD J. FAROLE, JR. & LYNN LANGTON, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007, at 6 (2010), http://www.bjs.gov/content/pub/pdf/clpdo07.pdf; *see also* LYNN LANGTON & DONALD FAROLE, JR., BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: STATE PUBLIC DEFENDER PROGRAMS, 2007, at 8 (2010), http://www.bjs.gov/content/pub/pdf/spdp07.pdf.

136. Young, *supra* note 129.

137. *See* discussion *supra* Section I.B.1.

138. For implications of various public defender distribution decisions, see discussion *infra* Part III.

139. *See, e.g.*, Tom Robertson, *Minnesota Lawyers Frustrated over Shortage of Public Defenders*, MINN. PUB. RADIO (Sept. 30, 2003), http://news.minnesota.publicradio.org/features/2003/09/30_robertsont_pdshortage/.

140. *See, e.g.*, Morris B. Hoffman et al., *An Empirical Study of Public Defender Effectiveness: Self-Selection by the "Marginally Indigent,"* 3 OHIO ST. J. CRIM. L. 223, 230, 247 (2005); Floyd Feeney & Patrick G. Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?*, 22 RUTGERS L.J. 361, 368–69 (1991); STEVEN K. SMITH & CAROL J. DEFRANCES, BUREAU OF JUSTICE STATISTICS, INDIGENT DEFENSE 4 tbl.7 (1996), http://bjs.gov/content/pub/pdf/id.pdf (reporting the 69% of clients who paid for their representation through private funds met with their lawyer within a week of their arrest while only 47% of those who were represented by government-paid attorneys could claim the same).

age into their practice.[141] When the client is unable to pay for specific services or withhold payment for unacceptable service, it is easy to disregard the client's role as the primary recipient of a valuable service. That is an even stronger tendency when the defender trades upon the services one client may be entitled to in order to provide services to another client. As opposed to operating as a professional, who is rendering valued services, the defender is subject to forces beyond his control—the presence of other clients in need—with no professional rubric to use in determining which client receives which necessary services and when.[142] Failing to consider certain fundamental objectives of the public defense function further removes a public defender institution and its attorneys from a legal practice that complies with their constitutional and professional obligations.

Failing to consider how best to manage a resource so that it is perpetually available or capable of regenerating itself to maximum utility, only further contributes to the lack of available resources caused by an inadequate funding stream. While it is true that some resources may not be able to sustain themselves when they are not originally an adequate amount to achieve their objective, certain triage decisions are better for the maintenance of resources than others.[143] An enterprising public defender institution must make sure it adopts the triage system that is most beneficial to it in the long-term. The four public defender institutions detailed in the following sections have made four different decisions regarding the distribution of the limited attorney-experience resource and these decisions implicate their effectiveness in a variety of ways.

III. FOUR APPROACHES TO DISTRIBUTING THE ATTORNEY RESOURCE

One very important public defender resource that is often in short supply in public defender institutions faced with overwhelming need and limited resources is attorneys with practice experience.[144] While it is true

141. Professionalism is marked by civility in the practice of law. Haphazard approaches to providing subpar representation to client's who may have their life or liberty on the line implicates an attorney's understanding of his or her role in the legal process. *See* Michael Davis, *Professionalism Means Putting Your Profession First*, 2 GEO. J. LEGAL ETHICS 341, 342–44 (1988).

142. This is primarily because there are no formal public defender ethic guiding triage decisions. For different scholarly opinions, see discussion *supra* Section I.A. For different public defender institutional approaches, see discussion *supra* Section II.B.2.

143. Expert witness fees might be an example of resources that are too finite to sustain regardless of the triage scheme used. Dispensing those fees on a contractual basis instead of through individual hires could be considered a triage decision that proves more efficient.

144. *See* Rapping, *supra* note 76, at 173–74. The attrition rate for public defenders nationwide was 10% in 2007 with Virginia having the highest at 24%. LANGTON & FAROLE, *supra* note 135, at 18. Several scholars have advocated for public defender administrators to focus hiring on newer, inexperienced attorneys as a way to improve indigent defense. This follows from the fact that many of the public defender institutions that fall prey to the "ordinary injustice" claims set forth by authors such as Amy Bach are older attorneys who have become accustomed to the status quo. "Ordinary injustice" occurs when legal professionals become so used to inadequate and often appalling rights violations that they fail to see their role in providing such subpar representation. *See* AMY BACH, ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT 2 (2009).

there is no consensus on the legal skills necessary for effective assistance of counsel, there are few system stakeholders who would argue that defender experience is not a valuable component.[145] The more experience a defender has, the better the defender is at making quick assessments of certain issues in cases, seeing general patterns to pursue, and developing an effective and efficient method for pursuing them.[146] Experience also enables a defender to more accurately evaluate how a particular decision-maker—prosecutor, judge, probation or parole officer, or jury—will treat a particular defense or explanation for certain types of conduct. It is for these reasons that few clients would reject an attorney with substantial practice experience in favor of an attorney with little or no experience.

The attorney is often considered the primary resource of a public defender institution.[147] Although subsequent case law has interpreted the Sixth Amendment mandate of effective assistance of counsel as including investigation, interpretation, or mitigation services, all of these fall under the umbrella of the right to an attorney.[148] The manner in which a public defender institution distributes attorneys with experience to clients is central to the ability of the client to obtain a fair criminal process. The more highly functioning public defender institutions used a combination of the three avenues for experience—training, guidance, or mentorship by a senior attorney, and completion of the defender's own cases—as tools for evaluating or assigning experience levels to an attorney.[149]

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145. *See* ABA PRINCIPLES, *supra* note 21, at 3. This is particularly true in newer public defender offices or systems. The dearth of experienced attorneys exists because new offices must engage in values-based recruitment in order to truly reform a broken or ineffective public defender office and establish an office culture that values client-centered representation. The reform-minded public defender leader must identify candidates who are the most receptive to the agency's new and improved values and the values-based training that should accompany the change in mission. Once a leader has identified attorneys who are receptive to pursuing this change, the leader must instill these values and ensure that these lessons are reinforced and internalized through training. The experienced public defenders in broken systems are often unaware of the value and necessity of a client-centered approach to indigent defense representation because they were neither trained on nor practiced in such an environment. Those who study organizational change note that resistance from those who are asked to alter their approach or practice is a major problem in creating change. Accordingly, experienced public defenders in a broken system may see a commitment to change and a new client-centered form of representation as a comment on their competence. *See* Rapping, *supra* note 76, at 173–74.

146. A public defender can gain experience in a number of ways: training, guidance or mentorship by a more senior attorney, or completion of the defender's own cases.

147. This claim is self-evident because indigent defense is about legal representation. Regardless of how important investigation, expert witness testimony, or administrative services may be to a successful defense team, there can be no effective assistance of counsel without an attorney. The Strickland standards for Sixth Amendment violations begin and end with the role, the function, and the ability of the attorney to provide representation. Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988).

148. *See* ABA PRINCIPLES, *supra* note 21, at 3.

149. The Public Defender Service of the District of Columbia is widely considered one the of the best public defender offices in the country, serving as a model for indigent defense throughout the nation. *See* THE PUB. DEF. SERV. FOR THE D.C., ANNUAL REPORT 1–5 (2012) [hereinafter PDS ANNUAL REPORT], http://www.pdsdc.org/docs/default-source/default-document-library/fy-2012-pds-annual-report.pdf?sfvrsn=0. Their training program is expansive and can be accessed at *PDS*

Some offices that suffer from significant resource deficiency may disregard formal training programs and instead rely on the defender's own natural abilities or the informal guidance by other more senior attorneys.[150]

Public defender institutions primarily distribute attorney experience to clients in three ways. Some public defender offices pay little attention to the amount of experience an attorney has and simply assign clients or cases at random or through some type of scheduled pickup process for the attorney.[151] These institutions will often assign public defenders to a particular courtroom and hold that the public defender is responsible for any cases, regardless of severity, that are assigned to that courtroom.[152] Other public defender institutions use an attorney's experience level to guide case assignments.[153] These offices categorize the level of legal experience a particular client or charge requires for effective assistance of counsel and then assign those clients to attorneys who possess the requisite experience.[154] For example, a public defender office could decide that an attorney only needs six weeks of training in order to provide effective assistance of counsel for a client facing a simple misdemeanor charge.[155] A final group of public defender institutions distribute attorney experience in a form that mirrors attorney specialization, either in the particular stage of the proceeding or the particular type of case.[156] Such an institution may determine that homicide or rape cases are the exclusive domain of a certain group of attorneys.[157]

Training Programs, PUB. DEFENDER SERV. FOR D.C., http://www.pdsdc.org/professional-resources/pds-training-programs (last visited Jan. 2, 2016).

150. *See* Rapping, *supra* note 28, at 331–33. For a discussion of ineffective public defender training models, see Rapping, *supra* note 76.

151. These type of distribution schemes will usually still consider separate public defender assignments for clients facing capital offenses so as to ensure compliance with the Supreme Court's description of "death as different" when it comes to the requirements of effective assistance of counsel.

152. *See, e.g.*, *Public Defender Frequently Asked Questions/Client Assistance*, COUNTY DUPAGE, https://www.dupageco.org/PublicDefender/30835/ (last visited Sept. 19, 2015) [hereinafter *Client Assistance*]. The DuPage and Will County Public Defender Offices in Illinois are two examples of public defender institutions that use this form of representation. *Id.*; *FAQ's: Can I Choose Which Assistant Public Defender I Want to Represent Me?*, OFF. WILL COUNTY PUB. DEFENDER, http://www.willcountypublicdefender.com/faqs/112-can-i-choose-which-assistant-public-defender-i-want-to-represent-me (last visited Jan. 12, 2016). The Orleans Public Defenders used this form as well before adopting a reformed approach where experience was taken into account in 2009. LEWIS & GOYETTE, *supra* note 52, at 40–41.

153. For a discussion of The Orleans Public Defenders as an example, see *infra* Section III.B.

154. For a discussion of The Orleans Public Defenders as an example, see *infra* Section III.B.

155. *See* PDS ANNUAL REPORT, *supra* note 149, at 5.

156. LA. PUB. DEF. BD., *supra* note 107, at 283. This form of specialization appears facially similar to horizontal representation but differs in that one attorney is responsible for an individual client's entire case and not just a particular portion of it.

157. The public defender office in Lake Charles, Louisiana, uses this form of representation. For detailed information, see the Louisiana State Public Defender Report. *Id.*

A. Courtroom Based Representation (DuPage County, Illinois)

Some public defender institutions, such as the one in DuPage County, Illinois, do not use experience to inform case assignments and instead require attorneys to handle any type of case or charge they are assigned. DuPage County uses a courtroom assignment model, where a particular defender is assigned to a particular judge or a specific courtroom.[158] That assigned public defender is then required to handle all clients or charged offenses in that section of court or before that particular judge.[159]

Defense representation is a skill that improves with experience, and failing to use experience to inform the assignment practice leaves a client at risk of obtaining subpar or ineffective representation.[160] Additionally, clients are not ordinarily assigned to a particular courtroom upon arrest.[161] Although an individual is able to retain a private attorney to represent him or her any time after being taken into custody, DuPage County does not currently provide a public defender to a similarly situated indigent defendant until formal charges have been filed.[162] In this county, the district attorney has thirty days, if the defendant is in custody, from the defendant's arrest to indict the individual or conduct a preliminary hearing that would replace the need for a formal indictment.[163] If the accused is out of custody, the district attorney has sixty days to complete either option.[164] This means that clients can remain in jail for thirty days without an attorney representing their interests. An enterprising public

158. *Client Assistance*, *supra* note 152. "There are 102 counties in Illinois and each county operates its criminal justice system independently." JUNAID AFEEF ET AL., POLICIES AND PROCEDURES OF THE ILLINOIS CRIMINAL JUSTICE SYSTEM 1 (2012), http://www.icjia.org/assets/pdf/ResearchReports/Policies_and_Procedures_of_the_Illinois_Criminal_Justice_System_Aug2012.pdf. Some indigent defender assignment systems use a "wheel" to assign cases whereby an attorney is selected through a lottery method and assigned to a case with little attention paid to the attorney's level of practice experience. *See* Bill Piatt, *Reinventing the Wheel: Constructing Ethical Approaches to State Indigent Legal Defense Systems*, 2 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 372, 388–90 (2012). These types of public defender systems do not have an attorney assigned to a particular courtroom and may just rely on the services of private counsel to accept appointments for all indigent clients. *See id.*

159. *See Client Assistance*, *supra* note 152. In some jurisdictions, such as the Lake Charles Public Defenders in Lake Charles, Louisiana, certain attorneys only represent clients facing misdemeanor offenses or city court charges. LA. PUB. DEF. BD., *supra* note 107, at 283. There are also attorneys who only handle certain types of cases such as sex offenses, drug offenses, mental health offenses or offenses risking the maximum punishment of life incarceration or death. *See id.*

160.

> Counties throughout the state of Nevada have been cited for assigning attorneys to serious felony and murder cases for which the attorney is not qualified. Most recently, the 9th Circuit Court of Appeals allowed a defendant who was exonerated from death row after fourteen years to sue the Clark County (Las Vegas) public defender administrator for appointing an attorney just out of law school who had never handled a murder case to represent him on capital charges.

Gideon *Reviewed: The State of the Nation 40 Years Later*, NAT'L LEGAL AID & DEFENDER ASS'N, http://www.nlada.org/Defender/Defender_Gideon/Gideon_Reviewed (last visited Jan. 12, 2016).

161. *Cf.* AFEEF ET AL., *supra* note 158, at 10 (explaining the court's role in the criminal process and noting that certain crimes are only adjudicated in certain courts).

162. *See id.* at 11.

163. *See id.* at 15.

164. *Id.*

defender office may assign an attorney at arrest, but if the process focuses on assigning representation by courtroom, every client may not have the same attorney at arrest that they will have assigned to them once charges have been formally filed.

Although not an entirely horizontal system of representation, this type of distribution scheme is counter to Principle 7 of the ABA's guide for an effective indigent defense delivery system. Principle 7 describes the ideal representation as being one where the same attorney represents the same client throughout the criminal proceedings.[165] As discussed previously, horizontal representation places a client at risk of having gaps in time without any representation. The importance of an attorney to a fair process is critical at every stage of the proceeding, and adopting a distribution scheme that allows for gaps in representation undermines a fair criminal process.

One popular argument used by proponents of this representation scheme is that there are moral implications to allocating scarce resources according to any system other than random selection.[166] Any allocation of resources should be equitable or just, and the targeted distribution of certain resources can easily move from equitable terrain to a favored mode of practice that relies on unconscious bias. Adopting a random distribution scheme, however, could also be considered morally objectionable. Acknowledging the special needs of certain clients or charges would, in fact, be considered necessary for an equitable distribution and a fair process in the criminal justice system. For example, an individual may need additional attention or resources in the form of expert witness assistance or scientific testing to ensure they are provided the same level of adequate and effective representation as an individual who does not need either. Ignoring the difference in station or existence could be considered a dereliction of duty to provide effective assistance of counsel.

B. Minimal Standards Distribution (Orleans Parish, Louisiana)

The Orleans Public Defenders in Louisiana uses a distribution scheme that provides clients with an attorney who possesses the minimal level of training or experience deemed necessary to protect the client's rights.[167] Charged offenses are placed into one of five categories ranging from those with the lowest potential punishment, up to six months in jail for misdemeanors such as simple possession of marijuana or curfew violations, to those with the highest sense of complexity.[168] Attorneys are

165. *See* SIXTH AMENDMENT CTR., THE CRUCIBLE OF ADVERSARIAL TESTING: ACCESS TO COUNSEL IN DELAWARE'S CRIMINAL COURTS, at V (2014), http://sixthamendment.org/6ac/6AC_delawarereport.pdf. The entire state of Delaware actually practices horizontal representation. *Id.*

166. Tremblay, *supra* note 78, at 2484–85.

167. *See* LEWIS & GOYETTE, *supra* note 52, at 40–41.

168. *See id.* at 27–28.

assigned a class level based on the amount of criminal defense experience they have acquired.[169] The Level One attorneys are the attorneys with the least amount of experience in the office, usually less than one year, and represent clients facing misdemeanor charges.[170] The Level Five attorneys are those attorneys in the office with the highest amount of experience, at least four years, and represent clients facing the highest possible noncapital charges.[171] Levels Two through Four consist of attorneys with increasing amounts of experience and are assigned cases with corresponding increases in case complexity.[172] This system slightly mirrors the rotating courtroom assignment system used in jurisdictions like Santa Barbara County, but it differs in that public defenders are not rotated back through less serious offenses.

Once these less experienced attorneys achieve a modicum of success or skill in a certain class of cases, client demands encourage leadership to immediately move these attorneys "up the ladder" to handle more complex cases. It is hard to find fault in this system because hiring new attorneys to handle lower level misdemeanor cases, or any noncomplex cases that require little experience, is much more easily done than hiring attorneys qualified to handle the higher level and more complex felony cases.[173] When the facts and circumstances are simplistic or potential penalties are limited, the amount of experience an attorney has seems less important. Additional benefits of this type of approach are that it would ensure all clients receive a basic level of representation and also allows the attorneys to ease into representing defendants charged with more complex offenses and risking stricter punishments more comfortably.

If attorneys are also faced with constantly representing new and more complex cases, they are more likely to exist in a constant state of stress over learning new elements of a charge or investigative and representative techniques.[174] Disillusionment and fatigue may more easily take hold in public defender disposition or approach to the professionalism of the work. The benefits of financial and temporal investment in recruiting and training new attorneys cannot be fully realized if these new attorneys

169. *See id.* at 9, 27–28. One could imagine that prosecutorial experience could be used in lieu of defense experience because of the trial skills that are developed on either side. Attorneys have to advise defense clients of constitutional rights, however, so the transfer may not be a clear match.

170. *See id.* at 12, 28 (stating that the OPD case assignment system "intend[s] to match the seriousness of the case with the practice level and experience of the attorney").

171. *Id.* As noted earlier, Orleans Public Defenders did not historically accept capital cases and only recently established a small division to assume responsibility of a handful of defendants facing capital charges. *See id.* at 45.

172. *See id.* at 9.

173. More experienced public defenders may find it difficult to transition to a more client-centered form of representation. *See* Rapping, *supra* note 76, at 173–74. This may be due to a number of reasons including a lack of training in that area and a need to experience their previous defense work as acceptable and not deficient. *See id.*

174. *See* Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 L. & CONTEMP. PROBS. 81, 85–89 (1995).

leave their employment with the public defender's office in significant numbers because of the desire to seek the type of work they feel they can conquer or to develop a particular skill. Some attorneys may actually prefer a fast-paced movement through different levels of cases. This type of change ensures that the work will vary and the attorney will use different skills at different times. This pattern of growth will face the same eventual pitfall when the attorney reaches the highest level of representation. The only difference is the attorney will reach that stage sooner without nearly the same level of expertise as they would have obtained for less complex cases.

In such a scheme, all but the highest level of cases receive representation by an attorney with just the minimum level of experience necessary to represent their charges. The lower level misdemeanor clients do not have the benefit of representation by an attorney with years, or even decades, of experience, and the same holds true to varying degrees for the classes in between the lowest and highest classes. This result actually limits the influence a public defender office can potentially have on the criminal justice system or its community. In 2007, forty percent of the nation's criminal justice system was made up of low-level misdemeanor offenses with the smallest percentage of cases consisting of those facing the highest potential punishments, so the impact of representation in those cases has the most effect in a given community.[175] Preventing those clients from having access to attorneys with the highest levels of experience limits the potential impact that defense could have in improving the criminal justice system.

C. Rotating Courtroom Assignment (Santa Barbara County, California)

The Santa Barbara County Public Defenders uses a rotation system for its attorney experience resource.[176] When newer and more inexperienced attorneys are first hired by the administration, they are first assigned less serious offenses.[177] Once they have achieved a certain level of experience, they become eligible to represent clients charged with higher-level offenses.[178] Only after having obtained a certain level of experi-

175. LANGTON & FAROLE, *supra* note 135, at 10. The exponential growth of misdemeanor charges in the criminal justice system has been well chronicled in legal scholarship. *See, e.g.*, Roberts, *supra* note 112, at 1090. This shift was based in large part on a zero-tolerance policing theory referred to as the "broken windows theory." *Id.* at 1091–92. The "broken windows theory" states that monitoring certain urban environments to prevent smaller offenses creates a sense of law and order that prevents serious crime from occurring. *See id.*

176. *See* Santa Barbara Cty. Grand Jury 1997–1998, *Final Report on Public Defender Department*, SANTA BARBARA CTY. GRAND JURY (June 1, 1998), http://www.sbcgj.org/97-98/MPUBLICDEFENDER.html.

177. *See* Santa Barbara Cty., *Deputy Public Defender I–III*, GOVERNMENTJOBS, https://secure.governmentjobs.com/view_job.cfm?JobID=247066 (last visited Feb. 15, 2016).

178. *See id.* As discussed in *supra* note 157, the distribution scheme in Lake Charles, Louisiana, occupies an area in between the courtroom assignment model of DuPage County and the rotating courtroom assignment model of Santa Barbara County. The Lake Charles Public Defenders assigns public defenders to individual courtrooms. It deviates from the courtroom assignment model

ence representing clients charged with low-level felony offenses are the attorneys allowed to represent clients charged with more serious felony offenses. The attorneys are then rotated through different types of cases at the discretion of the public defender administrator.

Even with this type of rotation system, there is no formal process for clients facing less serious misdemeanor charges to obtain representation by the more highly experienced attorneys in the office. This assignment process is a game of chance where the lower-level misdemeanor client might obtain representation by the more experienced person but that same client could also be assigned the least experienced person. In fact, because new hires are assigned only misdemeanor offenses, a misdemeanor client who is able to obtain representation by a more experienced attorney could still be considered the exception and not the rule.

D. Practice Specializations (Atlanta Judicial Circuit, Georgia)

Specialization is often preferable in the criminal defense context, especially when considering certain protected classes or characteristics of the available dispositions, such as juvenile representation, immigration consequences, or capital punishment.[179] These types of distribution schemes are supported by the general knowledge that certain types of cases, such as juvenile, sex offense, or capital cases, require specialized skills.[180] Holistic advocacy, done properly, actually rests on having specialized individuals on each defense team. Specialized distribution, however, has many of the same consequences as a more default, courtroom-based distribution scheme.

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by creating a "life without parole" specialization for attorneys who are assigned any life without parole cases that arise in the jurisdictions regardless of the courtroom to which the case is assigned. LA. PUB. DEF. BD., *supra* note 107, at 283. The office also has specific attorneys who are tasked with representing misdemeanors. *Id.* at 18. For each of these categories there is no elevation process but, instead, the attorneys are hired for a particular role be it misdemeanor attorney, courtroom specific felony attorney or a life without parole attorney, and the attorney is dedicated to that case subject matter for the entirety of their employment unless they apply for and are hired for another position. *See id.*

179. There may be an even more marked shift towards more specializations in the wake of *Padilla v. Kentucky*, 559 U.S. 356 (2010). In *Padilla*, the Court found that, for there to be a valid conviction, defense counsel must provide access to immigration advice. *See id.* at 374. This decision has tasked defense attorneys with a "responsibility to consult others and create an effective defense team." Ronald F. Wright, *Padilla and the Delivery of Integrated Criminal Defense*, 58 UCLA L. REV. 1515, 1517 (2011). Before *Padilla*, public defender organizations experimented with various methods for delivering the best service to clients facing immigration consequences as a result of their criminal charges. *See id.* at 1531–33. Some of those methods involved contracting out the immigration work to specialists outside the organization; others entailed bringing the immigration expertise inside the organization, either through placing experts in a single state-level position or by sending immigration experts to local offices. *Id.* at 1532–33.

180. *See, e.g.*, Miller v. Alabama, 132 S. Ct. 2455, 2463–64 (2012) (discussing the importance of understanding adolescent development in the sentencing of a juvenile); Graham v. Florida, 560 U.S. 48, 78 (2010) (discussing the importance of understanding adolescent development in the sentencing of a juvenile).

The Superior Court of Fulton County, Georgia, divides all of the cases into one of three tracks: noncomplex, standard, and complex.[181] Noncomplex matters consist of "non-violent, lower level felony offenses including drugs, theft," and property crimes, and "are 'fast-tracked' through the criminal justice process" with a sixty-three day timetable between arrest and final disposition.[182] Burglaries and aggravated assaults belong on the standard track.[183] The remaining cases, which range from terroristic threats to armed robbery, are in the complex division.[184] There is also a juvenile court division. Attorneys in the Fulton County Public Defenders Office are assigned to the particular divisions based on experience but do not necessarily transition between the divisions.[185]

Such a distribution scheme also does little in furtherance of ensuring a fair process for defendants by requiring a fair share of limited resources. Attorney burnout, which can also be thought of as "resource fatigue," can occur much more readily when an attorney is tasked with representing the same type of case continuously or has no hope for improved assignments. Also, expertise in particular types of cases is complimented by new ideas and the fresh perspectives that may result from having an attorney, who does not specialize in a particular type of case or charge, responsible for the representation.

IV. RECLAIMING THE SIXTH AMENDMENT BY REASSESSING DISTRIBUTION

Although each of the four counties adopt certain distribution schemes to handle caseload concerns, each pays insufficient attention to the resource preservation and intrinsic fairness that are fundamental goals of the public defender practice. The discussion has provided important examples of how this failure undermines the overall public defender goal of providing effective assistance of counsel and a fair criminal process for the nation's poor defendants. Incorporating resource preservation practices and system accountabilities to limit arbitrary decision-making are two critically important changes to make for the improvement of indigent defense delivery systems. Public defenders will find it difficult to accomplish their prescribed objectives without these changes.

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181. *See About the Office of the Public Defender*, FULTON COUNTY, GA., http://www.fultoncountyga.gov/fcpubd-about (last visited Sept. 19, 2015); *see also* Matthew A. Sorensen, EVALUATION OF THE FULTON COUNTY SUPERIOR COURT'S CRIMINAL NON-COMPLEX CASE MANAGEMENT DIVISION 12 (2007), http://www.ncsc.org/~/media/Files/PDF/Education%20and%20Careers/CEDP%20Papers/2007/Sorensen_CriminalDCM.ashx; *cf. Trial*, OFF. FULTON COUNTY DISTRICT ATT'Y, http://www.atlantada.org/divisions/prosecution_units/trial.php (last visited Jan. 12, 2016).

182. *Trial*, *supra* note 181.

183. *Id.*

184. *Id.*

185. *About the Office of the Public Defender*, *supra* note 181.

On the surface, the Atlanta Judicial Circuit appears to use a distribution scheme that more closely aligns with the fundamental public defender goals of providing effective assistance of counsel while preserving resources and limiting arbitrary decision-making. It is deficient, however, because it fails to incorporate attorney advancement and could encourage attorneys to develop a rote style of representation as they represent the same type of cases repeatedly. An enterprising public defender institution may consider adopting a set amount of time for each attorney to stay in a particular division or level of representation in consideration of how much time it takes a particular attorney to master the skills needed for representing a particular class of cases. That public defender institution may also consider providing all attorneys with a mixed caseload or rotating attorneys in the most complex division through the less complex divisions to ensure those clients are provided with the most highly skilled attorneys. This move would ensure the attorneys are not facing significant burnout because of the difficulty managing cases at the mostly highly complex level. Regardless of how a defender approaches incorporating the three components of effective public defender triage, the institution must ensure that every case and client are afforded serious consideration and treated with importance.

In developing a triage scheme to "make do," public defender institutions must consider more than just their legal constraints. Before the advent of public defenders, the criminal justice system was characterized by a government-resourced, prosecuting attorney opposing a lone defendant who was too poor to afford hiring an attorney with the defendant's own personal financing.[186] Public defenders were created to inject fairness into a criminal justice process that was growing increasingly large and life determining.[187] In order to accomplish its objectives in light of limited resourcing, public defender institutions must make management decisions about work priorities.[188] The private sector refers to these types of institutional decisions as organizational strategies.[189] "An organizational strategy is a coherent [plan or] idea that: 1) [clearly defines] the purposes [or mission] of an [agency] and the value[s] [that] it is trying to [promote]; 2) identifies [all of] the sources of support . . . that [are necessary] to sustain its operations; and 3) describes how the [agency's] resources . . . can best be [distributed] to accomplish the [agency's purpose or mission]."[190] The failure of public defender institutions and the schol-

186. *See* ANTHONY LEWIS, GIDEON'S TRUMPET 7–8 (1964).

187. Gideon v. Wainwright, 372 U.S. 335, 344 (1963); *see also* LEWIS, *supra* note 186.

188. MARK H. MOORE & BRYAN SHAHA, ALTERNATIVE STRATEGIES FOR PUBLIC DEFENDERS AND ASSIGNED COUNSEL 2 (2001), http://www.nasams.org/DMS/Documents/1058361964.14/Alternate%20Strategies%20for%20Public%20Defenders.pdf.

189. *Id.*

190. *Id.*; *see generally* CAIT CLARKE & CHRISTOPHER STONE, BOLDER MANAGEMENT FOR PUBLIC DEFENSE: LEADERSHIP IN THREE DIMENSIONS (2001), https://www.ncjrs.gov/pdffiles1/bja/187768.pdf.

arship that addresses the improvement of services comes from the single-minded focus on the legal constraints the institution must operate under.

A superficial view of national public defender systems may lead to the conclusion that a uniform approach to distribution practices would not work in every jurisdiction. It is true that, as discussed in Part III public defender services are provided in a variety of ways, and the system used for delivery will impact the ability any system has to incorporate the fundamental goals into its triage scheme. With the three customary models for the delivery of indigent defense services in mind, it is clear that the comprehensive distribution scheme is best used to determine the appropriate method of distributing resources to clients in staffed public defender offices. In these staffed, full-time offices, there is one individual familiar with each attorney's growth and supervision schemes that allow the distributors to witness the individual attorney's capabilities.[191] There is also one individual available to view outcomes of the distribution scheme and to ensure the practice remains consistent.[192]

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191. *See* Schulhofer & Friedman, *supra* note 105, at 6–8.

192. Much has been written about the deficiencies in the management associated with non-public defender office models of indigent defense representation. A public defender office, as opposed to an assigned counsel or contract program, has "a salaried staff of full or part-time attorneys who represent indigent defendants and are . . . government employees or [the employees of] a public, non-profit organization." LANGTON & FAROLE, *supra* note 135, at 3. The 2007 Census of Public Defender Offices "was the first systemic, nationwide study of public defender offices." *Id.* It collected "data on the staffing, caseloads, expenditures, standards and guidelines, and . . . training [programs or procedures of all of the existing state public defender programs in] 49 states and the District of Columbia" in the year 2007. *Id.* The only state not included in the study was Maine, which did not have a public defender office in 2007. *Id.*

In the assigned counsel model, courts usually have lists or "wheels" from which a private attorney is chosen for a particular case. Bill Piatt, *County Needs More Efficient Indigent Defense System*, SAN ANTONIO EXPRESS-NEWS (June 1, 2011, 12:01 AM), http://www.mysanantonio.com/opinion/commentary/article/County-needs-more-efficient-indigent-defense-1403588.php. An attorney's ability to get on the wheel will depend on the attorney's ability to fulfill certain requirements, including a certain level of experience. *See id.* This type of system does not lend itself to quality control and oversight. For example, under the current assigned counsel system in one Texas jurisdiction, qualified attorneys who have submitted applications to be one of the attorneys assigned to represent indigent clients have their names placed on a "wheel" of lawyers who are then assigned, in order, to a client by the presiding judge for that case. *Id.* In this Texas example, there are nearly 300 lawyers on the appointment list, and very little attention is paid to the specific quality of representation each attorney provides to his or her indigent client. *Id.* Additionally, any system that allows for the judges to control the appointment accepts the possibility that judges may manipulate the system in determining which attorneys are placed on the wheel or granted a case assignment. Judges may also manipulate through their control of the purse strings since they would hold the power to approve or deny payments for time spent working on a case or for experts or investigation for a particular client. *See* Brown, *Rationing*, *supra* note 110, at 833. In his article about rationing, Darryl K. Brown noted that judges and other funding allocators ration defense funds by assigning public defenders or court-appointed attorneys more cases than they can possibly handle. *See id.* at 812, 833–34. Courts also tend to give preferential treatment in attorney assignments to those attorneys who resolve cases quickly, often without motion practice or investigation or request for expert witness funds. *Id.* at 812. Even if a judge does not consciously manipulate this system there remains a strong potential for significant disparities in resources expended on a particular case depending on which judge is presiding over a defendant's case.

Contract models are not without criticism. One example of a contract model exists in San Mateo County, California, where the California Private Defender Program (PDP) bas been in place since 1969 and holds status as the largest private defender program. Rachel Swan, *Private Defense*

Additionally, the majority of public defenders in the nation today work in large, complex organizations.[193] According to a national census conducted in 2007, there were 957 public defender offices operating in the United States, with 427 of those offices funded at the state level, and 530 controlled and primarily funded at the local or county level.[194] The sizes of these offices vary greatly. Public defender offices at the local or county level employ a median of 7 litigating attorneys but the 154 offices with the highest caseloads employed a median of 28 litigating attorneys per office.[195] Despite the prevalence of public defender offices, these offices remain organized according to plans that emphasize the individual responsibility of a single attorney for a single client. The most senior attorneys are then assigned to the most serious felony charges.[196] Because the majority of public defender systems are large organizations that practice vertical representation, incorporating distribution policies that reflect more effective triage schemes dedicated to fair shares of limited

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Saves Public Money in San Mateo County, EXAMINER (May 31, 2013), http://www.sfexaminer.com/sanfrancisco/private-defense-saves-public-money-in-san-mateo-county/Content?oid=2350131. In this public defender model, participating attorneys, and not the county, pay to maintain their own office space and practices. *Id.* When a judge determines that a defendant is indigent and in need of a state-funded attorney, the judge appoints the PDP. The PDP then assigns the case to one of its private attorneys. The overall benefits of such a system, including the amount of insight and supervision and the degree and method of accountability is unclear. *See id.* It is also unclear whether such privatization of the public defender function is more cost-effective because the PDP does not record the cost per defendant. *Id.* The PDP's annual defender budget of $17 million is much lower than the $34 million required for San Francisco's public defender's office when the San Francisco population is only about 12 percent larger than that of San Mateo County. *Id.* The difference in budget could reflect the reduction of best practices as defined by the ABA and other public defender system commenters that tend to require a more significant budget. For example, the San Francisco public defender office is able to provide services "linking defendants to social workers" and expunging criminal resources, none of which is available in San Mateo. *Id.* There are also incentive structures in private defender offices that may prove problematic. Peter A. Joy & Kevin C. McMunigal, *Does the Lawyer Make a Difference? Public Defender v. Appointed Counsel*, 27 CRIM. JUST. 46, 47 (2012). For example, in order to discourage lawyers from simply processing cases by obtaining guilty pleas, attorneys receive a high hourly legal rate which increases once a case goes to trial. *See id.* Absent adequate supervision, however, even an attorney who takes cases to trial may simply be processing cases for increased fees.

193. *See* LANGTON & FAROLE, *supra* note 135, at 3–4.

194. *Id.* at 3.

195. *See id.* at 4.

196. The classes assigned for cases can range from misdemeanor to capital cases and the particular positioning of the defendant can also play an integral role. Although an attorney may understand fully how to represent a misdemeanor charge, in some jurisdictions, enhanced sentencing for multiple offenses makes a client facing a "simple misdemeanor" the type of case usually reserved for a more experienced attorney because of the increased potential punishment. For example, in Louisiana, a simple marijuana conviction carries a maximum penalty of six months in jail. Editorial, *Should Louisiana Take the "High" Road*, CREOLE (Feb. 4, 2014), http://www.thecreole.com/?p=22422. A defendant charged with a simple marijuana first offense can receive a fine and inactive probation. This can also happen for the first few marijuana first convictions. It is at the discretion of the district attorney to charge a particular defendant with a multiple marijuana charge. *See* LA. CODE CRIM. PROC. ANN. art. 61 (2015) (providing the district attorney with "entire charge and control of every criminal prosecution instituted or pending in his district"). Until recently, a multiple marijuana convictions could carry up to life in prison as the maximum punishment. *See* Kevin Litten, *Bobby Jindal Signs Marijuana Bills that Reform Criminal Penalties, Medical Marijuana Access*, TIMES-PICAYUNE (June 29, 2015, 4:39 PM), http://www.nola.com/politics/index.ssf/2015/06/bobby_jindal_marijuana_laws.html.

resources is critical to achieving permanent changes in the delivery of indigent defense services. In this matter, equity and efficiency actually converge to create a better system for the nation's indigent people. It also creates a system that much more closely follows the mandate of the Sixth Amendment by considering resource preservation and fair distribution of limited resources to clients.

CONCLUSION

Individual public defender triage practice undermines the fair process public defenders are meant to ensure by depending on informal prioritization decisions and increasing the likelihood of public defender burnout. If a public defender institution envisions a fair criminal process, regardless of class, as its goal, then it must first develop a comprehensive scheme for distributing limited resources to indigent defendants that considers all of its constitutional and professional obligations. There is no system of services that can claim to be fair if it does not first fairly allocate the limited goods it provides to the individuals with competing needs or claims.[197] This is particularly true where unfair allocation exacerbates the ability of the resource to accomplish its intended objectives.

Recall that attorney expertise is not the only finite resource public defender offices must strategically distribute. Investigative services and administrative services are two more resources available at most public defender offices that are necessary to the effective assistance of counsel but are also severely limited in under-resourced institutions.[198] As with the attorney-experience resource, public defender administrators distribute these limited resources in a variety of ways. Some institutions distribute them using a team-based model, where the same investigator and administrative person are assigned to the same attorney and assume responsibility for each case an individual attorney possesses. Others assign investigators and administrative personnel independent of the attorney assigned to a particular case.[199] The methods used to distribute these other two limited resources are also critical to the ability of a client to receive a fair criminal process. Each of these limited resources can be

197. Economists and philosophers both consider such decisions in their fields.

198. The importance of investigation cannot be overstated, and the ABA has listed quality investigation as one of the hallmarks of effective defense. *See* ABA PRINCIPLES, *supra* note 21, at 3. Quality investigation includes similar characteristics as quality lawyering, including experience or expertise. The lack of quality investigative services are present in many challenged systems and public defenders often bemoan the amount of administrative paperwork they are responsible for completing.

199. *See, e.g.*, Steinberg, *supra* note 120, at 1003–07 (describing the advantages of a team-based approach to indigent defense). Nonteam based representation can occur when investigators are hired for cases on a contract basis or subject to approval by the court. For investigative deficiencies when investigators are subject to approval by the court, see Laurence A. Benner, *The Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263, 288–89 (2009).

evaluated using the same analysis presented for distributing attorney experience.

In this era of limited resources and overwhelming need, reassessing public defender office structure is critical to maintaining some constitutionally and professionally acceptable representation in the indigent defense field. Undoubtedly, the primary problem of indigent defense is a problem of insufficient funding. This Article's overall thesis is not meant to diminish the importance of secure, stable, and sufficient funding. Neither is it meant to discount a review of mass incarceration and the role current crime classifications and police targets involving certain marginalized individuals may have on increasing the amount of people in need of public defender services. All of these reforms may be part of the continuing struggle to create a more just indigent defense system, but developing the best organizational strategies within these limits imposed by inadequate funding is also an important action.[200] Public defender administrators and legal scholars truly seeking permanent improvement of the nation's broken indigent defense system should focus on providing indigent defendants a fair share of the limited resources. This would help alleviate some of the stress in the overburdened system and help the public defender function regain its role of maintaining a fair criminal process for the nation's poor defendants.

200. Neither is this Article meant to lessen the need for caseload caps. Caps on caseloads or standards that govern the number of cases an individual can properly oversee at one time are critical to maintaining effective assistance of counsel. If a defense system or defender leader does not impose case limits on an individual lawyer, case pressures will inevitably overwhelm the lawyer and compromise the quality of representation. Overwhelming caseloads can render even the most dedicated, experienced attorneys into a simple plea machine or a system processor who cannot spend more than a few minutes reviewing a client's case with an eye towards the easiest path of disposition.

FULL DISCLOSURE: THE NEXT FRONTIER IN CAMPAIGN FINANCE LAW

JESSICA LEVINSON[†]

ABSTRACT

The influence of money in politics has beguiled and beleaguered legislators and judges for decades. Campaign finance laws were borne out of a desire to limit the role that money plays in the political process. The constitutionality of those laws hinges on a judge's interpretation of the First Amendment and whether and how it applies to laws that limit the giving and spending of money in elections and the disclosure of those sums.

While the role that money plays in our political system has increased exponentially, the Supreme Court has continued to strike down laws that seek to stem the flood of money that is pumped into our elections. Particularly in the wake of landmark rulings like *Citizens United v. FEC* and *McCutcheon v. FEC*, limits on how much individuals and groups can give and spend in elections are constitutionally suspect. As a result, lawmakers and judges are looking to transparency and disclosure laws to do much of the work that campaign contribution and expenditure limits were designed to accomplish.

Unfortunately, while lawmakers throughout the country are rushing to draft new and more robust disclosure laws to limit the influence of money in our political system, it is becoming clear that the Supreme Court's campaign disclosure jurisprudence is a loophole-ridden failure. This leaves lawmakers and lower judges with little guidance when crafting and ruling on disclosure laws.

This is the moment for the Supreme Court to clarify its campaign disclosure jurisprudence. The Court must be specific about the benefits and burdens that result from disclosure provisions and must also consider additional factors, such as the identity of the donor and the recipient of campaign funds, the type of election, and the revolutionary impact the Internet has had on campaign disclosure laws. This Article provides a roadmap for the Supreme Court and the lower courts to rule on campaign disclosure laws.

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† Jessica Levinson is a Clinical Professor at Loyola Law School where she teaches in the area of election law. She serves as President of the Los Angeles Ethics Commission. The author wishes to thank her parents, Fay and Mark Levinson, her husband, Stephen Lonseth, and her dear friend, Ana Dahan, for their support during the writing of this piece.

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I. INTRODUCTION: IT IS ALL ABOUT DISCLOSURE

Lawmakers throughout the country have long sought to guard against the pernicious influence of money in politics by enacting campaign finance laws.[1] Money can affect every step of the electoral process: from who runs for office, to who wins, to which bills are introduced and passed. Campaign finance law can be seen as a tool chest filled with four tools—contribution limits, expenditure limits, public financing programs, and disclosure provisions.

Unfortunately, the Court has whittled away at the ability of lawmakers to employ three of these four tools.[2] Since 2006, when Justice

1. *See* 148 CONG. REC. S1991-02 (daily ed. Mar. 18, 2002) (statement of Sen. Feingold); S. REP. NO. 93-689, at 5587–88 (1974).

2. The Court's 1976 decision in *Buckley v. Valeo* remains the bedrock of campaign finance law. 424 U.S. 1 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010). There it struck down limits on expenditures by candidates and independent individuals and groups. *Id.* at 143. Decades later in *Citizens United v. FEC*, the Court struck down limits on independent expenditures by corporations and unions. 558 U.S. 310, 372 (2010). Shortly thereafter in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the Court invalidated a key provision of many public campaign financing programs throughout the nation. 131 S. Ct. 2806, 2812 (2011). In 2014, the Court invalidated aggregate contributions limits in *McCutcheon v. FEC*. 134 S. Ct. 1434, 1462 (2014). It sadly now seems possible that the Court could

Samuel Alito replaced Justice Sandra Day O'Connor on the Supreme Court, the Court has struck down or weakened, in five-to-four rulings, the constitutionality of expenditure limits,[3] certain types of contribution limits,[4] and portions of public campaign financing laws.[5] While the Court has recently looked with disfavor on laws that limit the amount of money that can be given and spent in elections, it has consistently endorsed laws requiring report and disclosure of campaign spending.

Simply put, campaign disclosure laws face increasing pressure in the wake of recent United States Supreme Court decisions such as *Citizens United v. FEC*[6] and *McCutcheon v. FEC*.[7] Because of the Court's campaign finance jurisprudence, voters, legislators, and judges are looking to disclosure provisions to fix the problems that all of the tools in the campaign finance toolbox were meant to remedy.

Disclosure laws have served as an important facet of our legal framework for more than a century.[8] Reporting laws require electoral actors (candidates, political committees, political parties, and others) to report campaign funds, both raised and spent, to a government agency. Disclosure laws then require public dissemination of that information. Disclosure laws will bear a much heavier burden than they have in the past. This is problematic for at least five interconnected reasons.

First, disclosure laws are only one-fourth of a comprehensive campaign finance solution. They were never intended to, nor can they, solve all of the ills that contribution and expenditure limits and public campaign financing programs were also designed to remedy.

Second, even if disclosure laws could conceivably bear a heavier burden, our current system of campaign disclosure is largely a loophole-ridden failure. So-called dark money, campaign money that is undisclosed to the public, flows freely throughout our political system.[9] One need only look at the vast sums of money funneled through 501(c) non-

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also invalidate direct contribution limits. At that point, lawmakers truly will be left with little more than disclosure provisions as the only tool through which to try to regulate the flow of money in politics.

3. *See, e.g.*, *Citizens United*, 558 U.S. at 316, 372; Davis v. FEC, 554 U.S. 724, 727, 744–45 (2008); FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 454, 476–81 (2007).

4. *McCutcheon*, 134 S. Ct. at 1462.

5. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2812.

6. 558 U.S. 310 (2010).

7. 134 S. Ct. 1434 (2014).

8. *See, e.g.*, 2 U.S.C. § 241 (1910) (repealed 1972). This Article focuses on campaign disclosure laws and at times references other election law related disclosure laws. It does not address disclosure laws that apply in other contexts.

9. Andy Kroll, *Follow the Dark Money*, MOTHER JONES (July–Aug. 2012), http://www.motherjones.com/politics/2012/06/history-money-american-elections.

profit corporations to know that transparency laws have failed to meet their goals.[10]

Third, while at first blush the Court's rulings on the constitutionality of disclosure provisions appear to embody a rare moment of consistency on campaign finance issues, a closer reading of the cases demonstrates that the doctrinal foundation of the Court's campaign disclosure jurisprudence is badly fractured. Doctrinally, the Court's analysis is both potentially contradictory and shallow. This manifests in three main areas. First, what burden do disclosure laws place on constitutional rights? How much of a burden is too much? The Court often fails to fully define the precise burden at issue. Second, what standard of review should be used to review disclosure provisions? The Court has employed a loosely defined standard known as "exacting scrutiny" to disclosure laws. Worse, it has inconsistently applied what amounts to a balancing test. Third, what is the government's interest in enacting disclosure laws? Legislators and members of the public often exaggerate or misunderstand the purposes of disclosure, if not both. The government must be more specific about what it hopes to accomplish through disclosure provisions and whether those goals are achievable.

Fourth, the Court's thin doctrinal treatment of disclosure laws ignores or glosses over a number of important factors that could alter the Court's analysis. First, should the identity of the donor matter? The benefits and burdens associated with disclosure provisions could change depending on whether the donor is a small or big donor, or an individual or an artificial entity. Second, should the identity of the recipient (the donee) change the Court's calculus? The Court's analysis could, and perhaps should, shift depending on whether a candidate, a political party, a political committee, a nonprofit corporation, or another individual or entity is the recipient of a campaign donation. Third, should the Court's analysis change depending on the type of election? For instance, perhaps both legislators and the courts could take into account the differences between candidate and ballot measure elections before crafting and ruling on disclosure laws. Fourth, should the temporal aspect of disclosure play a bigger role in the Court's analysis? Disclosures made before elections differ significantly from those made after elections.

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10. *See* CAUSE OF ACTION, CONPROFIT: HOW THE IRS'S FAILED OVERSIGHT ALLOWS NONPROFIT MONEY LAUNDERING 5 (2013), http://causeofaction.org/assets/uploads/2013/06/130614-Fiscal-Sponsorship-FINAL-report.pdf; BRENDAN FISCHER & BLAIR BOWIE, ELECTIONS CONFIDENTIAL: HOW SHADY OPERATORS USED SHAM NON-PROFITS AND FAKE CORPORATIONS TO FUNNEL MYSTERY MONEY INTO THE 2012 ELECTIONS 1–2 (2013), http://www.uspirg.org/sites/pirg/files/reports/USP%20Elections%20Report%20Jan13%201%203.pdf; Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should Be Subject to Robust Federal Campaign Finance Disclosure Laws*, 16 NEXUS: CHAP. J.L. & POL'Y 59 (2010–2011); Kim Barker, *How Nonprofits Spend Millions on Elections and Call it Public Welfare*, PROPUBLICA (Aug. 18, 2012, 10:25 PM), http://www.propublica.org/article/how-nonprofits-spend-millions-on-elections-and-call-it-public-welfare.

Fifth, the Court's doctrine fails to account for the revolutionary impact of online campaign finance disclosure. Both the doctrine and the policy must change in light of online disclosure, which significantly increases both the benefits and burdens of disclosure requirements.

It is past time to solidify the framework we use to analyze the constitutionality of disclosure laws. Legislators throughout the country are rushing to propose new ways to shed light on campaign giving and spending. When crafting these laws, we must ask at least the following questions: Who should disclose? What do they need to disclose?[11] When should information be reported to a government agency, and when should that information be disseminated to the public? Before we craft and adopt more disclosure provisions, we must be specific about what these laws can accomplish and at what cost.

Part II discusses the creation and implementation of disclosure regimes and the Supreme Court's response to those laws. Part III focuses on the burdens created by disclosure laws. Part IV addresses the standard of review applicable to disclosure provisions. Part V focuses on the application of that standard of review, exacting scrutiny, and focuses on the government's interest in providing public disclosure. Part VI addresses the implications of online disclosure. This Article concludes in Part VII by discussing potential solutions to campaign disclosure regimes.

II. THE DISCLOSURE DOCTRINE—EXAMINING THE COURT'S APPROACH TO DISCLOSURE PROVISIONS

The following part explores the legislative and jurisprudential history of disclosure provisions.

In 1910, Congress passed the nation's first federal disclosure provisions as part of the relatively toothless Federal Corruption Practices Act (the Publicity Act).[12] The Publicity Act required disclosure of political spending by certain political committees after an election.[13] The next year, Congress amended the Act to include both disclosure of donations to and expenditures by federal candidates.[14] Congress once again amended the Publicity Act in 1925 by, in part, broadening and strengthening the disclosure requirements to apply to presidential elections.[15]

The Court evaluated the validity of campaign disclosure laws contained in the Publicity Act in *Burroughs v. United States*.[16] In that 1934

11. For instance, must they disclose their name, address and/or occupation?
12. Act of June 25, 1910, ch. 392, 36 Stat. 822.
13. *Id.* § 2, 36 Stat. at 823.
14. BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 24 (2001).
15. Federal Corrupt Practices Act, 1925, Pub. L. No. 68-506, §§ 303–306, 43 Stat. 1070, 1071–72.
16. 290 U.S. 534 (1934).

case, the Court upheld the law as within congressional power.[17] The Court framed the question as whether such laws must be left to the states or if Congress could legislate in this area.[18] Hence, the Court treated the law as raising a question of federalism, not the First Amendment.

Congress supplanted the Publicity Act in 1971 when it passed the nation's first comprehensive campaign finance scheme, the Federal Election Campaign Act (the FECA).[19] The FECA was later amended in 1974 to establish an independent agency to monitor campaign spending, the Federal Election Commission, as well as create stricter restrictions on contributions and expenditures, and establish public financing options for candidates.[20] The FECA required disclosure of contributions over $100.[21]

As is typically the case, with a new law comes a lawsuit challenging that law. In 1976, in *Buckley v. Valeo*,[22] the Court analyzed the constitutionality of, among other provisions, the disclosure provisions in the FECA.[23] *Buckley* stands as the foundation of our understanding of the constitutionality of campaign finance laws, including campaign disclosure provisions.

Prior to delving into *Buckley*, it is important to survey the legal landscape in place in 1976 and to have an understanding of the cases that *Buckley* relied upon. *Buckley* was the first case since *Burroughs* to analyze the constitutionality of campaign disclosure provisions. Hence, all other pre-*Buckley* case law focuses on laws providing for disclosure in areas outside of the campaign finance context.

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17. *Id.* at 547–48.

18. *Id.* at 544–45.

19. *See* Federal Election Campaign Act of 1971, Pub. L. No. 92–225, 86 Stat. 3 (1972). Prior to the passage of the FECA, in 1946, Congress passed the Federal Regulation of Lobbying Act to increase information regarding federal lobbyists. 2 U.S.C. §§ 261–270 (1964) (repealed 1995). In 1954, the Court upheld the Federal Regulation Lobbying Act against a challenge that it was unconstitutionally vague. United States v. Harriss, 347 U.S. 612, 617, 624 (1954). Chief Justice Warren, writing for the Court, expressed his full-throated support of the disclosure provisions. *Id.* at 624–25. The Court found that in passing that Act Congress "ha[d] merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much." *Id.* at 625. The Court further found that "full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressure. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal." *Id.* The Court rejected the argument that the law would act as a deterrent to the exercise of First Amendment rights, finding that "the restraint is at most an indirect one resulting from self-censorship, comparable in many ways to the restraint resulting from criminal libel laws." *Id.* at 626. Congress repealed the Federal Regulation of Lobbying Act in 1995 with the passage of the Lobbying Disclosure Act. Lobbying Disclosure Act of 1995, Pub. L. No. 104-65 § 11(a), 109 Stat. 691, 701.

20. Act of Oct. 15, 1974, Pub. L. No. 93-443, §§ 309–318, 88 Stat. 1263, 1280–89.

21. Buckley v. Valeo, 424 U.S. 1, 63–64 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).

22. 424 U.S. 1 (1976), *overruled by* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

23. *Id.* at 60–84.

The Court appears to be more likely to strike down disclosure laws or create exemptions to those laws in cases outside of the campaign finance context. It is also important to note that typically, when the Court reviews campaign disclosure laws, it does so in the context of challenges to other facets of campaign finance laws as well, such as contribution and expenditure limits. The Court has only once ruled on a challenge to a campaign disclosure law in isolation.[24] Hence, in the campaign finance context, the Court may feel additional pressure to uphold disclosure provisions when it strikes down limits on campaign contributions and expenditures so as not to entirely dismantle campaign finance laws. The Court often views disclosure laws as a less burdensome alternative to contribution and expenditure limits. However, outside of the campaign finance context, the Court has ruled on isolated challenges to disclosure provisions. The Court evidences none of the same concerns when ruling on noncampaign disclosure laws in isolation.

In 1958, in a noncampaign finance case, the Court created what would become the test for qualifying for exemptions from disclosure laws. In *NAACP v. Alabama*,[25] the Court ruled on the propriety of a request by the State of Alabama to obtain the names and addresses of members and staff of the National Association of Colored People (NAACP) residing in Alabama.[26] There, the Court first recognized that disclosure provisions can raise serious associational and speech concerns under the First Amendment.[27] The Court concluded that disclosure was not justified where the NAACP has shown "on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[28] Hence, the Court protected the disclosure of membership lists when members faced serious threats. This, as demonstrated by subsequent decisions, is a difficult standard to satisfy.

In 1964, in *Talley v. California*,[29] the Court struck down a Los Angeles law that required the authors and distributors of handbills and leaflets to disclose their names and addresses.[30] Based on a First Amendment challenge to the laws, the Court struck down the disclosure provisions even though they provided the public with information about the identity of the authors and distributors. In striking down this disclosure provision, the Court noted that the affected forms of communication, handbills and leaflets, had "played an important role in the progress of mankind."[31]

24. *See* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 89–90 (1982).
25. 357 U.S. 449 (1958).
26. *Id.* at 451.
27. *See id.* at 461–62.
28. *Id.* at 462.
29. 362 U.S. 60 (1960).
30. *Id.* at 60–61, 65.
31. *See id.* at 64–65.

Hence, it may be that in *Talley*, instead of protecting lists of members facing serious threats (as in *NAACP*), the Court protected potentially poor and marginalized people who might not want to disclose their names to the public.

Where did the law stand at this point? Again, unlike *Burroughs, NAACP* and *Talley* were not campaign disclosure cases. They dealt with disclosure of membership lists (in the case of *NAACP*) or the authors and distributors of handbills and leaflets (in the case of *Talley*). *Burroughs* upheld campaign disclosure provisions as within congressional authority, and *NAACP* and *Talley* struck down other disclosure provisions as governmental overreaching in light of First Amendment concerns. Prior to the Court's decision in *Buckley*, it was not entirely clear which course the Court would follow the next time a campaign disclosure law came before it.

This lack of clarity was resolved in 1976 in *Buckley*, where the Court followed the path tread in *NAACP* and *Talley* and firmly placed an analysis of the propriety of campaign disclosure laws as falling within the First Amendment.[32] The Court concluded that laws requiring the disclosure of names of members of political organizations (such as those at issue in *NAACP*) did not differ substantially from those that require the names of campaign contributors (such as those contained in the FECA).[33] Simply put, the Court concluded that "[o]ur past decisions have not drawn fine lines between contributors and members but have treated them interchangeably."[34] Therefore, the Court imported the *NAACP* analysis into the campaign finance context.

In *Buckley*, the Court employed a deferential standard of review and upheld the disclosure laws against a challenge that they were overbroad as applied to minor-party and independent candidates and small contributors but were not per se unconstitutional.[35] The Court concluded that disclosure provisions serve three interests: preventing corruption or the appearance of corruption, providing the public with information regarding campaign contributors and spenders, and detecting violations of other campaign finance laws.[36]

Brown v. Socialist Workers '74 Campaign Committee (Socialist Workers)[37] stands at the intersection of *NAACP* and *Buckley*. There, the

32. *See* Buckley v. Valeo, 424 U.S. 1, 64–68 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).

33. *Id.* at 65–66. The Court concluded that "the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations." *Id.* at 66.

34. *Id.* at 66.

35. *Id.* at 60–61.

36. *Id.* at 66–68.

37. 459 U.S. 87 (1982).

Court protected the disclosure of campaign contributors to the Socialist Workers Party (SWP) and the recipients of those contributions when members of the SWP faced harassment by government officials and private parties.[38] *Socialist Workers* is the first and last case since *Buckley* where plaintiffs successfully waged an as-applied challenge to a campaign disclosure law. This is because it is difficult for any group to bring forth specific evidence of threats that survive the *NAACP* test. It is also a rare case in which the Court addresses a campaign disclosure provision in isolation. Again, it is typically the case that the Court reviews challenges to campaign disclosure provisions in cases in which other campaign laws are also challenged. This may be another reason why the Court carved out an exemption to the disclosure provision here.

In *McIntyre v. Ohio Elections Commission*,[39] the Court once again analyzed a disclosure law outside of the campaign finance context.[40] In that 1995 case, the Court struck down an Ohio law that prohibited the distribution of anonymous campaign literature (including pamphlets geared toward candidate and ballot measure campaigns).[41] Plaintiff Margaret McIntyre distributed anonymous campaign literature to people attending a public meeting at a school, in violation of the statute.[42] Justice Stevens, writing for a majority of the Court, relied heavily on *Talley*, another case dealing with disclosure laws outside the realm of campaign disclosure, to strike down the Ohio law requiring the identification of authors of campaign literature.[43]

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38. *Id.* at 101–02. The *Socialist Workers* majority rejected the argument that the test elucidated in *Buckley* applies only to campaign contributors and not also campaign recipients. *Id.* at 94–95. The Court held that "[c]ompelled disclosure of the names of such recipients of expenditures could therefore cripple a minor party's ability to operate effectively and thereby reduce 'the free circulation of ideas both within and without the political arena.'" *Id.* at 98 (quoting *Buckley*, 424 U.S. at 71). Justice O'Connor wrote a separate opinion in which she argued that "there are important differences between disclosure of contributors and disclosure of recipients of campaign expenditures." *Id.* at 109 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor concluded that "the heightened governmental interest in disclosure of expenditures and the reduced marginal deterrent effect on associational interests demand a separately focused inquiry into whether there exists a reasonable probability that disclosure will subject recipients or the party itself to threats, harassment, or reprisals." *Id.* at 112.

39. 514 U.S. 334 (1995).

40. *See id.* at 334.

41. *Id.* at 357. Justice Ginsburg wrote a concurring opinion to emphasize her perception of the Court's ruling as a narrow one. Justice Ginsburg concluded that "[w]e do not thereby hold that the State may not in other, larger circumstances require the speaker to disclose its interest by disclosing its identity." *Id.* at 358 (Ginsburg, J., concurring). Justice Thomas wrote a concurring opinion to underline his point that the Court should have taken an originalist's perspective and analyzed only "whether the phrase 'freedom of speech, or of the press,' as originally understood, protected anonymous political leafletting." *Id.* at 359 (Thomas, J., concurring). Justice Thomas concluded that it did. *Id.* Justice Scalia wrote a dissenting opinion in which he agreed with Justice Thomas on how to frame the pertinent question but disagreed with him as to the ultimate conclusion. *See id.* at 371–72 (Scalia, J., dissenting). Justice Scalia concluded that the Court has improperly "discover[ed] a hitherto unknown right-to-be-unknown while engaging in electoral politics." *Id.* at 371.

42. *Id.* at 337–38 (majority opinion).

43. *See id.* at 341–44. The law in *Talley* was broader, as it applied to all handbills and leaflets, not just campaign literature.

The *McIntyre* Court rejected the voter information interest and found the state's interest in preventing fraud and libel to be insufficient, despite acknowledging that it "carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large."[44] The Court found that other portions of Ohio's statutory scheme served those interests sufficiently well.[45] In addition, the Court rightly pointed out that the prohibition on the distribution of anonymous campaign literature "encompasses documents that are not even arguably false or misleading."[46]

The Court once again entered the election disclosure thicket in 1999 in *Buckley v. American Constitutional Law Foundation, Inc. (ACLF).*[47] There, Justice Ginsburg, writing for a majority of the Court, struck down a Colorado law that, among other things, required that ballot initiative proponents file disclosure reports including the names and addresses of paid circulators, the amount paid per petition signature, and the circulator's total salary.[48]

The Colorado law at issue in *ACLF* also required the reporting of the petition proponents' names and the amounts they spent on circulating petitions for specific measures.[49] The Court did not review whether those reports would alone survive review.[50] The Court's opinion relied, in large part, on the existence and availability of monthly reporting requirements as a way to provide the electorate with important information and provide a check against the power of special interests on the initiative process.[51]

Legislative reforms often follow scandals.[52] After the explosion of so-called soft money, not to mention the use of the Lincoln bedroom for

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44. *Id.* at 349.

45. *See id.* at 350.

46. *Id.* at 351. Justice Scalia took the majority to task on this point, finding that Ohio's law served important interests: "How much easier—and sanction free!—it would be to circulate anonymous material (for example, a *really* tasteless, though not actionably false, attack upon one's own candidate) with the hope and expectation that it will be attributed to, and held against, the other side." *Id.* at 383 (Scalia, J., dissenting).

47. 525 U.S. 182 (1999).

48. *Id.* at 201. Justice Thomas wrote a separate concurring opinion to emphasize his point that mandatory disclosure provisions can chill the First Amendment rights of association and belief. *See id.* at 212 (Thomas, J., concurring) (citing Buckley v. Valeo, 424 U.S. 1, 64 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010)). Justice Thomas also argued that the government's interest in providing the electorate information was lower as applied to ballot measures, at least at the petition phase, than as applied to candidate elections. *Id.* at 213.

49. *Id.* at 201 (majority opinion).

50. *Id.*

51. *Id.* at 202–03. The Court also pointed out that "ballot initiatives do not involve the risk of '*quid pro quo*' corruption present when money is paid to, or for, candidates." *Id.* at 203.

52. *See* Amanda S. La Forge, Note & Comment, *The Toothless Tiger -- Structural, Political and Legal Barriers to Effective FEC Enforcement: An Overview and Recommendations*, 10 ADMIN. L.J. AM. U. 351, 356–57 (1996).

campaign donors,[53] Congress passed its first major overhaul of the campaign finance system since the FECA. The 2002 Bipartisan Campaign Reform Act (commonly known as McCain-Feingold) partially revamped federal disclosure, disclaimer,[54] and reporting requirements.

McCain-Feingold provided for disclosure of so-called electioneering communications, or radio advertisements that refer to a clearly identified federal candidate and air sixty days before a general election or thirty days before a primary election.[55] The creation of electioneering communications as a new class of communications subject to, among other things, mandatory disclosure provisions came as a result of heavy spending of soft money[56] on sham-issue advertising.[57] These are advertisements that are clearly designed to advocate for the election or defeat of a candidate, but do not use the "magic words" described in *Buckley* that previously triggered the application of the disclosure requirements.[58] Hence, individuals, corporations, and labor unions could donate soft money to political parties that could then use that money to air sham-issue ads that were not subject to limitations or disclosure provisions.[59]

One year later, in 2003, in *McConnell v. FEC*,[60] the Supreme Court upheld the disclosure, disclaimer, and reporting requirements contained

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53. Editorial, *The Soft Money Explosion*, N.Y. TIMES (May 28, 2000), http://www.nytimes.com/2000/05/28/opinion/the-soft-money-explosion.html.

54. Disclaimer requirements are distinguishable from disclosure requirements because they mandate that a communicator set aside space in or on a communication. The disclaimer provision at issue requires that noncandidate televised electioneering communications provide that "____ is responsible for the content of this advertising." Bipartisan Campaign Reform Act (BCRA) of 2002, Pub. L. No. 107-155, § 311, 116 Stat. 81 (codified as 2 U.S.C. § 441(d)(2)). Under 2 U.S.C. § 441d(d)(2) the required disclaimer had to be made in a "clearly spoken manner" and displayed on the television screen in a "clearly readable manner" for a minimum of four seconds. *Id.* The disclaimer also had to state that the electioneering communication "is not authorized by any candidate or candidate's committee" and had to display the name and address (including web site address) of the individual or group that paid for the advertisement. Citizens United v. FEC, 558 U.S. 310, 366 (2010) (emphasis omitted). In addition, "any person . . . spend[ing] more than $10,000 on electioneering communications []in [one] calendar year [has to] file a disclosure statement with the FEC" that identifies that person, the amount of the expenditure, and the names of some contributors. *Id.*

55. BCRA, Pub. L. No. 107-155, § 201(a), 116 Stat. 81, 88–89 (2002) (codified as 2 U.S.C. § 434(f)(3)).

56. "Soft money" began as "nonfederal" money that can be given "to political parties for activities intended to influence state or local elections." McConnell v. FEC, 540 U.S. 93, 123 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010). An FEC ruling held that soft money could be used to fund "mixed-purpose activities" that would affect both state and federal elections. *See id.* As the Court found in *McConnell*, "[t]he solicitation, transfer, and use of soft money thus enabled parties and candidates to circumvent FECA's limitations on the source and amount of contributions in connection with federal elections." *Id.* at 126.

57. *Id.* at 126–27.

58. *Id.* In *Buckley* the Court upheld disclosure requirements for independent expenditures but only with respect to those expenditures that contained the so-called "magic words," such as "vote for," "vote against," "cast your ballot for," "elect," or "defeat." FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 513 (2007) (quoting Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010)). Hence it was easy to avoid the disclosure provisions by simply avoiding use of the magic words.

59. *McConnell*, 540 U.S. at 126.

60. 540 U.S. 93 (2003).

in McCain–Feingold under a relaxed standard of review.[61] The disclosure provisions at issue required disclosure of those making electioneering communications of over $10,000.[62] The Court concluded that the provisions imposed a minor burden and served the three governmental interests identified in *Buckley*—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions applied to the disclosure provisions contained in the Bipartisan Campaign Reform Act of 2002 (BCRA).[63]

McConnell v. FEC was the Court's last campaign finance case decided with Justice Sandra Day O'Connor on the bench. In 2006, Justice Samuel Alito replaced Justice O'Connor, shifting the balance of the Court from five-to-four favoring campaign finance regulations, to five-to-four against such regulations. Justice Alito authored the first campaign finance decision the Court made during his tenure on the bench. In *Davis v. FEC*,[64] the Court struck down a provision of McCain–Feingold commonly referred to as the "Millionaire's Amendment" and its accompanying disclosure provisions.[65] While the substance of that ruling has little to do with disclosure, it is important because it clearly marks the shift in the Court's course away from deference to campaign finance laws that limit the amount of money given and spent in elections. That shift in the Court's composition ushered in our modern era in which campaign disclosure laws bear the weight of remedying the problems contribution and expenditure limits and public campaign finance laws were designed to solve.[66]

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61. *See id.* at 190–202.
62. *Id.* at 194–95.
63. *Id.* at 196.
64. 554 U.S. 724 (2008).
65. *See id.* at 728–29, 744–45.
66. It is true that even before Justice Alito joined the Court in 2006, a majority of its members struck down limits on expenditures by in part relying on the efficacy of disclosure provisions. For instance, in 1986, in *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*, the Court struck down a prohibition on the ability of corporations to make independent expenditures, as applied to a small, ideological nonprofit. FEC v. Mass. Citizens for Life, Inc. (*MCFL*), 479 U.S. 238, 262 (1986). As is often the case when the Court strikes down prohibitions on spending, it specifically relied on disclosure provisions to do some of the work the monetary limitation was supposed to do. For instance, Justice Brennan, writing for the majority of the Court, dismissed the FEC's argument that without the prohibition there would be "massive undisclosed political spending by similar entities, and . . . their use as conduits for undisclosed spending by business corporations and unions" because independent expenditures would trigger the disclosure provisions still in place. *Id.* In *MCFL* the Court also worried about the organizational burdens that disclosure laws can place on outside spenders. *Id.* As Justice Brennan observed, "These additional regulations may create a disincentive for such organizations to engage in political speech." *Id.* at 254. Justice O'Connor wrote separately to emphasize her view that *Buckley* "was concerned not only with the chilling effect of reporting and disclosure requirements on an organization's contributors, but also with the potential burden of disclosure requirements on a group's own speech." *Id.* at 265 (O'Connor, J., concurring in part and dissenting in part) (citation omitted).

This pattern of striking down expenditure limits and upholding disclosure provisions continued in subsequent cases,[67] including, most famously, the Court's 2010 decision in *Citizens United*.[68] There, while the Court struck down a prohibition on the ability of corporations and labor unions to use general treasury funds on electioneering communications on a five-to-four basis, the Court upheld both disclaimer and disclosure requirements at issue by a vote of eight-to-one.[69]

The *Citizens United* Court relied heavily on *Buckley* and *McConnell* in upholding the disclaimer and disclosure provisions against as-applied challenges. The Court had recently upheld the same provisions under a facial challenge in *McConnell*.[70] In *Citizens United*, eight members of the Court emphasized "that disclosure is a less restrictive alternative to more comprehensive regulations of speech."[71] Put another way, the Court characterized disclosure provisions as a less burdensome alternative to contribution and expenditure limits.

The *Citizens United* Court found "that independent expenditures . . . [could] not give rise to corruption or the appearance of corruption" and struck down limits on those expenditures.[72] The disclaimer and disclosure provisions at issue were tied to independent expenditures. Hence, when upholding those disclaimer and disclosure provisions, the Court necessarily had to conclude that the informational interest alone was sufficient.[73]

In *Citizens United*, it was only Justice Thomas who dissented from the Court's decision to uphold the disclaimer and disclosure requirements against as-applied challenges. Unsurprisingly, Justice Thomas relied in part on *McIntyre* to argue that the "right to anonymous speech" cannot be abridged "based on the 'simple interest in providing voters with additional relevant information.'"[74] Justice Thomas concluded that "[d]isclaimer and disclosure requirements enable private citizens and elected officials to implement political strategies *specifically calculated*

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67. *See, e.g.*, FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007). *Wisconsin Right to Life* also evidences the Court's current hostility to campaign finance laws. *See id.* at 457. However, that case does not relate to disclosure laws and has little bearing on the issues discussed in this Article.

68. Citizens United v. FEC, 558 U.S. 310 (2010).

69. *See id.* at 316, 365–66.

70. *See* McConnell v. FEC, 540 U.S. 93, 196 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).

71. *Citizens United*, 558 U.S. at 369. Interestingly, while Justice Thomas was the only justice to dissent from this portion of the Court's holding in *Citizens United*, it was Justice Thomas in another case, *Nixon v. Shrink Mo. Gov't PAC*, who suggested that disclosure may often be a less restrictive vehicle through which to limit corruption and the appearance of corruption. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 429–30 (2000) (Thomas, J., dissenting).

72. *Citizens United*, 558 U.S. at 356–57.

73. *See id.* at 368–69.

74. *Id.* at 480 (Thomas, J., concurring in part and dissenting in part) (quoting McConnell v. FEC, 540 U.S. 93, 276 (2003) (Thomas, J., concurring in part, concurring in the judgment in part, and dissenting in part), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010)).

to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights."[75]

The bulk of Justice Thomas's dissent focused on the events following the passage of Proposition 8 in California.[76] Proposition 8 was a ballot initiative that defined marriage as between only a man and a woman.[77] In the aftermath of its passage, opponents of the measure gathered information about who donated money in favor of the measure, including their names, addresses, occupations, employer's names, and total amount of the contributions.[78] This information was posted online at the California Secretary of State's website.[79] Opponents of the measure used this information to create web sites with maps showing the locations of the homes or businesses of those who donated in favor of the measure.[80] Some of those donors experienced property damage and threats.[81] Others resigned from their jobs.[82]

Because of the events following the passage of Proposition 8, late contributors sued in federal court seeking a preliminary injunction to prevent forced disclosure of their names and addresses.[83] However, the court upheld the disclosure provisions, finding that the provisions would not result in "a threat of harm so substantial" that plaintiffs were entitled to an exemption from the disclosure provisions.[84] The court emphasized that exemptions from disclosure provisions are "historically reserved for small groups promoting ideas almost unanimously rejected" as opposed to a majority of voters whose ballot measure was successful.[85] The court concluded that the plaintiffs were not entitled to an exemption to the disclosure requirements because they were successful at the polls, which "evidenced a very minimal effect on their ability to sustain their movement," and were "unable to produce evidence of pervasive animosity even remotely reaching the level of that present in [*Socialist Workers*]."[86]

While the majority in *Citizens United* focused on the importance of online disclosure to increasing the effectiveness of transparency provisions, Justice Thomas, focusing on the Proposition 8 litigation, argued

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75. *Id.* at 483.

76. *Id.* at 480–85. Justice Thomas also argued that "the threat of retaliation from *elected officials*" was another reason to invalidate the disclosure requirements. *Id.* at 483.

77. Hollingsworth v. Perry, 558 U.S. 183, 184 (2010) (per curiam).

78. *Citizens United*, 558 U.S. at 481 (Thomas, J., concurring in part and dissenting in part).

79. *Id.*

80. *Id.*; *see also* Stephen R. Klein, *A Cold Breeze in California: ProtectMarriage Reveals the Chilling Effect of Campaign Finance Disclosure on Ballot Measure Issue Advocacy*, 10 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 68, 68 (2009).

81. *Citizens United*, 558 U.S. at 481 (Thomas, J., concurring in part and dissenting in part).

82. *Id.* at 482.

83. ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1199 (E.D. Cal. 2009).

84. *Id.* at 1205.

85. *Id.*

86. *Id.* at 1214. It may be that the informational interest is not high enough to sustain post-election late disclosures. *See, e.g.*, Klein, *supra* note 80, at 71.

that online disclosure increases the potential chill on First Amendment rights that results from mandatory disclosure laws.[87] Justice Thomas concluded that online disclosure provides "political opponents 'with the information needed' to intimidate and retaliate against their foes."[88] Both the majority of the Court and Justice Thomas agreed that online disclosure changes the impact of disclosure laws; they just disagreed as to whether that was a benefit or a detriment.

Following on the heels of its endorsement of the disclaimer and disclosure provisions in McCain–Feingold in *Citizens United*, the Court examined and upheld disclosure provisions outside of the campaign finance context in *John Doe #1 v. Reed*.[89] In that 2010 case, the Court upheld a Washington state law that provided for the disclosure of the names and addresses of those who signed referendum petitions.[90] Justice Roberts, writing for an eight-member majority of the Court,[91] found that a signature on a referendum is entitled to some First Amendment protection because "[a]n individual expresses a view on a political matter when he signs a petition under Washington's referendum procedure."[92] The Court upheld the disclosure requirement, finding that it preserved "the integrity of the electoral process by combating fraud, detecting invalid signatures, and fostering government transparency and accountability."[93] Justice Roberts explained that Washington's interest in maintaining electoral integrity extended beyond combating fraud to things like discover-

87. *Citizens United*, 558 U.S. at 484 (Thomas, J., concurring in part and dissenting in part).

88. *Id.* (quoting *Id.* at 916 (majority opinion)).

89. 561 U.S. 186, 191 (2010).

90. *Id.* The Court framed the issue broadly as "whether disclosure of referendum petitions in general would [violate the First Amendment.]" *Id.* The Court found that plaintiffs had to satisfy the standards for a facial challenge, in part because the claim "is not limited to plaintiffs' particular case, but challenges application of the law more broadly to all referendum petitions." *Id.* at 194.

91. Justice Breyer wrote a separate concurrence in *Reed* to emphasize that there were "competing constitutionally protected interests" at issue that had to be balanced. *Id.* at 202 (Breyer, J., concurring) (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring)).

92. *Id.* at 194–95 (majority opinion). The Court held that most often "the individual's signature will express the view that the law subject to the petition should be overturned. Even if the signer is agnostic as to the merits of the underlying law, his signature still expresses the political view that the question should be considered 'by the whole electorate.'" *Id.* at 195 (quoting Meyer v. Grant, 486 U.S. 414, 421 (1988)). Justice Scalia wrote separately in *Reed* to contend that "[o]ur Nation's longstanding traditions of legislating and voting in public refute the claim that the First Amendment accords a right to anonymity in the performance of an act with governmental effect." *Id.* at 221 (Scalia, J., concurring). Justice Scalia also emphasized a point he made in *McIntyre*, arguing that "[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed." *Id.* at 228. Justice Scalia argued that petition signers were akin to legislators or voters, and there was nothing to indicate that the act of legislating or voting is entitled to First Amendment protection. *See id.* at 221.

93. *Id.* at 197 (majority opinion). The Court did not address Respondents argument that the laws were justified by the government's interest in "providing information to the electorate about who supports the petition." *Id.* Instead, the Court found the interest "in preserving the integrity of the electoral process" to be sufficient. *Id.*

ing invalid signatures caused by mistakes and "more generally to promoting transparency and accountability in the electoral process."[94]

In *Reed*, and consistent with his position in *Citizens United*, Justice Thomas found that because of the "'vital relationship between' political association 'and privacy in one's associations'" the Court should apply "strict scrutiny to laws that compel disclosure of protected First Amendment association."[95] The compelled disclosure provisions failed to survive this level of review, according to Justice Thomas.[96] First, Justice Thomas found that the asserted interests were not compelling.[97] Justice Thomas relied on *McIntyre* to conclude that the informational interest was insufficient in this context.[98] Next, Justice Thomas argued that the availability of as-applied challenges did not sufficiently alleviate the harm caused by disclosure provisions because they "require substantial litigation" and "risk . . . chilling protected speech."[99]

Most recently, in *McCutcheon v. FEC*, the Court struck down aggregate contribution limits as contravening the First Amendment but again endorsed disclosure provisions as a less burdensome alternative.[100] Justice Roberts, writing for five-members of the Court, trumpeted the efficacy of online disclosure.[101] While disclosure may have been "only a partial" remedy in 1976 when the Court decided *Buckley*, Justice Roberts found that online disclosure "now offers a particularly effective means of arming the voting public with information" and "offers much more robust protections against corruption."[102] Justice Roberts failed to acknowledge that online disclosure also significantly increases burdens on privacy rights.

In sum, the legislative and jurisprudential history of disclosure provisions reveals a fractured constitutional approach to those provisions.

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94. *Id.* at 198. It is worth questioning whether, unlike in the case of *McIntyre* when the Court protected the identity of leaf letters and handbill distributors against forced disclosure, here the Court is simply less concerned with protecting ballot measure signatures from disclosure.

95. *Id.* at 232 (Thomas, J., dissenting) (quoting NAACP v. Alabama, 357 U.S. 449, 462 (1958)).

96. *Id.* at 233.

97. *Id.* Justice Thomas analyzed the asserted interests in "'transparency and accountability,' which . . . encompasses several subordinate interests: preserving the integrity of its election process, preventing corruption, deterring fraud, and correcting mistakes by the secretary of state or by petition signers." *Id.* (quoting Brief of Respondent Sam Reed at 40, *Reed*, 561 U.S. 186 (2010) (No. 09-559)). Justice Thomas concluded that "[i]t is readily apparent that Washington can vindicate its stated interest in 'transparency and accountability' through a number of more narrowly tailored means than wholesale public disclosure." *Id.* at 238.

98. *Id.*

99. *Id.* at 241 (quoting Citizens United v. FEC, 558 U.S. 310, 326–27 (2010)).

100. McCutcheon v. FEC, 134 S. Ct. 1434, 1459 (2014).

101. *See id.* at 1460.

102. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 28 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010)). Justice Roberts concluded, somewhat naively, that the invalidated aggregate contribution limits could have encouraged money to be given and spent by entities not subject to disclosure provisions. *Id.*

The Court has inconsistently described the burdens, benefits, and standard of review to be employed when analyzing disclosure provisions.

III. THE BURDEN RESULTING FROM DISCLOSURE PROVISIONS

In part because of a larger doctrinal incoherence with respect to campaign finance law, the Court has been purposefully or ignorantly inconsistent about defining the burden imposed by disclosure laws and in analyzing how severely that burden affects various individuals and groups. The Court's jurisprudence focuses much more heavily on the government interests served by disclosure and does not give the same weight to defining the rights burdened by such provisions.[103]

It is worth initially asking which rights we are worried about when we talk about the burdens imposed by disclosure provisions. We are likely worried about First Amendment rights, but which ones? First, we are worried about speech rights because forced disclosure can chill speech and reduce the flow of ideas by discouraging people from giving and spending money. Second, we are also worried about associational rights because forced disclosure may make people reticent to join and contribute money to a particular group.[104] Third, we are additionally worried about privacy rights. It is unclear whether those rights are separate or connected to privacy rights that fall under the umbrella of First Amendment protections. The Court, unfortunately, provides no guidance on those questions.

The Court's campaign disclosure jurisprudence also begs the question of what exactly gives rise to a cognizable burden. Is it simply fears of physical and economic harms and public hostility, such as those discussed in *NAACP*[105] and *Socialist Workers*?[106] Or can and should we include additional concerns, such as fears related to personal or professional isolation, simple loss of privacy or anonymity and aversion to public exposure, or the more abstract concept loss of dignity and autonomy in the ability to shape one's identity? The Court glosses over these nuances and instead discusses the rights to anonymity and privacy.

In *Buckley*, the seminal case in the area of campaign disclosure, the Court declared that while "disclosure requirements impose no ceiling on campaign-related activities . . . we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and

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103. Left with little guidance regarding the burden imposed by disclosure laws, the Court is unsurprisingly inconsistent when defining and applying the proper standard of review.

104. Disclosure laws can infringe on the First Amendment rights of association and speech by acting as a deterrent to an individual's ability to associate and speak or an organization's ability to speak, which in this case is the giving and spending of money. While the majority opinions in this area often give a thin treatment to how exactly disclosure laws can infringe on First Amendment rights, some of the justices' separate opinions paint a slightly fuller picture.

105. NAACP v. Alabama, 357 U.S. 449, 462–63 (1958).

106. Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 98–101 (1982).

belief guaranteed by the First Amendment."[107] The Court has relied on this language in subsequent cases. For instance, relying on *Buckley*, the *Socialist Workers* Court characterized the burden as one on "privacy of association and belief guaranteed by the First Amendment."[108] But the Court has failed to examine fully what it meant by the First Amendment guarantee of "privacy of association and belief."

The *Buckley* Court treated the freedom of association as important only insomuch as it leads to speech and advocacy.[109] Having explained why association is significant, the Court concluded that "funds are often essential if 'advocacy' is to be truly or optimally 'effective,'" and "the right to pool money through contributions" bolsters the "advancement of beliefs and ideas."[110]

According to *Buckley*, courts must look to *NAACP* to determine whether the burdens on those challenging disclosure provisions are so great that they are entitled to an exemption. Courts look to whether there is a "reasonable probability" that the compelled disclosure will lead to "threats, harassment, or reprisals from either Government officials or private parties."[111] The *Buckley* Court added that proof could include "specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient."[112] When plaintiffs can come forward with such evidence, then there "exists the type of chill and harassment identified in *NAACP v. Alabama*."[113] It is only at that point that would-be disclosers could obtain an exemption from forced disclosure.

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107. Buckley v. Valeo, 424 U.S. 1, 64 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010). The Court later referred to "the invasion of privacy of belief" that may occur from the imposition of disclosure laws. *Id.* at 66.

108. *Socialist Workers*, 459 U.S. at 91 (quoting *Buckley*, 424 U.S. at 64). The Court also provided that disclosure laws could only survive as-applied challenges where there is a "substantial relation between the information sought and [an] overriding and compelling state interest." *Id.* at 91–92 (alteration in original) (quoting Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 546 (1963)).

109. Citing to *NAACP*, the Court provided that, "group association is protected because it enhances '(e)ffective advocacy.'" *Buckley*, 424 U.S. at 65 (alteration in original) (quoting *NAACP*, 357 U.S. at 460).

110. *Buckley*, 424 U.S. at 65–66 (quoting *NAACP*, 357 U.S. at 460). The Court refused to differentiate between contributors and members. *Id.* at 66.

111. *Id.* at 74.

112. *Id.* The Court added that "[n]ew parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views." *Id.* Reviewing the Court's ruling in *NAACP*, there the Court found an "uncontroverted showing" of "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 69 (quoting *NAACP*, 357 U.S. at 462). Further, the Court found that the government could now show a "'substantial bearing' on the issues it sought to clarify." *Id.* (quoting *NAACP*, 357 U.S. at 464).

113. *Id.* at 74. As Justice O'Connor noted in a separate opinion in *Socialist Workers*, "[T]he application of the *Buckley* standard to the historical evidence is most properly characterized as a

The Court found the *NAACP* exemption to be met in only one campaign disclosure case. Justice Marshall, writing for a majority of the Court in *Socialist Workers*, concluded that, among other things, there was "proof of specific incidents of private and government hostility toward the SWP and its members within the four years preceding the trial."[114] There, the evidence consisted of "threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members' property, police harassment of a party candidate, and the firing of shots at an SWP office."[115] Additionally, there was "a past history of government harassment of the SWP," including massive FBI surveillance of SWP.[116]

There may be indications that at least outside the campaign finance context, the Court is willing to recognize that the burdens imposed by disclosure laws sometimes require exemptions from those laws. The *McIntyre* Court waxed poetic about the importance of anonymity. "The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible."[117] The Court continued by pointing out the following:

> [Q]uite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. . . . Thus, even in the field of political rhetoric, where 'the identity of the speaker is an important component of many attempts to persuade,' the most effective advocates have sometimes opted for anonymity.[118]

Hence, *McIntyre* recognizes that disclosure laws may lead to cognizable burdens that stretch beyond immediate threats.[119] *NAACP* and *Socialist Workers* hinge on specific evidence of immediate threats. *McIntyre*, by contrast, discusses the importance of a mere desire to be free from forced identification.[120]

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mixed question of law and fact, for which we normally assess the record independently to determine if it supports the conclusion of unconstitutionality as applied." *Socialist Workers*, 459 U.S. at 113 (O'Connor, J., concurring in part and dissenting in part).

114. *Socialist Workers*, 459 U.S. at 99.

115. *Id.*

116. *Id.*

117. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42 (1995).

118. *Id.* at 342–43 (citation omitted) (quoting City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994)).

119. It may be that *McIntyre* can now be viewed as an outlier in the Court's disclosure jurisprudence. *McIntyre* may represent the height of the Court's protection of anonymous speech.

120. Justice Scalia touched on this point in his dissent. *See McIntyre*, 514 U.S. at 379 (Scalia, J., dissenting). He argued:

> [*NAACP* and *Socialist Workers*] did not acknowledge any general right to anonymity, or even any right on the part of *all* citizens to ignore the particular laws under challenge. Rather, they recognized a right to an *exemption* from otherwise valid disclosure requirements on the part of someone who could show a "reasonable probability" that the com-

In another case outside of the campaign finance context, the Justices' many separate opinions displayed a marked disagreement regarding the burden caused by the disclosure of the names and addresses of those signing referendum petitions. In *Reed*, once Justice Roberts decided to frame the case as a facial challenge rather than as an as-applied challenge, it was relatively easy for him to reject plaintiffs' contention that the potential First Amendment burdens caused by the law were too great in light of the government interests served by the law.[121] The Court rejected the claim that online disclosure could "become a blueprint for harassment and intimidation,"[122] finding that it relied on specific harms that could result from signing a particular referendum, not any referendum.[123]

Justices Alito and Thomas both wrote separately to emphasize the burdens wrought by public disclosure. Justice Alito was particularly concerned with the "associational privacy" interests that could be harmed by compelled disclosure.[124] Online disclosure, Justice Alito argued in his concurrence, allowed "anyone with access to a computer [to] compile a wealth of information" about those signing referendum petitions or making campaign contributions.[125]

Justice Thomas wrote the lone dissent in *Reed*, arguing that compelled disclosure of signed referendum and initiative petitions "severely burdens" the First Amendment rights of speech and association and that "there will always be a less restrictive means" of "preserving the integrity of [the] referendum process."[126] Justice Thomas specifically focused

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pelled disclosure would result in "threats, harassment, or reprisals from either Government officials or private parties."

Id. at 379 (quoting Buckley v. Valeo, 424 U.S. 1, 74 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010)). As Justice Scalia rightly pointed out, there was no evidence that Mrs. McIntyre faced the sort of threats that would rise to the level of the *NAACP* and *Socialist Workers* standard. *Id.* at 380.

121. *See* John Doe #1 v. Reed, 561 U.S. 186, 199–200 (2010). Justice Roberts concluded that, "there is no reason to assume that any burdens imposed by disclosure of typical referendum petitions would be remotely like the burdens plaintiffs fear in this case." *Id.* at 201. While Justice Alito agreed with the Court's result, his agreement seemed to stem only from the fact that the Court framed the case as a facial challenge. *See id.* at 202–04 (Alito, J., concurring). Justice Alito, in fact, laid out the reasons why the Plaintiffs in *Reed* had likely alleged a sufficient case for an as-applied challenge to the law. *Id.* at 207–08. Justice Alito stressed the need for speakers to be able to obtain as-applied exemptions from disclosure provisions "quickly and well in advance of speaking." *Id.* at 203. Justice Alito's concurrence focused on the necessity of maintaining as-applied challenges as a viable option for those seeking exemptions from disclosure laws. Justice Alito pointed to the aftermath of the passage of Proposition 8 and commented that "if the evidence relating to Proposition 8 is not sufficient to obtain an as-applied exemption in this case, one may wonder whether that vehicle provides any meaningful protection for the First Amendment rights of persons who circulate and sign referendum and initiative petitions." *Id.* at 205.

122. *Id.* at 200 (majority opinion).

123. *Id.* at 201.

124. *Id.* at 204–07 (Alito, J., concurring).

125. *Id.* at 208. Justice Alito concluded that, "[t]he potential that such information could be used for harassment is vast." *Id.*

126. *Id.* at 228–29 (Thomas, J., dissenting).

on the "privacy of association."[127] Justice Thomas discussed the risks that online disclosure can pose and relied on his opinion in *Citizens United* to conclude that "the state of technology today creates at least *some* probability that signers of every referendum will be subjected to threats, harassment, or reprisals if their personal information is disclosed."[128]

By contrast, Justices Sotomayor and Stevens wrote separate concurrences in *Reed* to argue that the disclosure provisions caused relatively minor burdens. Justice Sotomayor focused on "the character of initiatives and referenda"[129] and concluded that "the burden of public disclosure on speech and associational rights [is] minimal in this context."[130] The impact on "expressive interests is even more attenuated" with respect to initiatives and referenda as compared to campaign finance disclosure, Justice Sotomayor argued.[131]

In the campaign finance context, the Court pretty consistently dismisses claims in which the burdens of disclosure provisions outweigh their benefits. The Court grants exemptions only when plaintiffs can demonstrate that the burdens imposed by the laws rise to the level of the standard elucidated in *NAACP*. In such cases, plaintiffs must make an uncontroverted showing of economic or physical harms or public hostility.[132] Outside of the campaign finance context, the Court has been less consistent about when burdens are too great to overcome the benefits of disclosure provisions. In both areas, the Court fails to fully define the burden or burdens it is worried about and when those burdens are so great that disclosure laws should not stand.

IV. THE STANDARD OF REVIEW APPLICABLE TO DISCLOSURE PROVISIONS

The Court is inconsistent about the applicable level of scrutiny because it lacks clarity when defining the burdens imposed by disclosure laws. Again, *Buckley* provides the foundational understanding for this question. There, the Court rejected rational basis as the proper test, explaining that disclosure cannot be justified by "a mere showing of some legitimate governmental interest."[133] The Court cited to *NAACP v. Ala-*

127. *See id.* at 240. Contrary to the positions staked out by Justices Stevens and Sotomayor, Justice Thomas concluded that "signing a referendum petition amounts to 'political association' protected by the First Amendment." *Id.* at 232 (quoting Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 295 (1981)).

128. *Id.* at 242.

129. *Id.* at 212 (Sotomayor, J., concurring).

130. *Id.* at 214. Justice Sotomayor further argued that "[d]isclosure of the identity of petition signers, moreover, in no way directly impairs the ability of anyone to speak and associate for political ends either publicly or privately." *Id.*

131. *Id.*

132. *See* NAACP v. Alabama, 357 U.S. 449, 462 (1958).

133. Buckley v. Valeo, 424 U.S. 1, 64 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).

bama for the proposition that such laws must survive "exacting scrutiny," which requires "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed."[134] Later in the opinion, the Court reiterated that "[t]he strict test established by *NAACP v. Alabama* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights."[135]

The exacting scrutiny standard falls somewhere in between the strict scrutiny and rational basis tests.[136] Courts have applied something less than strict scrutiny because "disclosure requirements impose no ceiling on campaign-related activities."[137] By the same token, courts have applied a more searching standard than rational basis because disclosure provisions can present a "significant encroachment[] on First Amendment rights."[138]

This level of scrutiny is, therefore, typically seen as requiring both "a sufficiently important governmental interest" and a "substantial relation[ship]" between the restriction and that interest.[139] These words alone provide little guidance to legislators and lower courts. An interest is "sufficiently important" when the Court says that it is. The same is true for when a relationship will be "substantial" or "relevant."

In part because the exacting scrutiny standard presents serious definitional issues, it is inconsistently applied. While this criticism may be lodged against other standards of review, exacting scrutiny, in particular, suffers from definitional issues. In addition, application of exacting scrutiny often looks like little more than a balancing test, which is easily malleable depending on the judge's predilections.[140] Hence, exacting scrutiny is tailor-made for inconsistent application.[141]

The discretion given to judges when applying exacting scrutiny is almost complete. The only real guidance comes from looking at how this

134. *Id.* (footnotes omitted). The Court later described this as a "strict test," despite the fact that it applied the test in a most deferential fashion. *See id.* at 66–67.

135. *Id.*

136. As many of the justices and legal scholars have pointed out, "exacting scrutiny" is not the same as strict scrutiny. As Justice Thomas has explained, "in *Buckley*, although the Court purported to apply strict scrutiny, its formulation of that test was more forgiving than the traditional understanding of that exacting standard." Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 214 (1999) (Thomas, J., concurring).

137. *Buckley*, 424 U.S. at 64.

138. *Id.*

139. *Id.* at 16, 64 (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)).

140. *See* Lloyd Hitoshi Mayer, *Nonprofits, Politics, and Privacy*, 62 CASE W. RES. L. REV. 801, 813 (2012) ("Once one or more particular governmental interests have been identified as sufficiently important, however, the Court appears to have essentially weighed the benefits from that interest or interests being furthered against the costs of disclosure to the affected parties.").

141. *See* Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 GEO. MASON L. REV. 413, 419–20 (2012) (arguing that exacting scrutiny "may be more subject to change than either strict scrutiny or rational basis review because, unlike those standards, 'exacting scrutiny' does not put a thumb on either side of the constitutional scale").

standard has been applied in precedent. Prior case law puts meat on the bones of these all-but-hollow terms. This is a problem when trying to give legislators and members of the public notice about what is permissible under the First Amendment. Simply put, exacting scrutiny provides too little protection for those subject to disclosure provisions in light of sometimes significant privacy costs.

For instance, the exacting scrutiny applied in *Buckley* looks more like a rational basis level of review than a heightened level of review. The *Buckley* Court took a permissive, deferential view of congressional power in this area, upholding all of the challenged disclosure provisions.[142] First, with respect to the applicability of the FECA's disclosure provisions to minor party and independent candidates, the Court upheld the provisions despite finding that the government's interests in applying disclosure provisions is decreased and that the burden on the contributors is significant.[143]

Second, with respect to the applicability of the FECA's disclosure provisions to small contributors, the Court upheld the $10 and $100 thresholds despite finding that small contributors are "likely to be especially sensitive to recording or disclosure of their political preferences."[144] In fact, the Court explicitly acknowledged that Congress had merely adopted the thresholds that were part of the 1910 Publicity Act.[145] Clearly applying something far less than strict scrutiny, the Court held that the thresholds were not "wholly without rationality."[146] This language sounds like a far cry from anything approaching exacting scrutiny.[147]

Indeed, Chief Justice Burger dissented from the portion of *Buckley* upholding the disclosure provisions as applied to small contributors. Burger acknowledged that disclosure "is an effective means of revealing the type of political support that is sometimes coupled with expectations of special favors or rewards" but cautioned that "disclosure impinges on

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142. *See Buckley*, 424 U.S. at 83–84.

143. *See id.* at 70–71. Specifically, with respect to the burden that the disclosure provisions placed on contributors to minor party and independent candidates, the Court acknowledged that:

> [T]he damage done by disclosure to the associational interests of the minor parties and their members and to supporters of independents could be significant. These movements are less likely to have a sound financial base and thus are more vulnerable to falloffs in contributions. In some instances fears of reprisal may deter contributions to the point where the movement cannot survive. The public interest also suffers if that result comes to pass, for there is a consequent reduction in the free circulation of ideas both within and without the political arena.

Id. at 71 (footnotes omitted).

144. *Id.* at 83.

145. *See id.*

146. *Id.*

147. Indeed, Chief Justice Burger spent much of his dissent in *Buckley* arguing that the Court failed to apply the proper level of scrutiny. *Id.* at 240 (Burger, C.J., concurring in part and dissenting in part).

First Amendment rights."[148] Burger argued that while disclosure provisions serve many important governmental purposes, the provisions contained in the FECA were "irrationally low" and should be struck down.[149] Burger worried that with such low limits many small contributors would be deterred from contributing to candidates and committees.[150] Concluding that the disclosure provisions were impermissibly low, Burger famously found that "Congress has used a shotgun to kill wrens as well as hawks."[151]

In *McIntyre*, and in contrast to its decision in *Buckley*, the Court applied a much more stringent version of exacting scrutiny than applied in *Buckley*. Finding that the Ohio statute burdened "core political speech," the *McIntyre* Court applied exacting scrutiny to the prohibition on the distribution of anonymous campaign literature.[152] The Court defined exacting scrutiny as requiring narrow tailoring to serve "an overriding state interest."[153] This language sounds much more like strict scrutiny than the exacting scrutiny standard applied in *Buckley*.

In sum, while the Court has consistently used exacting scrutiny as the level of scrutiny applicable to disclosure provisions, it has been inconsistent in its discussion of how that standard should be applied.[154] At times, the Court has appeared to apply something akin to strict scrutiny, while at other times, the Court has applied something much closer to rational basis.

V. APPLYING EXACTING SCRUTINY

Exacting scrutiny, like other constitutional tests, includes two prongs. First, courts look to the strength of the government's purpose.[155] Second, courts look to the level of fit between the law and that purpose.[156] In the case of exacting scrutiny, prong one requires "a sufficient-

148. *Id.* at 236.

149. *Id.* at 236–37.

150. *Id.* at 237.

151. *Id.* at 239.

152. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995). Justice Scalia, by contrast, characterized the statute as far from burdensome. Justice Scalia concluded that the law "forbids the expression of no idea, but merely requires identification of the speaker when the idea is uttered in the electoral context." *Id.* at 378 (Scalia, J., dissenting). In fact, Justice Scalia viewed the disclosure provisions in *Buckley* as far more burdensome. *Id.* at 383–85. Justice Scalia believed the court should have been more deferential to legislative judgment, concluding that the issue "bears closely upon the real-life experience of elected politicians and *not* upon that of unelected judges." *Id.* at 381.

153. *Id.* at 347 (majority opinion) (citing First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 782 (1978)).

154. As the Ninth Circuit noted in *California Pro-Life Council, Inc. v. Getman*, "[T]he Supreme Court has been less than clear as to the proper level of judicial scrutiny we must apply in deciding the constitutionality of disclosure regulations such as those in the [Political Reform Act]." 328 F.3d 1088, 1101 n.16 (9th Cir. 2003).

155. *See* Buckley v. Valeo, 424 U.S. 1, 16 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).

156. *See id.* at 64.

ly important government[] interest," and prong two requires a substantial relationship between the restriction and that interest.[157] This Article, like the courts that analyze campaign disclosure provisions, focuses on the first prong of the test.

We again return to *Buckley* for the foundation of our understanding about campaign disclosure laws, this time about what those laws seek to accomplish. *Buckley* discusses three government interests served by such restrictions: preventing corruption or its appearance, informing voters, and enforcing other campaign finance laws.[158] These remain the three interests most often discussed as sufficient to uphold disclosure provisions.

A. Corruption and the Appearance of Corruption

1. Definitional Issues

The Court has provided little guidance regarding the specific type of corruption that disclosure laws prevent and how exactly those laws serve that goal. *Buckley* stated, in expansive terms, that disclosure provisions "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity."[159] The Court did little to explain what it meant by this broad proclamation. The Court added only a few explanatory statements. First, public disclosure "may discourage those who would use money for improper purposes either before or after the election."[160] Second, disclosure gives the public "information about a candidate's most generous supporters [so they are] better able to detect any post-election special favors that may be given in return."[161]

In essence, the Court argues that disclosure provisions serve pre- and post-election purposes. The underlying assumption here seems to be that there is something nefarious about certain contributions, and subjecting those contributions to the light of day will have a cleansing effect.[162] Before the election, the requirement that contributions be disclosed could avert the giving of problematic contributions because donors will want to avoid revealing themselves and the recipient of their donations to the public.[163] After the election, the disclosure requirement could place a

157. *Id.* at 16, 64 (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)).

158. *Id.* at 66–68.

159. *Id.* at 67.

160. *Id.* The Court later found that disclosure "tends 'to prevent the corrupt use of money to affect elections.'" *Id.* (quoting Burroughs v. United States, 290 U.S. 534, 548 (1934)).

161. *Id.*; *see also* Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 326 (arguing that disclosure laws put "the question of undue influence or preferential access in the hands of voters, who, aided by the institutional press, can follow the money and hold representatives accoutable [sic] for any trails they don't like.").

162. *See* Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 274 (2010).

163. *Id.* at 281.

check on elected officials who might be predisposed to make decisions that favor their contributors. If the disclosure provisions do not lead elected officials to avoid such behavior, they will at least allow the public to be aware of special favors. In this way, corruption may be seen to encompass accountability.[164] Knowledge regarding who contributes to candidates and groups could allow members of the public to hold their officials accountable.[165] For instance, even Justice Thomas, long hostile to disclosure provisions, concluded that "disclosure laws work to make donors and donees accountable to the public for any questionable financial dealings in which they may engage."[166] But what exactly does public accountability look like? Who is watching? How? And what are the consequences?

The government's interest in preventing corruption or its appearance after the election can at times sound like an iteration of the voter informational interest. Essentially, corruption is avoided by empowering voters to obtain the information necessary to root it out. However, this interest is distinct from the pure voter informational interest, which in a way is broader and encompasses a voter's desire to place a candidate along a political spectrum, not necessarily to detect or prevent problematic behavior.

Corruption now stands as a narrow concept that arguably prevents little more than bribery.[167] In *Citizens United*, the Court dispelled any beliefs that corruption could embrace a broad concept and defined corruption as merely quid pro quo.[168] The Court reiterated this crabbed view of corruption again in *McCutcheon*.[169] Hence, it is unclear how much force the interest in reducing the appearance of corruption has in the wake of *Citizens United* and *McCutcheon*.

Was corruption intended to embrace much more than merely the concept of quid pro quo? *Buckley* and earlier campaign finance cases likely envisioned corruption as a broader concept. For instance, *Buckley* talks about preventing the "'buying' of elections and . . . undue influence of . . . contributors on officeholders."[170] In *Socialist Workers*, Justice O'Connor explains that "[c]orruption of the electoral process can take

164. *See* Johnstone, *supra* note 141, at 436–37 (explaining that *Buckley* can be interpreted as supporting disclosure on the basis that it prevents corruption or its appearance because disclosure laws promote accountability).

165. Briffault, *supra* note 162, at 281 ("Most advocates for disclosure from the 1890s through the 1960s emphasized the Brandeisian 'cleansing power' of disclosure.").

166. Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 643 (1996) (Thomas, J., concurring in the judgement and dissenting in part).

167. *See* FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985).

168. *See* Citizens United v. FEC, 558 U.S. 310, 359 (2010).

169. *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1441 (2014).

170. Buckley v. Valeo, 424 U.S. 1, 70 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).

many forms: the actual buying of votes; the use of 'slush funds;' dirty tricks; and bribes of poll watchers and other election officials."[171]

2. Other Factors to Consider

Outside of the definitional issues regarding what exactly we mean by corruption, we also must dig deeper than the Court and ask more nuanced questions about how the identity of the contributor and the recipient might alter the Court's analysis as to the importance of the government's interest in preventing corruption or its appearance. With respect to the identity of the contributor, it may be that donations by small contributors go entirely unnoticed by recipients and fail to provide useful information to the public to hold public officials accountable for their actions or root out corruption.

Further, with respect to the identity of the recipient, when the recipient is a third-party member or independent candidate who is unlikely to win, "[t]he Government's interest in deterring the 'buying' of elections and the undue influence of large contributors on officeholders also may be reduced."[172] In such cases, it becomes unclear whether disclosure can serve anticorruptive purposes.

Next, one must ask whether there is a difference between disclosures made before and after the election. Mandating disclosure on the basis of preventing corruption or its appearance before an election is likely based on assumptions that there is something nefarious or problematic about certain contributors or contributions. But there must be more than that. It must also be that disclosure will do something to remedy those problems. Perhaps disclosure will deter contributions made by people who would expect something in return for their contributions. Pre-election disclosure, therefore, seems premised on the belief that contributions will predict the behavior of candidates once they are officeholders, specifically, behavior with respect to certain contributors. After the election, disclosure laws premised on preventing corruption or its appearance are likely designed on a belief that disclosure will place a check on elected officials who might be predisposed to make improper decisions that favor their contributors.

B. Voter Information

1. Definitional Issues

The voter informational interest clearly places First Amendment concerns on both sides of the balance when analyzing disclosure provi-

171. Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 109–10 (1982) (O'Connor, J., concurring in part and dissenting in part).

172. *Buckley*, 424 U.S. at 70.

sions.[173] Simply put, under the voter informational interest, disclosure can be seen supporting, rather than merely burdening, First Amendment rights.[174]

The Court recognized that disclosure provisions provide the public with useful information regarding the identity of those who seek to influence ballot box decisions.[175] With respect to candidates, the *Buckley* Court found that disclosure "allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches."[176] The Court concluded that disclosure of campaign contributions "alert[s] the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office."[177] Hence, disclosure of contributions essentially serves as a voting cue and an indication of a candidate's position as an officeholder, much like party affiliation or the identity of endorsers might.

In contrast to its decisions in *Buckley*, *McConnell*, and *Citizens United*, in *McIntyre* the Court found the voter informational interest to be insufficient to uphold the prohibition on the distribution of anonymous literature.[178] The Court treated the identity of the speaker as indistinguishable from any other piece of content in a document.[179] From this conclusion, it followed that "[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise

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173. Justice Breyer has noted that "constitutionally protected interests lie on both sides of the legal equation." Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring).

174. Justice Stevens wrote separately in *Reed* to emphasize his point that "[t]his is not a hard case" because the regulation did not affect pure speech, and "any effect on speech that disclosure might have is minimal." John Doe #1 v. Reed, 561 U.S. 186, 215–16 (2010) (Stevens, J., concurring).

175. For an argument that the Court has misidentified the foundations of the informational interest, see Johnstone, *supra* note 141, at 415–16. Johnstone argues that the informational interest is both broader and narrower than the Court's current understanding. *Id.* at 415.

> It is broader in the sense that informing voters through disclosure of a wide range of interests in political campaigns is critical to the full function of the Constitution's antifactional machinery. It is narrower in the sense that the interest is in disclosing interests—factions—and not other information that voters may find valuable for other reasons.

Id.

176. *Buckley*, 424 U.S. at 67; *see also* Burt Neuborne, *One Dollar-One Vote: A Preface to Debating Campaign Finance Reform*, 37 WASHBURN L.J. 1, 15 (1997) ("[C]ompelled public disclosure of campaign contributions, campaign expenditures, and individual expenditures on behalf of a candidate was sustained in *Buckley*, in part, because the Court believed that knowledge of a candidate's financial supporters was of great value to voters in assessing the candidate's political positions.").

177. *Buckley*, 424 U.S. at 67.

178. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 348–53 (1995).

179. *Id.* at 348 ("Insofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a document, we think the identity of the speaker is no different from other components of the document's content . . . .").

omit."[180] However, the speaker's identity is not the same as any other piece of content that might be omitted from or added to a communication. The speaker's identity allows the voters to evaluate how much credibility they want to give to a message. There is a reason that some advertisements must tell viewers whether a spokesperson is paid; we will evaluate the message based on the speaker's motivations. There is a reason why people take advice on taxes from their accountants and medicine from their doctors. Having said that, all of those examples presume that the listener or viewer will be able to identify the speaker. If that is not the case, then the disclosure obviously provides little information.

The *McIntyre* Court distinguished *Buckley* on the basis of the informational interest.[181] However, it is difficult to square *Buckley*'s holding regarding the importance of disclosure with respect to independent expenditures and *McIntyre*'s holding regarding the importance of anonymity with respect to campaign literature. Both provisions serve the government's interest in providing information to the electorate. As Justice Scalia argued in his dissent, "The provision . . . here serves the same informational interest" as those discussed in *Buckley*.[182]

The *McIntyre* Court acknowledged that *Buckley* addressed the disclosure of not just contributions to or expenditures by candidates but also independent activity, like Mrs. McIntyre's activity.[183] But the basis on which the *McIntyre* Court distinguished the disclosure provision at issue in *Buckley* from the Ohio statute fails to withstand serious scrutiny.[184]

The *McIntyre* Court held that while the mandatory reporting at issue in *Buckley* "undeniably impedes protected First Amendment activity, the intrusion is a far cry from compelled self-identification on all election-related writings. A written election-related document—particularly a leaflet—is often a personally crafted statement of a political viewpoint."[185] But the same is true for many independent expenditures, which

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180. *Id.* The Court added that, "in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message." *Id.* at 348–49.

181. *Id.* at 353–57. The Court quickly dismissed *Bellotti* as concerning the protections given to corporations. *See id.* at 353–54.

182. *Id.* at 384 (Scalia, J., dissenting).

183. *Id.* at 354–55 (majority opinion) (citing Buckley v. Valeo, 424 U.S. 1, 75–76 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010)). The Court recognized that in *Buckley* it had "expressed approval of a requirement that even 'independent expenditures' in excess of a threshold level be reported to the Federal Election Commission." *Id.* at 355.

184. The Court distinguished *Buckley* by finding that the Federal Election Campaign Act "entailed nothing more than an identification to the Commission of the amount and use of money expended in support of a candidate." *Id.*

185. *Id.* The Court further concluded, without evidence, that "even though money may 'talk,' its speech is less specific, less personal, and less provocative than a handbill—and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation." *Id.* If that were

the Court has said are akin to the spender's speech. And while reporting information to the Federal Elections Commission (FEC), as opposed to placing it on the face of a leaflet, may have been qualitatively different before the advent of widespread online disclosure, the same is not true now. While it is of course true that the disclosure provision in *Buckley* was not identical to the one at issue in *McIntyre*, that does not make the provisions analytically distinguishable.

Back in the campaign finance arena, in both *McConnell* and *Citizens United*, the Court focused primarily on the informational interest when upholding disclosure provisions.[186] For instance, the *Citizens United* Court found that "[a]t the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party."[187] Similarly, with respect to the disclosure requirements, the Court found that "the public has an interest in knowing who is speaking about a candidate shortly before an election."[188] The Court concluded that "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[189] Hence, the *Citizens United* Court focused on the importance of pre-election disclosure.

The voter informational interest, unlike the interest in preventing corruption or its appearance, mainly supports pre-election purposes. Simply put, the Court concluded that information regarding a candidate's supporters tells the public more about who their candidates are and who those candidates may later support than other information provided during the often rancorous political campaigns.

The voter informational interest must stand alone with respect to laws that require disclosure of funds, which the Court says cannot give rise to corruption or its appearance. For instance, the Court has said that spending by independent groups does not lead "to corruption or the appearance of corruption."[190] For the same reason, lower courts have concluded that contributions to independent groups cannot lead to corruption or the appearance of corruption.[191] Therefore, disclosure provisions that

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true, then limits on independent expenditures should not be treated as limits on pure speech that are subject to strict scrutiny.

186. *See* Citizens United v. FEC, 558 U.S. 310, 368 (2010); McConnell v. FEC, 540 U.S. 93, 195–96 (2003), *overruled by Citizens United*, 558 U.S. 310.

187. *Citizens United*, 558 U.S. at 368.

188. *Id.* at 369. The Court also rejected Citizens United's contention that the disclosure requirements would chill speech by exposing donors to retaliation. The Court found that Citizens United "offered no evidence that its members may face similar threats or reprisals." *Id.* at 370.

189. *Id.* at 371. The Court found that "[a] campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today." *Id.* at 370.

190. *Id.* at 357.

191. *See, e.g.*, SpeechNow.org v. FEC, 599 F.3d 686, 692–94 (D.C. Cir. 2010).

apply to independent expenditure groups must be supported only by the voter informational interest.[192]

The same is true of disclosure provisions on the state level regarding the financing of ballot measure campaigns. Because the Court has said that spending by ballot measure committees cannot give rise to corruption or its appearance,[193] it is the informational interest alone that supports disclosure provisions affecting ballot measures.

It may be that the voter informational interest applies with special force in the ballot measure context.[194] In *ProtectMarriage.com v. Bowen*,[195] the Ninth Circuit found that the informational interest applies most strongly in the ballot measure context because "[v]oters rely on information regarding the identity of the speaker . . . particularly where the effect of the ballot measure is not readily apparent."[196] In addition, citizens act as legislators in the ballot measure context and have a strong interest in knowing who is trying to sway their votes.[197]

However, while the informational interest must stand alone in supporting disclosure regarding independent expenditure groups and ballot measure committees, this interest has been found to be insufficient with respect to distributors of leaflets and handbills in *Talley* and *McIntyre*.[198]

2. Other Factors to Consider

As is true for the government's interest in preventing corruption or the appearance of corruption, courts must look to additional factors to see if the government's voter informational interest is truly served by disclosure provisions.

For instance, with respect to the identity of the contributor, one must evaluate which contributors provide the voters with useful information. Small individual donors are unlikely to give the voters any in-

192. *See* Buckley v. Valeo, 424 U.S. 1, 76 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010). In *Buckley* the Court upheld the disclosure of independent expenditures, despite striking down limits on those expenditures because the limits failed to prevent corruption or its appearance. The Court found that the disclosure provisions "serve another informational interest, and . . . increase[] the fund of information concerning those who support the candidates." *Id.* at 81. The Court held that disclosure of independent expenditures "helps voters to define more of the candidates' constituencies." *Id.* This, of course, assumes those who make independent expenditures on a candidate's behalf are a candidate's constituency.

193. *See, e.g.*, Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 297–98 (1981); First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 790 (1978).

194. *See* ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1207 (E.D. Cal. 2009).

195. 599 F. Supp. 2d 1197 (E.D. Cal. 2009).

196. *Id.* at 1208 (quoting Cal. Pro-Life Council, Inc. v. Getman, No. 00–1698, slip op. at 17:12–28 (E.D. Cal. Feb. 25, 2005)).

197. *Id.* (citing Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1106 (9th Cir. 2003)).

198. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 348–49 (1995); Talley v. California, 362 U.S. 60, 63–65 (1960).

formation that could bear on their ballot box decisions. Instead, when it comes to small donors, and indeed most individual donors, what would be useful to the public is the aggregation of certain types of information. It would be helpful, for example, for the public to know if forty percent of the donors to a ballot measure committee, a candidate committee, or another political committee were all employed in the real estate industry, the health care industry, or the legal industry. Similarly, it might be elucidative for the public to know what percentage of the donors to a committee live in a certain area, are a certain age, or even identify as being from a certain racial background.

With respect to donors that are artificial entities, it is important for the public to obtain information about that entity and the identity of its supporters, members, and employees. Innocuous sounding names like Americans for a Better Tomorrow or even Smith and Adams LLC may provide the public with little information. However, information regarding the source of its funds (in the case of Americans for a Better Tomorrow) or the identity of its members (in the case of Smith and Adams LLC) can give the public important information about the identity of those campaign contributors. Disclosure laws should be designed to provide the public with the information necessary to evaluate the motivation of contributors and spenders.

Further, with respect to the identity of the recipient, when the donee is a third-party member or independent candidate, the voter informational interest may be low because "minor parties usually represent definite and publicized viewpoints."[199] In such cases there is a decreased need to give the voters information about the views that a candidate espouses.

When the donee is a ballot measure committee, as opposed to a candidate committee, it may be that disclosure of campaign funds most directly serves the voter informational purpose. In the case of candidate elections, the voters are confronted with a living, breathing candidate who they can evaluate. Candidates typically share their views on a wide range of issues prior to an election. In the case of ballot measure elections, the voters face only a proposal on which they can vote yes or no. The proposal may have a somewhat misleading title and summary and may be confusing to understand for those few voters who endeavor to

199. Buckley v. Valeo, 424 U.S. 1, 70 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010). The Court continued:

> Major parties encompass candidates of greater diversity. In many situations the label "Republican" or "Democrat" tells a voter little. The candidate who bears it may be supported by funds from the far right, the far left, or any place in between on the political spectrum. It is less likely that a candidate of, say, the Socialist Labor Party will represent interests that cannot be discerned from the party's ideological position.

Id.

read it. When the donee is an artificial entity, the same considerations apply as when the entity is a donor.

Again, the voter informational interest demonstrates that disclosure provisions can also foster, not merely burden, First Amendment rights. Disclosure provisions increase the amount of information available to voters when deciding who will represent them and, in the case of ballot measures, which laws to enact.

C. Detecting Violations and Enforcement

Finally, in *Buckley*, the Court found that "recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations [contained in the FECA]."[200]

Here, the Court likely conflated these various restrictions. Public disclosure is not necessary to detect violations; instead, recordkeeping and reporting alone serve that purpose. It may be that the public serves a watchdog function. But it is far from clear how much the public truly polices campaign finance laws.

VI. THE EFFECT OF ONLINE DISCLOSURE

Online access to campaign finance information significantly enlarges both the benefits and burdens of disclosure laws. The case law should essentially be divided between cases decided before and after the advent of widespread online disclosure. *Citizens United*, decided in 2010, is arguably the first major decision regarding the constitutionality of disclosure provisions made in our modern Internet Age. And it is no coincidence that the majority focused on the efficacy of online disclosure when striking down limits on expenditures, while the dissent focused on the detriments of online disclosure and discussed privacy concerns.

A. Benefits

There can be no doubt that the ability to access disclosure information with the click of a mouse button, as opposed to a trip to a city hall, county seat, state capitol, or the District of Columbia, has radically increased the ease of obtaining disclosed information. Online disclosure facilitates the government's interests identified in *Buckley*: enhancing voter information, preventing corruption or its appearance, and promoting enforcement of campaign finance regulations.

In *Citizens United*, Justice Kennedy leaned heavily on the utility of disclosure provisions when striking down McCain–Feingold's prohibi-

200. *Id.* at 67–68. It is worth noting that this interest may be losing efficacy because there are simply fewer contribution and expenditure laws to enforce. Therefore, courts seeking to uphold disclosure provisions should be careful about putting too much weight on this interest.

tion on the ability of corporations and labor unions to use general treasury funds on electioneering communications.[201] Justice Kennedy, writing for five other Justices, explicitly found that "[a] campaign finance system . . . with effective disclosure has not existed before today."[202] Justice Kennedy took this to mean that limits on spending were no longer required because disclosure laws could do much of the work that contribution and spending limits were designed to achieve.

But what exactly does "effective disclosure" mean to Justice Kennedy? Justice Kennedy focuses on accountability: "[M]odern technology makes disclosures [more] rapid and informative. . . . With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."[203]

The *Citizens United* Court additionally emphasized the importance of online disclosure to the efficacy of disclosure rules.[204] There are a number of assumptions that must be examined regarding the ability of disclosure laws to provide voters with useful information about candidates before an election. First, should the voters associate a candidate's ideology with that of her contributors? Second, how often do contributions affect an officeholder's decisions and votes? Third, does the current form of delivering campaign finance data to the voters serve this purpose? For instance, would it be more useful to aggregate information based on factors such as geography and type of employment?

The world that Justice Kennedy describes is a dream far from reality. Dark money flows freely throughout our political system.[205] Immense sums of money are spent to sway the ballot box decisions of voters throughout the country. And much of that goes undisclosed. If money is speech, as the Court has said, quite often the voters do not know who is speaking.[206]

The public similarly faces very real challenges in obtaining the information necessary to hold their officials accountable.[207] This is a failing, not of online disclosure, but of a complex web of rules and regula-

201. *See* Citizens United v. FEC, 558 U.S. 310, 366–67 (2010).

202. *Id.* at 370.

203. *Id.*; *see also* Briffault, *supra* note 162, at 276 ("[E]ven if the constitutional rules governing disclosure do not change, the enhanced potential for disclosure to affect political participation ought to force us to think more carefully about what we want and what we can get from disclosure and how disclosure laws ought to be tailored to provide important election-related information with the least impact on participation.").

204. *Citizens United*, 558 U.S. at 370.

205. "The political involvement of tax-exempt nonprofit organizations, which often do not disclose their financial supporters, has become a topic of national interest." Mayer, *supra* note 140, at 802.

206. *See* Kroll, *supra* note 9.

207. *See* Johnstone, *supra* note 141, at 417 (arguing that "[i]n short, 'disclosure failed colossally in the 2010 election.'" (quoting William McGeveran, *Mrs. McIntyre's Persona: Bringing Privacy Theory to Election Law*, 19 WM. & MARY BILL RTS. J. 859, 864 (2011))).

tions promulgated by the FEC and Internal Revenue Service (IRS). While federal election law requires that some entities that engage in political activity, such as political action committees, must disclose their donors, it also allows other entities that engage in some amount of political activity, like social welfare organizations, trade associations, chambers of commerce, and labor unions, to not disclose their donors.[208]

Additionally, the world Justice Kennedy describes has also failed to come to fruition for some practical reasons. Notably, the press corps is dramatically shrinking. One study of DC Media Corps found "a significant decrease in the reporting power of mainstream media, [in part] because . . . the number of newspapers" devoted to covering Congress has decreased by fifty percent, and the number of reports monitoring Congress has fallen by thirty percent.[209] Members of the press often serve a watchdog function by mining data, finding connections between contributors or spenders and candidates, and digesting and contextualizing campaign finance information. However, there are simply fewer performing that function.

Further, while the Internet can serve a democratizing function by providing anyone with access to a computer with the ability to obtain disclosed information, the reality is that very few citizens take it upon themselves to pore over disclosure reports. Hence, while campaign finance information is available, it is largely underutilized.

Justice Kennedy naively misstates the legal and practical implications of online disclosure. The legal framework has failed to bring about full and complete disclosure. Practical realities have similarly failed to create a world in which disclosure laws can supplant other campaign finance tools—such as contribution and expenditure limits.

B. Detriments

The Internet no doubt bolsters the effectiveness of disclosure provisions by making information easier and faster to access. However, with the ease and speed come increased concerns about burdening speech and associational rights.[210] Our current rules were crafted in a pre-Internet era in which legislators could little fathom our current systems of delivering information to the public. As discussed above, the detriments of online disclosure are thoughtfully detailed in Justice Thomas's dissent in *Citizens United*.[211] In the wake of the threats, harassments, and reprisals faced by donors to "Yes on [Proposition] 8" campaigns, there can be

208. Mayer, *supra* note 140, at 804–05.

209. LEA HELLMUELLER, THE WASHINGTON, DC MEDIA CORPS IN THE 21ST CENTURY: THE SOURCE-CORRESPONDENT RELATIONSHIP 20 (2014).

210. Briffault, *supra* note 162, at 274; *see also* William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 8–24 (2003).

211. *See* Citizens United v. FEC, 558 U.S. 310, 480–85 (2010) (Thomas, J., concurring in part and dissenting in part).

little doubt that online disclosure can have negative consequences.[212] These consequences must be examined and, if possible, quantified.

VII. CONCLUSION

While disclosure laws can serve important purposes, campaign finance laws, including contribution and expenditure limits, are designed to accomplish much more than disclosure laws alone can.[213] Contribution limits, for example, can allow qualified candidates without a preexisting network of financial support to run for office. Expenditure limits can serve to prevent the drowning out of voices of those who cannot or do not wish to spend large sums of money in political campaigns.

A. Change the Existing Framework

While citizens, legislators, and even members of the judiciary are looking to disclosure laws to carry a heavy burden in our current electoral system, we lack a strong doctrinal framework through which to view and evaluate disclosure provisions. We begin by looking at the existing doctrine and reconceptualizing the way we analyze disclosure provisions. First, we must recognize that disclosure provisions often impose deeper and more varied burdens than we currently recognize. Courts should consider protecting additional concerns, including those that do not rise to the level of *NAACP*-like harms. The Court's opinion in *McIntyre*, for instance, provides support for the idea of recognizing additional burdens imposed by disclosure laws. Second, we should accept that exacting scrutiny is a vague standard of review that provides little guidance. Once we recognize that the burdens imposed by disclosure provisions are greater than currently thought, it might make sense to apply something closer to strict scrutiny. Third, it is important to realize that the government's interests in enacting disclosure provisions are ill-defined and overstated. It is time to be more specific about what we can and hope to achieve in our current framework.

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212. *See* ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1200–01 (E.D. Cal. 2009).

213. Briffault, *supra* note 162, at 276 ("Disclosure alone is likely to accomplish little. It is unlikely to be effective at advancing the anti-corruption value that is one of its justifications, and reliance on disclosure alone effectively abandons many of the other long-established goals of campaign finance regulation, such as voter equality, promoting electoral competition, ameliorating the time-burdens of fundraising, and reducing the role of private wealth in politics."). Justice White's dissent in *Citizens Against Rent Control* addresses this issue. *See* Citizens Against Rent Control v. City of Berkeley/Coalition for Fair Housing, 454 U.S. 290, 306–08 (1981) (White, J., dissenting). There the Court struck down a California law that limited contributions to ballot measure committees on the grounds that the law failed to serve a governmental interest. *Id.* at 298–99 (majority opinion). Justice White noted that disclosure laws alone failed to sufficiently serve the voter information interest. *Id.* at 309 (White, J., dissenting).

B. Explore Additional Factors

We must then be explicit about additional factors that should weigh into the Court's analysis. First, we should undertake a deeper exploration of how the identity of the contributor and recipient, and the type of election may factor into the Court's analysis. Disclosure may be more important with respect to ballot measure elections than candidate elections. The disclosure of campaign contributions may be one of the important indications of who would benefit from ballot measure proposals because there are few other voting cues in such elections.

Second, all of this should be done with an understanding that online disclosure of campaign finance data significantly alters both the benefits and burdens of public disclosure. The Court has focused on how online disclosure increases the effectiveness of disclosure provisions but has not similarly recognized the increased burden that online disclosure can impose on First Amendment rights.

C. Maintain Campaign Contribution and Expenditure Limits

Disclosure provisions are not a substitute for a comprehensive system of campaign finance law that includes limits on contributions and expenditures. Indeed, in *Buckley*, the foundation of modern campaign finance law, the Court explicitly rejected appellants' arguments that "disclosure requirements are the proper solution to virtually all of the evils Congress sought to remedy."[214] However, the Court's current trajectory is to leave disclosure as the only tool or solution through which to remedy the problems of money in politics. Given that, now is the time for the Court to clarify its campaign finance jurisprudence.

214. Buckley v. Valeo, 424 U.S. 1, 60 (1976) (quoting Brief of the Appellants at 171, *Buckley*, 424 U.S. 1 (Nos. 75-436, 75-437)), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).

LAWYERS, POWER, AND STRATEGIC EXPERTISE

COLLEEN F. SHANAHAN, ANNA E. CARPENTER, AND ALYX MARK[†]

ABSTRACT

> The only sound in a courtroom is the hum of the ventilation system. It feels as if everyone in the room is holding their breath .... Litigants are uneasy in the courthouse, plaintiffs and defendants alike. They fidget. They keep their coats on. They clutch their sheaves of paper—rent receipts and summonses, leases and bills. You can always tell the lawyers, because they claim the front row, take off their jackets, lay out their files. It's not just their ease with the language and the process that sets them apart. They dominate the space.[1]

This empirical study analyzes the experience of the parties described above, specifically the power, representation, and strategic expertise they bring to a dispute. Our analysis of these factors clarifies how representation may be a solution to the access to justice crisis. We find that a representative helps most parties most of the time. We also find that the other party's representation and the representative's strategic expertise are significant factors for understanding representation for civil litigants.

This study analyzes a database of 1,700 unemployment insurance appeals in the District of Columbia over a two-year period, the broadest and deepest collection of data about representation in recent years. The analysis shows wide disparity in representation, with employers (the more powerful party to a dispute or the quintessential "haves") represented twice as often as claimants (the less powerful party or the "have nots"), as well as a notable difference in parties' use of procedures in hearings. Using difference-in-proportions tests, this Article examines the interaction of party power and representation and finds that represented parties have better case outcomes than unrepresented parties, though

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† Colleen F. Shanahan is Associate Clinical Professor of Law at Temple University, Beasley School of Law. Anna E. Carpenter is Assistant Clinical Professor of Law and Director, Lobeck Taylor Family Advocacy Clinic, at University of Tulsa College of Law. Alyx Mark is Assistant Professor of Political Science at North Central College. We thank the many colleagues and workshop participants who provided comments and ideas for this project. This project is possible because of our research team, including Emily Bock, Jamie Bowers, Claudine Brenner, Genevieve Fugere, Hannah Guerrier, Madelaine Harrington, Katrina Homel, Michael J. Nelson II, Brice Plebani, Meredith Ragany, Rohini Singh, Samantha Wiggins, Emily Wong, Alyssa Wootton, and Iris Xie. We also thank the Georgetown Law Library and Summer Faculty Fund and the University of Tulsa Faculty Development Summer Fellowship for their support. Finally, we thank Judge Steven Wellner and the staff of the D.C. Office of Administrative Hearings for their support of this project and our research team.

1. Kat Aaron, *The People's Court?*, AM. PROSPECT (Nov. 21, 2013), http:// http://prospect.org/article/peoples-court.

employers see less benefit from legal representation than claimants. In addition, the Article confirms the intuitive result that represented parties are more likely to use procedures than unrepresented parties. Yet, surprisingly, the Article finds that represented claimants who use certain evidentiary procedures have worse case outcomes than represented claimants who do not use those same procedures.

We recommend that any policy solution to the country's civil litigation crisis, whether it is a right to civil counsel, unbundled legal services, lay advocacy, or pro se court reform, must account for these factors. To achieve this goal, we call for a deeper understanding of representation in context.

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INTRODUCTION

Advocates, scholars, and courts are struggling to address critical needs in civil representation in the United States. Despite these focused efforts, we are still unable to answer a fundamental question: when do civil litigants need a lawyer to effectively participate in our justice sys-

tem?[2] In part, this ongoing quest is the result of the incomplete development of empirical research—much existing research is focused on the outcome of cases with little exploration of how those outcomes are reached.[3] And in equal part, this quest continues because we have not yet fully developed theories that explain the effectiveness of representation.[4] This Article attempts to provide both theoretical grounding and empirical analysis of when, why, and how representation matters.

This study is informed by existing scholarship regarding the role lawyers play in civil justice settings, including theories of the balance of power and of professional expertise. Scholars have developed theories of the role that lawyers play in civil justice settings and how representation interacts with a range of variables, including the area of law, the complexity of procedural rules,[5] and the balance of power between the parties in a given dispute. Yet, these theories have not been tested in practice, until now.

We believe these core questions can only be understood, and we can only make good legal and policy decisions about when civil litigants should have lawyers, by investigating legal representation in context. We begin to engage in the complexity of studying representation in context by moving beyond the question of whether a litigant wins when he or she has a lawyer. To do this, we investigate how the balance of power between the parties interacts with representation and ask exactly what expertise a lawyer lends to the civil litigation process. We then use our empirical findings to propose a new theory of strategic expertise: how lawyers connect formal training with situational understanding and supplement it with judgment as they serve their clients. We argue that these findings mean policy decisions about legal assistance must be grounded in balance of power and strategic expertise.

Part I of this Article describes the site of the study: an administrative court where judges hold de novo hearings to resolve legal disputes between two parties, claimants seeking unemployment benefits and em-

2. *See* Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101, 106; Jeffrey Charn & Jeffrey Selbin, *The Clinic Lab Office*, 2013 WIS. L. REV. 145, 158–60; D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2125–26 (2012); Jeffrey Selbin et al., *Service Delivery, Resource Allocation, and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45, 53–54 (2012).

3. *See, e.g.*, Greiner & Pattanayak, *supra* note 2.

4. *See generally* Albiston & Sandefur, *supra* note 2, at 105–19 (offering an access to justice research agenda that is theory-driven and exploring a broad range of issues related to civil justice); Joshua B. Fischman, *Reuniting 'Is' and 'Ought' in Empirical Legal Scholarship*, 162 U. PA. L. REV. 117, 121 (2013) (calling for legal scholars to develop and be explicit about normative goals in empirical research and noting that "[i]ntuition alone cannot suffice to relate observable data to normative claims; legal scholarship needs conceptual frameworks and empirical methods that can bridge the gap between 'is' and 'ought'").

5. *See* Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers' Impact*, 80 AM. SOC. REV. 909, 915–16 (2015).

ployers opposing the grant of unemployment benefits. The units of observation are cases, all of which have the potential to end in a hearing and most of which do end in this way. Thus, like much of the access to justice literature, this study is concerned with legal disputes that are formally adjudicated.[6] These hearings are a particularly good context for examining the complexity of the value of representation because they have clear binary outcomes, a variety of parties and representatives, and a relatively formal legal process with clear procedural steps.[7]

This Article relies on a data set of 1,794 unique cases. As described in the Methodological Appendix, the data encompass all unemployment benefit appeals in the District of Columbia in 2012 where the circumstances of separation were at issue, regardless of which parties appeared at the hearing. The data for each case include extensive coding regarding the circumstances and activities in the case, such as the fact and type of representation, the presence of a representative at the hearing, the presence of parties at the hearing, the participation of parties in different procedural steps of the hearing process, and the procedural and substantive outcomes of the cases. This data set is larger in the number of cases collected than many recent empirical studies of representation and has broader data collected about each case than previous studies.[8] Further, while this study is not randomized, it uses a complete set of cases to look at differences among groups and, thus, contributes to ongoing research of representation in context.[9]

Part II of the Article presents our first finding from this examination of representation in context, which is that less powerful parties gain more from representation than more powerful parties do. To test theories of balance of power and representation, we ask whether one or both parties

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6. Most empirical studies on access to justice focus on civil justice problems that actually reach a lawyer's attention and become formal cases in the justice system, a focus that Albiston and Sandefur have challenged because it leaves out the vast majority of civil justice problems that never actually come to the attention of a lawyer, let alone an adjudicator. *See* Albiston & Sandefur, *supra* note 2, at 108–09.

7. It is common, when writing about administrative hearings, for scholars and policy-makers to assert that the quasi-inquisitorial nature of these hearings—where many parties are pro se, representation is rare, and the rules of evidence and procedure are relaxed—is a departure from the regular operation of civil courts. *See* Greiner & Pattanayak, *supra* note 2, at 2136–37. It might be suggested that the applicability of a study such as this is limited given the differences between administrative hearings, and city and county civil courts. However, the reality of the day-to-day operations of our civil justice system suggests this claim is overstated. The vast majority of litigants in civil cases are unrepresented, and even a brief observation at any of our nation's workhorse civil courts will reveal that hearings in these settings are often no less inquisitorial in nature, the rules of evidence and procedure are similarly relaxed (or ignored), and representation is rare. Although the structure, and perhaps the dream, of the adversarial system are more visible in our civil justice system, it is certainly not the case that inquisitorial judging is a rarity in America today. For that reason and others, we argue that the results of this study have wider applicability than the administrative appeals setting.

8. For a discussion of other empirical studies, see *infra* Section I.D.

9. For a detailed discussion of the contributions of observational and randomized studies, see *infra* Methodological Appendix.

have lawyers. We then investigate the case outcomes across variation in balance of power and balance of representation. The data show that representation makes a difference, especially for claimants and especially for claimants when employers are not represented. Interestingly, claimants also benefit from representation when both parties are represented. In this context, the employer generally is the party with more power and corresponds with the haves in the civil justice system, while the claimant is the party with less power and corresponds with the have nots.[10] As a result, we argue that while legal representation may offer advantages for anyone who can secure it, the benefit that flows from a representative's legal expertise is greatest for those who can least afford representation because the haves can acquire and use elements of legal expertise,[11] even without actual representation.[12] Thus, the have nots are at a disadvantage when they do not have representation and face the haves. If representation can shift the power dynamic in the civil legal setting, as we suggest it does, this raises the question of what lawyers are doing to create this shift.

Part III explains our second finding: what representatives do to help parties is more complex and dependent on context than simply using the available law or procedure. Our data reveal that all represented parties are more likely to appear at a hearing and use evidentiary steps than unrepresented parties. Represented employers who use these steps have better case outcomes than represented employers who do not use the same procedures. In contrast, represented claimants who use certain evidentiary steps have comparatively worse case outcomes than represented claimants who do not use the same procedures. This finding is surprising because it challenges basic assumptions about how lawyers use law and procedure to help their clients. As discussed more fully below, this finding suggests a variety of explanations, including the interaction of use of procedures with substantive legal burdens, the nature of representation in this study's context, and the signaling function of lawyers. We argue that one important explanation is a lawyer's strategic expertise, an important and previously uninvestigated component of representation. If lawyers potentially contribute three types of expertise—substantive, relational, and strategic—the concept of strategic expertise captures how lawyers make choices by synthesizing the rules that govern their work and the informal relationships they navigate in the course of that work.

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10. *See generally* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 97–107 (1974) (dividing parties in the civil legal system into "repeat players" and "one-shotters" and describing how well-resourced repeat players—the "haves"—gain advantage in litigation against one-shotters—the "have nots").

11. In this Article, we will use the terms "legal expertise" and "professional expertise" interchangeably.

12. *See* Galanter, *supra* note 10, at 98–101.

Finally, Part IV examines the implications of our findings for theory, future research, and policy reform. We reach the conclusion that it is not sufficient to ask whether a party is represented; we must also ask who that party is, what the balance of power is between the parties, and what the representative is doing for the party. We recommend avenues for future research and policy reforms to better match the problem of the civil litigation crisis with the solution of representation.

I. THE DATA: UNEMPLOYMENT CASES

To understand the data, and thus our analysis of the context in which we investigate our theories of balance of power and expertise, it is helpful to understand the unemployment insurance appeals that are the subject of our study. The site of this study is the District of Columbia's central administrative court, the Office of Administrative Hearings (OAH). The study focuses on a subset of OAH cases, unemployment insurance appeals regarding qualification.[13] In these cases, an individual seeking unemployment insurance benefits, a claimant, faces his or her previous employer in a hearing before an Administrative Law Judge (ALJ) who determines whether or not the claimant will receive unemployment insurance benefits.[14] This process begins when the claimant files for benefits with the D.C. Department of Employment Services (DOES), and one party subsequently appeals the grant or denial of benefits by DOES to OAH.[15] Under District law, unemployed workers are presumed qualified for benefits but may be disqualified from benefits for one of two reasons: (1) because they were terminated for work-related misconduct or (2) because they voluntarily quit without good cause.[16]

A. The Parties

Our data set for this Article includes unemployment appeals where the employer and the claimant are parties to the case. Employers have a stake in these cases because the regulatory scheme requires payroll taxes based in part on the number of former employees who have received unemployment insurance.[17]

In this study, we did not collect identifying or demographic data on either party, in part for confidentiality reasons and in part because the data was not consistently available in the case files. However, based on other research and our own observations in litigating cases from 2010 to 2015, we can generally describe the characteristics of employers and

13. Much of the discussion of the procedural practices and characteristics of these courts come from the authors' own observations. For a detailed discussion, see *infra* Methodological Appendix.

14. *See* D.C. MUN. REGS. tit. 1, § 2821 (2015) (emergency action adopted as a regulation on Nov. 6, 2015).

15. *See id.* (emergency action adopted as a regulation on Nov. 6, 2015).

16. D.C. CODE § 51-110(a)–(b) (2015).

17. *See id.* § 51-103(c)(1)–(2).

claimants in unemployment appeals. The employers who appear before OAH in unemployment cases range from small businesses to major corporations to federal agencies. Our anecdotal experience suggests that certain high turnover industries that tend to pay lower wages may be overrepresented among employers. For example, private security, food service, janitorial, and health-care companies were often the opposing parties in the cases the authors tried before OAH. In addition, due to a feature of the unemployment tax system, many nonprofit employers have a strong incentive to participate.[18]

Claimants, similarly, include individuals from a range of backgrounds and industries, from low-wage workers to lawyers who earned six-figure salaries.[19] However, our observation and data from studies of unemployment claimants indicate that those who receive unemployment benefits are disproportionately low income and people of color.[20] In addition, for a variety of reasons too numerous to list here, low-wage jobs tend to expose workers to the possibility of being terminated, or present reasons for quitting a job, far more often than higher wage work.[21]

B. The Representatives

Although most litigants are unrepresented, with claimants much more likely to be unrepresented than employers, there is a significant amount of representation in OAH cases.[22] On the employer side, there are lay representatives and attorneys.[23] On the claimant side, representatives are usually either attorneys or law students working in the context

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18. Under federal law, nonprofit employers may opt out of paying unemployment taxes and instead reimburse states directly for the cost of payments made to former employees. 26 U.S.C. §§ 3306(c)(8), 3309(a)(2) (2012).

19. In the United States during 2013, the number of weekly claims was around 682,102, 56.2% of which were by males while 43.2% were by females. U.S. DEP'T OF LABOR, *Characteristics of the Unemployment Insurance Claimants*, http://workforcesecurity.doleta.gov/unemploy/chariu.asp (last visited Nov. 7, 2015). The industries with the highest unemployment submissions were the Administration and Support/Waste Management/Remediation Services at 12.9%, Construction at 11.9%, and Manufacturing at 9.8%. *Id.* The races with the highest claims rates were whites at 54.7%, blacks at 17.5%, and Hispanics at 15.9%. *Id.*

20. *But see* AUSTIN NICHOLS & MARGARET SIMMS, URBAN INST., UNEMPLOYMENT AND RECOVERY PROJECT BRIEF # 4: RACIAL AND ETHNIC DIFFERENCES IN RECEIPT OF UNEMPLOYMENT INSURANCE BENEFITS DURING THE GREAT RECESSION 4 (2012), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412596-Racial-and-Ethnic-Differences-in-Receipt-of-Unemployment-Insurance-Benefits-During-the-Great-Recession.PDF (finding African-Americans are less likely to receive unemployment benefits even after accounting for factors that affect benefit receipt for other workers); U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-1147, LOW-WAGE AND PART-TIME WORKERS CONTINUE TO EXPERIENCE LOW RATES OF RECEIPT 3 (2007) (finding low-wage workers were half as likely to receive UI benefits despite being two and a half times more likely to be out of work, even where job tenure for both groups was similar).

21. Christine Vestal, *An Unemployment Insurance Balancing Act*, STATELINE (June 1, 2010), https://web.archive.org/web/20140113030802/http://www.pewstates.org/projects/stateline/headlines/an-unemployment-insurance-balancing-act-85899374819 (finding low-wage and part-time workers are less likely to quality for unemployment benefits as other workers).

22. *See infra* Section III fig.1.

23. *See* D.C. MUN. REGS. tit. 1, § 2835 (2015).

of a clinical education program where an attorney supervises their work.[24]

Employer lay representatives are typically employees or contractors working for third-party employer representation firms. OAH rules allow these lay representatives to appear on behalf of parties in unemployment appeals.[25] A third-party firm may, entirely or partially, manage an employer's unemployment insurance cost-reduction program.[26] Services provided by representatives may include handling correspondence with DOES and OAH, collecting and submitting evidence, and full representation at a hearing.[27] The actual representatives who appear at a hearing may have years of experience in unemployment appeals, or may have little experience. When an attorney appears on behalf of employers at OAH, the attorney may be a private lawyer, in-house counsel for the company (this is particularly common where the employer is a District or Federal government agency), or part of a program run by the Chamber of Commerce, which provides attorney representation to employers who qualify for services.[28]

On the claimant side, the most common attorney representatives work for the District AFL–CIO's Claimant Advocacy Program, which provides free legal representation to claimants.[29] The Legal Aid Society also assists unemployment claimants on a limited basis, and a number of local law schools provide student attorney representatives in unemployment appeals.[30]

C. Hearing Process and Procedure

OAH hears all unemployment insurance appeals in the District.[31] The hearings are de novo, which means the ALJ takes evidence in the case and makes factual determinations and conclusions of law without regard to DOES's initial determination.[32] An unemployment insurance

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24. *See id.* § 2833.

25. *Id.* § 2982.

26. *See, e.g.*, *Help Control Unemployment Claims Cost, Maximize Human Capital, and Mitigate Risk*, ADP, https://www.adp.com/solutions/large-business/services/tax-and-compliance/unemployment-claims.aspx (last visited Nov. 8, 2015); *Unemployment Cost Management*, EQUIFAX, http://www.talx.com/Solutions/Compliance/UnemploymentTax/ (last visited Nov. 8, 2015).

27. *See, e.g.*, *Help Control Unemployment Claims Cost, Maximize Human Capital, and Mitigate Risk*, *supra* note 26; *Unemployment Cost Management*, *supra* note 26.

28. *See* Enrique S. Pumar & Faith Mullen, *The Plural of Anecdote is Not Data: Teaching Law Students Basic Survey Methodology to Improve Access to Justice in Unemployment Insurance Appeals*, 16 UDC L. REV. 17, 22–23 (2012).

29. *Id.* at 22–24.

30. *Id.* at 23–24. While we acknowledge it is an imperfect distinction, for the purposes of this Article, we consider only licensed lawyers as attorneys, and all other representatives, including law students, as nonattorney or lay representatives.

31. *About OAH*, D.C. OFF. ADMIN. HEARINGS, http://oah.dc.gov/page/about-oah (last visited Nov. 8, 2015).

32. *See* Rodriguez v. Filene's Basement Inc., 905 A.2d 177, 179–80 (D.C. 2006).

hearing begins with the baseline legal presumption that a claimant is entitled to benefits, and it is up to the employer to prove otherwise.[33] Because the hearing is de novo and the employer has the burden of proof, if a claimant attends and the employer does not, the claimant automatically wins.[34]

Because the claimant is presumed qualified for benefits, hearings begin with the employer's case-in-chief, including witnesses and documentary evidence.[35] Next, the ALJ takes evidence from the claimant, who may also have witnesses or documents. The ALJ may ask questions of either party and may also allow the employer to present a rebuttal case.

Although this basic pattern is followed by most ALJs in most hearings, individual judges have different styles and preferences.[36] As OAH has been part of a recent effort in the District of Columbia to improve access to justice for pro se parties, ALJs have focused on providing more consistent and clearer descriptions of concepts like burdens of proof and use of testimony in hearings with unrepresented parties.[37] For example, some judges, when faced with an unrepresented employer, may ask the employer to give a narrative about why the claimant was separated from employment. Other judges may ask a series of very direct questions and refuse to hear a longer narrative.

1. Burdens of Proof

Burdens of proof are an important part of the legal and procedural landscape of an unemployment hearing, as in any litigation. As a matter of procedure, the burden of proof determines which party must present evidence first. As a matter of law, the party with the burden must provide the evidence necessary to prevail under the law. Under District law, in a misconduct case where the claimant was terminated, the employer bears the burden of proving, by a preponderance of the evidence, that the claimant was terminated for a reason that amounts to misconduct.[38] In such hearings, the ALJ will typically instruct the employer to present evidence first, followed by the claimant. In a "quit" case, where the claimant resigned from the position, the employer bears the burden of

33. *See id.* at 180; *see also* D.C. CODE § 51-110 (2016).

34. *See* D.C. MUN. REGS. tit. 1, § 2822.4 (2016); *see also Rodriguez*, 905 A.2d at 180.

35. *See* D.C. CODE § 51-111 (providing minimal guidelines for hearing procedure); *see also* D.C. MUN. REGS. tit. 1, § 2822.4–.5.

36. *See* Shannon Portillo, *The Adversarial Process of Administrative Claims: The Process of Unemployment Insurance Hearings*, 2014 ADMIN. & SOC'Y 1, 1–2 (concluding, based on a sociological study of forty-five unemployment insurance hearings at OAH, that "the hearing runs like traditional courtroom litigation" but that when claimants represent themselves, "[ALJs] engage directly with the claimant, gathering as much information as possible," and in contrast, when counsel is present, finding that "ALJs behave in traditionally passive ways, allowing each party to present their case").

37. *See infra* note 58.

38. *See* D.C. CODE § 51-110; D.C. MUN. REGS. tit. 1, § 2822.2(d).

proving the claimant quit voluntarily.[39] The burden then shifts to the claimant to prove that the resignation was for good cause as defined by District law.

The burden of proof has a significant impact on the strategic choices that parties, including legal representatives, make in presenting unemployment cases. Because the hearings are de novo, a threshold issue in any appeal hearing is whether it is a misconduct or quit case. There is a strategic calculus regarding whether it is in a claimant's interest to accept the facts framed by the employer's presentation of facts or whether it is in the claimant's interest to attempt to define the issues from the beginning by, for example, making an early evidentiary objection. It may be that the facts of a claimant's separation from employment may blur the line between termination and resignation. To understand this concept, consider this hypothetical example:

> Wilma worked as a security guard, earning minimum wage, for Security Guards, Inc. Wilma has a high school education and has never been involved in a legal proceeding. SGI is a company with approximately 700 employees. Wilma was fired from her job after she got a new supervisor who did not like her. The supervisor and Wilma had several heated exchanges over the length of Wilma's breaks, exchanges that were very upsetting for Wilma. In addition, in a period of three weeks Wilma was late to her shift three times: by four minutes, six minutes, and seven minutes. Wilma's supervisor wrote her up each time and then fired her after the third incident for violating the company's attendance policy.
>
> Wilma filed for and was denied unemployment benefits by DOES based on a finding that she was fired for misconduct. Wilma filed an appeal and is attending her hearing by herself. SGI sends Elaine, the director of Human Resources, to the hearing. Elaine handles five to ten unemployment benefits hearings for SGI each year.

Now imagine if Wilma knew she was about to be fired, perhaps because she heard statements to that effect from other employees. Rather than face the potential embarrassment of being fired, Wilma chose to resign instead. Unfortunately for Wilma, it may be very difficult to win an unemployment insurance appeal under District law on resignation. Thus, if Wilma has a sophisticated representative, she may assess the facts and law and determine that Wilma's chances of winning will be greatly improved if the ALJ applies a misconduct analysis. Despite the fact that the employer technically has the burden of proof, and even if the ALJ turns to the employer first, the representative may make the strategic choice to make a statement to the ALJ noting that Wilma was functional-

39. D.C. MUN. REGS. tit. 7, § 311.3.

ly terminated, with the hope that this remark will frame the hearing as a misconduct case, resulting in a more favorable burden for Wilma.

In an alternate scenario, where Wilma is unrepresented, she might say at the beginning of the hearing that she quit because she was not being treated well by the employer, her supervisors were always getting on her case about her breaks, and she had enough of it. Wilma may be operating out of a desire to protect her own personal pride—she may not want to admit that she was about to be fired for something she did on the job. Unfortunately for Wilma, satisfying her personal instincts may defeat her legal case by framing it as a quit case with a more challenging burden.

The burden of proof also presents critical choices about offering evidence. In a misconduct case where the employer has the burden, it is often unwise for a claimant to offer much evidence at all, other than evidence that undercuts the employer's case-in-chief. A claimant may unwittingly make a statement, introduce a document, or call a witness who provides facts that actually harm the claimant's case and help the employer's argument for misconduct. Just like a defendant in a criminal trial, the wisest strategy for a claimant is often to say as little as possible.

A nuanced understanding of the role of burdens in unemployment appeals can make the difference between a claimant winning or losing. In this context, representatives can frame issues and present evidence in the light most favorable to their client.[40] A representative might also decline to put a claimant on the stand to testify based on an assessment that the employer's evidence is too weak and the claimant's potential testimony too damaging to risk opening the client up to cross-examination or questioning by the ALJ. Similarly, a representative might make a motion at the close of the employer's case, pursuant to a little-used OAH rule, asking that the claimant be granted benefits because the employer has not carried the burden of proof.[41]

An understanding of burdens of proof can also affect preparation for a hearing. For example, a claimant's lawyer may present her client's testimony in a limited way so that the employer has to present evidence to uphold its burden rather than relying on the claimant's testimony. Similarly, a representative may prepare the client for the hearing by explaining the particular court and judge so that the client knows what to expect, feels more confident, and thus is a better witness.[42]

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40. HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 38–39 (1998).

41. *See* D.C. MUN. REGS. tit. 1, § 2819.

42. KRITZER, *supra* note 40, at 38.

2. Evidence Disclosures

Another critical aspect of hearing procedure is an OAH procedural rule that governs the disclosure of evidence prior to a hearing. The rule requires a party to send the court and the opposing party, at least three days prior to the hearing, any documents and a list of any witnesses that the party plans to offer at the hearing.[43] This "three-day rule" is designed to ensure that parties, and the court, have notice of evidence that will be presented at a hearing.[44]

Parties may choose to disclose, and ultimately introduce, a variety of documentary evidence.[45] For employers, this may include documents such as employee policies, documents reflecting discipline of the employee such as prior warnings, communications between the employee and supervisors about conduct or the circumstances of separation from employment, or documentary evidence of conduct such as video or written reports. Claimants may have documentary evidence, including communications with supervisors reflecting permission or acquiescence to conduct; documents reflecting contrary or supplementary policies; communications regarding the circumstances of separation from employment; or evidence of mitigating circumstances such as health problems, family demands, or failure to be paid.

The three-day rule presents a choice for claimants, employers, and their representatives: if there are documents or witnesses you may want to use at the hearing, do you disclose them? For employers, the choice is fairly simple. If you want to be sure the evidence gets in, you should probably disclose it. For claimants, the picture is more nuanced. The rule has an exception for evidence that will be used for impeachment or rebuttal, which leaves an opening for claimants to introduce evidence without disclosing it.[46] Thus, a representative may decide not to disclose documents in advance in a misconduct case, relying on an attempt to use the documents as rebuttal or impeachment at the hearing. In contrast, in a resignation case, a claimant may be more likely to disclose documents. A claimant or representative without appropriate expertise might disclose documents to the claimant's disadvantage based on an assumption that disclosure is required or on a misunderstanding of the burdens of proof in the case.

Similarly, a representative can contribute her expertise by gathering evidence and preparing evidentiary arguments based on her understanding of what evidence will be useful and whether documents or testimony are more powerful.[47] This is particularly important for employers, who

43. D.C. MUN. REGS. tit. 1, § 2985.1.
44. *See id.*
45. *See* D.C. CODE § 51-111(c) (2016).
46. D.C. MUN. REGS. tit. 1, § 2985.1(b).
47. KRITZER, *supra* note 40, at 39–41.

are required to bring witnesses with personal knowledge and documentation of the incidents to meet their burden of proof.[48] Experienced or represented employers may begin gathering evidence from the day an employee starts work (for example, having the employee acknowledge receipt of company policies) and will be able to easily access these records for an unemployment hearing. In contrast, unrepresented claimants are unlikely to appreciate or operationalize the need for documents or other evidence for the strategic power of disclosing (or not disclosing) evidence. This documentation is particularly important for claimants to try to exclude or at least discredit the weight of hearsay evidence. In general, understanding, preparing, and asking good questions on direct and cross-examinations of witnesses is also an element of expertise in presenting evidence. So in Wilma's case, a lawyer may choose to introduce a vague employer policy regarding attendance or to object to Elaine's testimony on hearsay grounds because Elaine's office location means she did not witness any of Wilma's conduct.

Although unemployment hearings are not procedurally complex compared to protracted commercial litigation, the cases do present significant layers of legal and procedural choices for any party or representative. The ability of a litigant to navigate these legal and procedural steps can make the difference between winning and losing.

D. Previous Studies of Representation in Unemployment Appeals

Ours is not the first study to investigate unemployment insurance appeals. Existing research overwhelmingly concludes that parties with representation—in general, and in unemployment insurance appeals—fare better in legal disputes than those who are not represented.[49] Previous studies of unemployment appeals have examined questions of the effectiveness of representation by comparing success rates of claimants with representation to those of claimants without representation.[50] All of these studies, save for the most recent one, reach the conclusion that representation improves a claimant's probability of winning, and these same studies also suggest that there are advantages to representation by nonlawyers, such as paralegals, law students, and lay representatives.[51] In

48. *See* D.C. MUN. REGS. tit. 7, § 312.2.

49. *See* Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51, 69–71 (2010); *see also* Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL'Y 453, 456–58 (2011) (examining the effectiveness of unbundled legal services). As discussed below, we acknowledge that one study does not support this assumption and believe others have adequately discussed the limits of that study.

50. *See, e.g.*, KRITZER, *supra* note 40, at 33–34; Murray Rubin, *The Appeals System*, *in* 3 NAT'L COMM'N ON UNEMPLOYMENT COMP., UNEMPLOYMENT COMPENSATION: STUDIES AND RESEARCH 625, 628–29 (1980); Maurice Emsellem & Monica Halas, *Representation of Claimants at Unemployment Compensation Proceedings: Identifying Models and Proposed Solutions*, 29 U. MICH. J.L. REFORM 289, 291–92 (1996); Greiner & Pattanayak *supra* note 2, at 2124.

51. *See, e.g.*, KRITZER, *supra* note 40, at 76–77; Sandefur, *supra* note 49, at 79.

three major observational studies of unemployment insurance appeals, authors analyzed national or state data in cases where parties appeared at hearings and consistently found higher rates of representation for employers as compared to claimants, as well as higher win rates for represented claimants as compared to unrepresented claimants.[52] There is interesting variation among the previous studies of unemployment insurance appeals and this project. In the present study, in all cases with any level of participation by the parties, the claimant won in 67% of the cases, which is higher than in most of the previous studies.[53] In addition to differences in samples, this variation may be explained by the fact that unemployment regulations in many states, including the District of Columbia, have evolved in the decades since earlier studies conducted by Kritzer, Emsellem and Halas, and Rubin. Specifically, states have enacted statutory or regulatory exceptions in favor of claimants, including exceptions granting benefits for claimants who are victims of domestic violence,[54] relocate with spouses,[55] or are caretakers for sick family

52. The 1980 Rubin study examined cases nationally where the parties appeared at hearings and found representation rates for both parties of less than 10% and overall claimant win rates of 35.7%, regardless of representation. Rubin, *supra* note 50, at 628. Further, the Rubin study found that claimants won 30.8% of cases where employers appeared, but 45.4% of cases where employers appeared and the claimant was represented, and 49.3% of cases where both parties were represented. *Id.*

The 1995 Emsellem and Halas study analyzed data from unemployment insurance appeals in Ohio and found employers were represented four times (45%) as often as claimants (10%). Emsellem & Halas, *supra* note 50, at 292. The study found that unrepresented claimants won 34% of cases, and represented claimants won 45% of cases. *Id.* It is not clear whether this study included all appeals or only those where the parties appeared at the hearing.

Kritzer's 1998 study examined unemployment insurance appeal data in Wisconsin, and for the first time parsed the data according to which party appealed and which party had the burden of proof, though the analysis was restricted to cases where both parties appeared for the hearing. KRITZER, *supra* note 40, at 33. Kritzer found that representation made no difference for employers (winning approximately 58% of cases whether represented or not) but that unrepresented claimants won 41.5% of cases and represented claimants won 50.4% of cases. *Id.* at 34. Further, Kritzer found that when both sides brought a representative, claimants won 44.6% of cases, when representation was imbalanced in favor of the claimant, claimants won 53.4% of cases, and when representation was imbalanced in favor of the employer, claimants won 41.6% of cases. *Id.*

53. *See supra* note 52. In Greiner and Pattanayak's more recent data from Massachusetts, in all cases, claimants won 47% of cases where the claimant appealed and 75% of cases where the employer appealed. Greiner & Pattanayak, *supra* note 2, at 2135–36. It appears from the description of the sample for the study that while the appeals in this sample are legally de novo hearings, the process in these hearings is not necessarily a de novo review of the evidence. *But see id.* at 2136. This difference in practice may lead to lower claimant win rates where claimants appeal.

54. In addition to the District of Columbia, there are thirty-four states and the Virgin Islands that have extended unemployment benefits to cover victims of domestic violence. LEGAL MOMENTUM, STATE LAW GUIDE: UNEMPLOYMENT INSURANCE BENEFITS FOR VICTIMS OF DOMESTIC & SEXUAL VIOLENCE (2013), http://www.legalmomentum.org/sites/default/files/reports/State%20Guide%20UI%20Final%20June%202013.pdf.

55. An exemption for claimants who voluntarily leave his or her employment for the purpose of relocating with his or her spouse exists in some states, including D.C., but it is unavailable in others. *See, e.g.*, VA. CODE ANN. § 60.2-618 (2015); WASH. REV. CODE § 50.20.050(2)(b)(iii) (2015); *see also* George L. Blum, *Eligibility for Unemployment Compensation as Affected by Voluntary Resignation Because of Change of Location of Residence Under Statute Denying Benefits to Certain Claimants Based on Particular Disqualifying Motive for Move or Unavailability for Work*, 27 A.L.R. 6th 123, pt. II.A, § 4 (2007).

members.[56] In addition, the tribunal for this study, the District of Columbia Office of Administrative Hearings, is unusual in that it is a highly professionalized administrative court that hears a variety of administrative appeals.[57] As such, it has been the subject of a variety of efforts aimed at protecting the rights of pro se litigants, including a revision of the D.C. Code of Judicial Conduct, effective January 1, 2012, emphasizing the affirmative duty of judges to facilitate the use of the courts by pro se litigants.[58] Thus, one would expect the nature of judicial conduct in our study would result in higher win rates for claimants who benefit from this assistance. Each of these factors is likely to contribute to the greater win rates for claimants as compared to earlier studies. However, as noted above, we are less concerned with overall win rates and more concerned with the relative advantages provided by representation and the use of procedures, as measured by case outcomes.

The most recent study of unemployment insurance appeals has garnered attention for its use of randomized design to measure the effect of an offer of representation. In this study, Greiner and Pattanayak found that an offer of representation by clinical law students does not make a significant difference in a claimant's probability of winning.[59] In addition, the claimants who received an offer of representation waited longer for resolution of their case.[60] While others have raised critiques of this study,[61] several characteristics of the Greiner and Pattanayak study are useful for understanding this Article.[62]

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56. Most states, including D.C., provide exceptions for caregivers of family members with an illness, others provide very limited exceptions in some cases, and others do not provide an exemption for this circumstance. *See, e.g.*, CONN. GEN. STAT. § 31-236(a)(2)(A) (2015) (providing an exception); FLA. STAT. § 443.101(1)(a) (2015) (providing no exception for caregivers).

57. This is in contrast to unemployment insurance appeal hearings in other jurisdictions that have been the subject of other studies. *See, e.g.*, KRITZER, *supra* note 40, at 24; Greiner & Pattanayak, *supra* note 2, at 2135–36.

58. *See* Zoe Tillman, *D.C. Courts System Adopts New Code of Judicial Conduct*, BLOG OF LEGAL TIMES (Jan. 23, 2012, 1:58 PM), http://legaltimes.typepad.com/blt/2012/01/dc-courts-system-adopts-new-code-of-judicial-conduct.html (explaining additional changes made to the D.C. Code of Judicial Conduct for pro se litigants beyond what is provided by the ABA Model Rules, including that judges may change the order in which they collect evidence, explain or avoid legalese, and suggest additional resources that may help a pro se litigant). *See generally* CODE JUDICIAL CONDUCT r. 2.6 cmt. 1A (D.C. COURTS 2012). In addition to the District of Columbia, twenty-four states have adopted provisions similar to the 2007 ABA Model Code of Judicial Conduct to help a litigant's ability to be fairly heard. Margaret J. Vergeront & Jeff Brown, *Access to Justice Commission Update*, 21 THIRD BRANCH 7 (2013), http://wicourts.gov/news/thirdbranch/docs/fall13.pdf.

59. Of those claimants who received an offer of clinical law student representation, 76% won their cases, and of those who did not receive an offer, 72% won. Greiner & Pattanayak, *supra* note 2, at 2149.

60. *Id.* at 2125.

61. *See, e.g.*, Albiston & Sandefur, *supra* note 2, at 106–13 & n.29; Fischman, *supra* note 4, at 165–67 & n.234; Selbin et al., *supra* note 2, at 48–51; Bob Sable, *What Difference Representation – A Response*, CONCURRING OPINIONS (Mar. 28, 2011), http://www.concurringopinions.com/archives/2011/03/what-difference-representation-a-response.html; David Udell, *What Difference Presentation?*, CONCURRING OPINIONS (Mar. 28, 2011), http:// www.concurringopinions.com/archives/2011/03/what-difference-presentation.html.

62. For a detailed description of our methodological choices, see Methodological Appendix.

The core challenge of a nonrandomized study, like the one presented in this Article, is the effect of selection bias on the analysis of representation and case outcomes. For example, it may be that only the most sophisticated claimants or only employers with the strongest factual cases seek out representation, but there is no way of knowing the effect of these factors on the measured variables. The Greiner and Pattanayak study overcame this challenge through randomization of the offer of representation and relied heavily on its randomized design as its source of authority. We do not dispute the value of randomized studies, but we believe that relying solely on randomization of claimants' offers of representation and then observing win rates misses important opportunities to understand legal representation.[63] For example, Greiner and Pattanayak's randomized design did not account for the ultimate representation status of claimants, whether they received an offer of clinical law student representation or not. Thus, their study ultimately provides limited insight into the relative experiences of claimants with different types of representation, or no representation at all. Similarly, the randomized design does not account for the representation status of the employer. In addition, the Greiner and Pattanayak study does not investigate the level of participation by the parties or the representatives, including use of procedures and attendance at the hearing, and so does not engage in questions of what representatives actually do for parties. While our study does not rely on randomized design, it does use a substantial data set and valid statistical methods to observe and investigate correlations at a breadth and depth of analysis that has not previously been conducted. In particular, this Article's analysis of the correlation between parties' use of procedural steps and case outcomes compares parties with the same representation status, thereby avoiding selection bias concerns. In sum, this study examines the experiences of parties with varying types of representation and participation in a way that a randomized study cannot.

II. REPRESENTATION AND BALANCE OF POWER

While there is extensive theory about the role of party power in the legal system, there is limited empirical examination of this phenomenon. As a general matter, scholars have examined how socioeconomic status and social power have a relationship with a person or organization's interactions with law and the justice system.[64] If the operation of law and

63. *See* Greiner & Pattanayak, *supra* note 2, at 2198–2208 (discussing limitations of randomized controlled studies).

64. Scholars from a range of fields, including law and sociology, have examined the relationship between the social power of individuals and groups and the operation of law and justice. The idea that legal doctrine, by itself, does not explain how cases are handled in the legal system, and that differences may be attributed in some measure to the social status of the parties, can be traced back to legal realism. In response to this idea, sociologists and legal scholars have attempted to explain the social factors that influence the operation of law. An early work in the field of legal sociology, Donald Black's *Sociological Justice,* published in 1989, explored how the social structure of cases and the power of parties predicts the way those cases are handled in the legal system. *See*

justice varies with social status, a full understanding of the impact of legal representation requires understanding the status of each party to a dispute and their statuses relative to each other.[65]

A corollary issue is the symbolic effect of a powerful party. Others have investigated how a party's social status or power has a signaling function in the legal system.[66] Scholars have theorized how individuals and businesses who have (or are perceived to have) higher status and better reputations are likely to be perceived more positively by judges and other court staff.[67] Along the same lines, representatives may confer a signaling benefit on a party by virtue of their presence. The lawyer's presence can signal to the court that the party is of some significance and

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generally DONALD BLACK, SOCIOLOGICAL JUSTICE (1989). Black argued that law is "situational" and "relative" and explained how law varies with social status. *See id.* at 6. He proposed that high status and low status parties experience the legal system differently as a baseline matter and noted that the treatment of a given case may be predicted by looking at the balance of power between parties. *See id.* at 8–10. More recently and in the context of access to justice literature, sociologist Rebecca Sandefur examined empirical approaches to studying the relationship between civil justice and various forms of social inequality. She notes:

> Civil justice experiences can reflect inequality in the sense that inequalities that exist prior to contact with or in some other way outside law and legal institutions are reproduced when people and groups come into contact with justiciable events or legal institutions. Such experiences can also create inequality, in the sense that differences between people or groups become disparities through contact with justiciable events or legal institutions. Finally, civil justice experiences can destroy or destabilize inequality, as disparities are reduced through contact with justiciable events or legal institutions.

Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOC. 339, 346 (2008). In legal scholarship, an expansive literature has assessed how social factors, including race, class, and gender, systematically influence law and justice. The literature explores issues such as the role of race in sentencing decisions, the effect of gender on jury selection, and the relationship between poverty, economic inequality, and constitutional law. *See, e.g.*, Margareth Etienne, *Pain and Race: A New Understanding of Race-Based Sentencing Disparities*, 3 U. ST. THOMAS L.J. 496, 503 (2006) ("The fourth (and current) wave of research questions the existence and extent of race-based sentencing disparities in the post-guideline, or 'determinate sentencing' era."); Lucy Fowler, *Gender and Jury Deliberations: The Contributions of Social Science*, 12 WM. & MARY J. WOMEN & L. 1, 2 (2005) (exploring gender and jury dynamics); Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1278 (1993) ("[E]xamin[ing] the Supreme Court's use of the rationality standard in areas that affect poor people, and argu[ing] that the political powerlessness of the poor requires some form of enhanced judicial protection."); Julie A. Nice, *Whither the Canaries: On the Exclusion of Poor People from Equal Constitutional Protection*, 60 DRAKE L. REV. 1023, 1029 (2012) (arguing the poor have been excluded from constitutional protection). A goal of this Article is to add to the literature by questioning how the combination of representation, a party's power, and the balance of power between the parties influences the legal process and the outcomes of cases in civil legal settings.

65. *See* BLACK, *supra* note 64, at 10–11.

66.

> In general, one sees evidence that lawyers, officials, and legal authorities, as well as perhaps legal procedures themselves, exhibit impaired comprehension of the disadvantaged and less powerful. However, in the case of class inequality, . . . we have no studies comparing different groups' experiences handling similar problems or in similar hearing settings . . . .

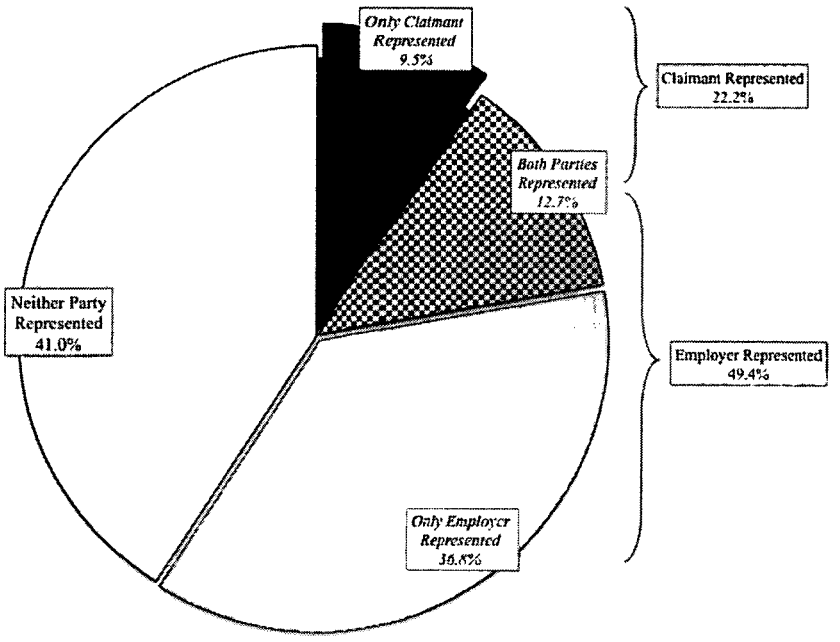
Sandefur, *supra* note 64, at 349 (citations omitted).

67. *See, e.g.*, Karyl A. Kinsey & Loretta J. Stalans, *Which "Haves" Come Out Ahead and Why? Cultural Capital and Legal Mobilization in Frontline Law Enforcement*, 33 L. & SOC'Y REV. 993, 996 (1999) ("Status expectations theory argues that the influence attempts of high-status individuals succeed, and those of lower-status people fail, due to *socially shared* cognitions and expectations that link social status to attributions about personal ability and worth . . . .").

that merits of the claim are worthy of consideration.[68] This may be particularly true in courts with a large number of pro se litigants, where the presence of a lawyer is notable. Thus, we hypothesize that representation provides the represented party with an advantage and that this advantage is greater when the parties have imbalanced representation. As a general matter, we are using the employer as a proxy for the more powerful party in civil legal processes and the claimant as a proxy for the less powerful party in the civil legal process.[69]

This analysis begins with the independent variable of the fact of representation. As shown in Figure 1, employers are represented more than twice as often as claimants, and rarely do both parties have representation. It is also rare for a claimant to have representation when an employer does not. In contrast, an employer has representation when a claimant does not in a third of the cases.

Figure 1



As it is possible for a party to have a representative of record who does not actually appear at the hearing, another independent variable is

68. Sandefur, *supra* note 5, at 910.

69. We acknowledge that employers and claimants, like all parties, are a variety of individuals and institutions. However, we believe that the general characteristics of claimants and employers in unemployment insurance appeals make the use of these parties as proxies for "haves" and "have nots" a fair one. *See infra* note 98.

whether a representative actually appears at a hearing.[70] In our data, 51% of employers with representatives and 65% of claimants with representatives have that representative appear at the hearing.

As shown in Figure 2, claimants' win rates are significantly higher when represented, while unrepresented employers do not see a significant difference in win rates compared to represented employers.[71] An additional layer of analysis is whether a party with representation imbalanced in its favor sees higher win rates than a party in a case with balanced representation. Figure 2 also shows how both a claimant and an employer with a representation advantage see a significantly higher win rate compared to a claimant and an employer without that advantage.

Figure 2: Party Win Rates with Levels of Representation

	Claimant Wins	Employer Wins
All Cases	67%	33%
Claimant unrepresented	62%	38%
Claimant represented	83.2%	16.8%
Claimant representation advantage	88.3%	11.7%
Employer unrepresented	66.2%	33.8%
Employer represented	67.3%	32.7%
Employer representation advantage	63.7%	36.3%
Both parties represented	79.3%	20.7%
Neither party represented	61.0%	39.0%

In addition, the data demonstrate that claimants have higher win rates when both parties have representation, as opposed to when both parties do not have representation.

70. For a discussion of situations where a representative of record may not appear at a hearing, see *infra* note 72.

71. As this Article uses difference in proportion tests to demonstrate patterns of relationships between the examined variables, we report our findings as comparisons, e.g., "represented claimants have a higher win rate than unrepresented claimants." For ease of expression, we do not reiterate each time we describe a finding that this describes two distinct groups: the group of claimants in the data who were represented and the group of claimants in the data who were not represented, rather than the experience of a single claimant exposed to the presence and absence of the variable of representation. In addition, we use the word "significant" to report statistically significant findings, as reflected in the Methodological Appendix. All of the differences described in this Article are statistically significant unless explicitly described otherwise.

As it is possible for a party to have a representative of record who does not actually appear at the hearing,[72] and this dynamic has not yet been studied, we examine this additional layer of representation—a representative who actually appears at the most important moment of representation.[73] When the representative's appearance at the hearing is factored in, a different picture appears. Among those cases where an employer has representation of record, the employer wins a significantly greater number of cases when the representative appears at the hearing, winning 23.9% of the time when the representative does not show up as compared to 46% when the representative appears. When a claimant is represented and her representative appears, there is no significant difference in the proportion of cases the claimant wins as compared to represented claimants whose representative does not appear. This result is not particularly surprising, as there is a high correlation between a claimant having representation and the representative showing up at the hearing. Thus, it is difficult to determine the additional benefit of the appearance of a claimant's representative, given both the high win rate in the represented group, as well as the high rate of appearance by that representation.

Our analysis of imbalance in the appearance of a representative is similar to overall imbalance in representation. Claimants for whom a representative appears win a significantly greater amount of the time when no representative appears for the other party, 90.5%, as compared to when representation appearance is balanced, 71.5%. When representation is unbalanced in favor of the employer, the employer wins a significantly greater amount of the time, 58.9%, compared to when representative appearance is balanced, 28.4%.

Our results reflect the practical reality of the civil justice system in America, one in which the vast majority of low-income Americans represent themselves—often against much more powerful parties—in the "ordinary, everyday cases" that constitute the bulk of the civil justice

72. *See supra* notes 27–27 and accompanying text. There are a variety of situations where a representative of record may not appear at a hearing. It may be that a party has a retained representative who is the contact for service of process. Thus, there is a representative of record but that representative might not actually be asked to be involved in the handling of a case. It may also be that a party retains a representative to help a human resources employee prepare for the hearing but does not want to spend the money to pay the representative to attend the hearing. It may also be that a party indicates to the court that she has a representative but in fact does not or ceases retaining that representative before the hearing. It is the authors' anecdotal impression that these situations are more likely to occur for employers, where the lay representative industry involves large companies that provide claims management as well as actual representation. These distinctions in representative type are a topic for future research.

73. This analysis also avoids concerns about randomizing representation and selection bias, as the entire sample in this section of the analysis is parties with representation. For a discussion of selection bias challenges in research on the effects of representation, see Greiner & Pattanayak, *supra* note 2, at 2192–95.

landscape.[74] The results similarly support the theory that the civil justice system can reflect and reproduce existing social inequality, just as it can be a site where inequality is challenged.[75] Where less powerful litigants represent themselves against those with more power, baseline inequities are likely to persist. But where such litigants have legal representation, the opportunity to challenge inequality follows. If there are power dynamics at play between the parties and representatives are a significant layer of these dynamics, especially when representation is imbalanced, what are representatives doing to shift the power dynamics? Our second area of analysis examines this question.

III. REPRESENTATION AND USE OF PROCEDURES

We use the concept of expertise to frame our inquiry into what representatives are doing that shifts the power dynamics between the parties. This examination of expertise builds upon existing scholarship regarding effectiveness in civil legal settings and, in particular, on theories of two categories of a lawyer's professional expertise: substantive and relational expertise, or what might also be called "formal training" as compared to "people knowledge."[76]

"[S]ubstantive . . . expertise is [the] abstract and 'principled'" knowledge held by professionals and gained through formal training.[77] In the legal context, this includes knowledge of the essential framework of professional theories, concepts, and rules, as well as an understanding of

74. *See* HERBERT M. KRITZER, THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION 3, 27 (1990) (offering a comprehensive analysis of lawyers' role in the routine litigation that takes place in America's state and federal civil courts). For a vivid description of the day-to-day operations of an American civil court, see COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 3, 11 (2012), http://www.courtstatistics.org/~/media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx, finding in a study of seventeen state general jurisdiction courts in 2010, 61% of cases were contract matters, 11% probate, 11% small claims, 6% tort, 2% real property, 2% mental health, and 7% all other civil; this excludes domestic relations cases, which make up 6% of state cases nationwide, and Aaron, *supra* note 1. One study found that "62% of all plaintiff award winners [in state courts] were awarded $50,000 or less." LYNN LANGTON & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005 (2009), http://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf.

75. *See* Sandefur, *supra* note 64, at 346–52 (discussing how race, class, and gender inequalities influence, reproduce, and are challenged by civil justice experiences).

76. *See* KRITZER, *supra* note 40, at 14–16, 194–95 (describing formal training and insider knowledge, or people knowledge, and a third category called process knowledge); Sandefur, *supra* note 5, at 911–12 (describing substantive and relational expertise). Sandefur describes two aspects of legal expertise, substantive (Kritzer's "formal training") and relational (Kritzer's "insider" or "people" knowledge). *See* Sandefur, *supra* note 5, at 911–12. Sandefur's substantive expertise category includes formal knowledge of the law, as well as procedural rules. *See id.* at 911. In contrast, Kritzer places knowledge of procedural rules in a separate category called "process expertise," which also includes lawyers' understanding of how a court or other legal institution operates and the processes involved in legal advocacy in that setting, such as the process of a given type of hearing in a given court. KRITZER, *supra* note 40, at 15.

77. Sandefur, *supra* note 5, at 911; *see* Stephen R. Barley, *Technicians in the Workplace: Ethnographic Evidence for Bringing Work Into Organizational Studies*, 41 ADMIN. SCI. Q. 404, 424–29 (1996).

how to operate within those rules.[78] Thus, substantive expertise includes both law and procedure.[79] Substantive legal knowledge consists of legal theories, common law rules, statutes, doctrine, case law, and other content-based knowledge.[80] In their work, lawyers draw on this knowledge to determine what law is relevant to a given client's case.[81] Procedural knowledge is what lawyers use to move cases through the formalities of the civil justice system, such as the appropriate means of communicating with the court and opposing parties, the use of pleadings and motions, the mechanisms of introducing evidence, and the navigation of litigation timelines.[82]

In contrast to the principled and rule-based nature of substantive expertise, relational expertise is "'situated' and 'contextual.'"[83] It involves understanding how to navigate human relationships, including how to behave and how to communicate with others.[84] This includes what can be called "people knowledge" and is the expertise that guides interactions with judges, court staff, clients, and other attorneys.[85] A characteristic of relational expertise across professional contexts is that it is not typically part of the "explicit curriculum of professional training," despite the fact that it may be essential for a professional's success in her work.[86] Many professionals learn relational skills outside of formal training and through experience in their day-to-day working lives.[87] In addition, relational expertise operates on specific as well as general levels. There are ways of behaving and communicating that are fairly universal, but there are also ways of behaving and communicating that are context dependent. For example, when speaking in court, a lawyer will address a judge with "Your Honor" because this is a universal practice in the profession. But that same lawyer, if she is new to the courtroom, will not know whether that judge prefers standing objections until she has appeared several times.

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78. Sandefur, *supra* note 5, at 911; *see* KRITZER, *supra* note 74, at 7.

79. Sandefur, *supra* note 5, at 911.

80. *See id.*; *see also* KRITZER, *supra* note 74, at 7.

81. Sandefur, *supra* note 5, at 911.

82. *Id.* Sandefur notes that an important use of substantive expertise is the translation of a client's real-world problems into legally cognizable terms. *See id.* For example, transforming a client's experience of a car accident into an argument for liability and damages uses formal legal knowledge, while knowing where to file such a claim and how the applicable court processes work uses procedural knowledge. Through substantive expertise, a lawyer will identify which harms might have a legal remedy, such as physical injury and property damage, and which do not, such as psychological effects.

83. *Id.* (quoting Barley, *supra* note 77, at 425).

84. *Id.* at 911–12.

85. KRITZER, *supra* note 40, at 196.

86. Sandefur, *supra* note 5, at 912. This is traditionally the case in legal education, which emphasizes instruction in legal doctrine and formalized legal argument, particularly in the core courses of the first year of law school. Many law students graduate without any formal training to develop the knowledge and skills of relational expertise. However, the growth of clinical and other forms of experiential legal education has incorporated the development of relational expertise into the law school curriculum for some students.

87. *See id.*

As our first set of findings reflects, representation correlates to advantages, and this reflects the value of professional expertise. But in the absence of representation, some parties to legal disputes may have the functional equivalent of professional expertise. Some parties may possess this functional equivalent unrelated to their involvement in the civil justice system, but most gain this equivalent expertise over time by virtue of their involvement as repeat players.[88] Mark Galanter famously articulated how powerful parties, whether individuals or organizations, benefit from being repeat players and how comparatively less powerful parties, one-shot litigants, are disadvantaged.[89] Repeat players have frequent dealings with the legal system, can develop the functional equivalent of substantive expertise by anticipating the issues they will face in a given case, and thus can plan in advance for the litigation. These parties can also develop relational expertise by building relationships with court staff and judges and, thus, develop both comfort and fluency in communicating with the people who work within a civil justice setting.

Even parties that are not repeat players can use some elements of a lawyer's professional expertise, particularly relational expertise. For example, nonlawyers who are familiar with general norms of professional communication may have the ability to relate effectively to actors in the civil justice system. Other parties who are not repeat players may be able to obtain a basic level of substantive expertise through education by studying the law or reading a court's procedural rules. Finally, some individuals may seek the advice of an attorney but then choose to represent themselves, and thus, they benefit from at least a measure of professional legal expertise. Of course, those parties that are the least likely to have some equivalent to professional expertise may be those without the social, cultural, economic, or professional background to come to the legal process with this knowledge or to quickly adopt such knowledge during their interaction with a court. These parties are the ones at the greatest disadvantage in the legal process and, thus, have the most to gain from representation and the expertise it provides.

To examine the role of expertise, our second area of inquiry identifies four different procedural steps in the unemployment appeals process: (1) whether the party appears at the hearing, (2) whether the party presents testimony,[90] (3) whether the party discloses documents before the

88. *See* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 79 (2010) ("Repeat players are more likely to wield financial power, utilize a forum that serves their interests, benefit from the substantive law, and be familiar with the procedure."); Galanter, *supra* note 10, at 97–99; *see also* Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1806 (2001) ("Yet comparative research finds that nonlawyer specialists are generally at least as qualified as lawyers to provide assistance on routine matters where legal needs are greatest.").

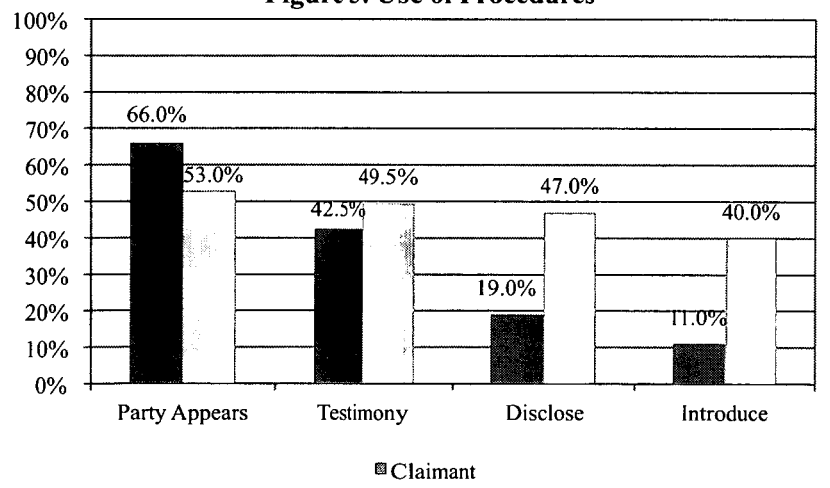
89. *See* Galanter, *supra* note 10, at 97–107.

90. This variable is defined broadly—whether there is any testimony for a party's case—to encompass both parties who themselves testify (i.e., did Elaine or Wilma testify) and witnesses

hearing as provided by court procedures, and (4) whether the party introduces documents at the hearing.[91] We focus on these procedures as they are the most commonly used steps for a party to present evidence in a case. For each procedural step, we examine two distinct questions: (1) whether having a representative results in greater use of the procedure, and (2) for those parties with representatives (or those without), whether using each procedural step correlates with improved case outcomes.[92] Examining these dependent variables provides additional nuance to the interaction of representation, expertise, and power. At the outset, it is important to note that the overall rate at which parties win is less meaningful in a study such as this one that looks at comparative case outcomes. Because our theories concern the relative advantages of representation, the more important analysis is case outcomes for the same party in light of different variables.

In the entire sample, regardless of representation, claimants and employers used procedures at the rates shown in the figure below.

Figure 3: Use of Procedures

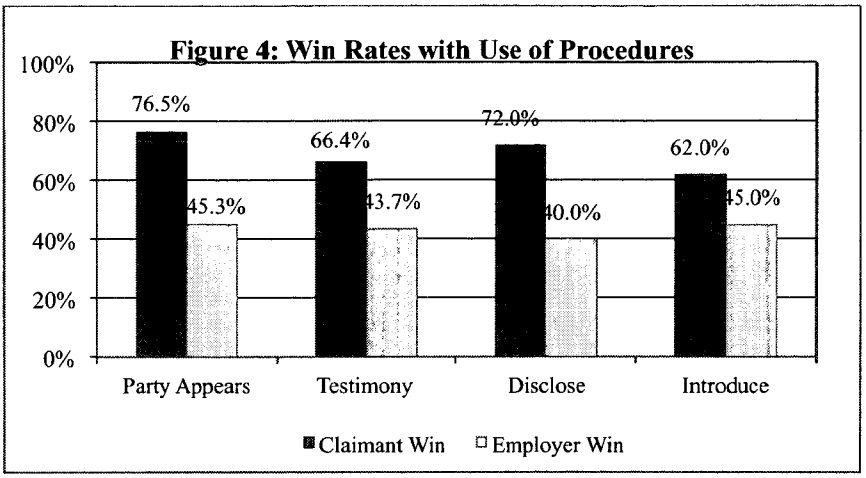


whose testimony is elicited by parties (i.e., did Elaine bring another company employee to testify). We use this broad definition because our interest is in the choice by the party or representative to present testimony.

91. We use the terms "appearance" and "evidentiary steps" to capture the four variables measured in this Article and the term "procedures" to describe the more general concept. There is admittedly some variation in the nature of the procedural steps considered in this analysis. One variable—disclosure of documents—occurs before the hearing, while the other variables occur at the hearing.

92. For all of these dependent variables, our analysis includes all of the cases in our sample, regardless of whether or which party appeared at the hearing and, thus, whether a full hearing was held. We include all of these cases because we cannot know why one party or its representative appears at a hearing. For example, this may be due to an imperfect appeal, ignorance, inadvertence, or a party or representative's strategic choice.

And for the entire sample, regardless of representation, use of each procedural step correlates to the case outcomes in the table below.

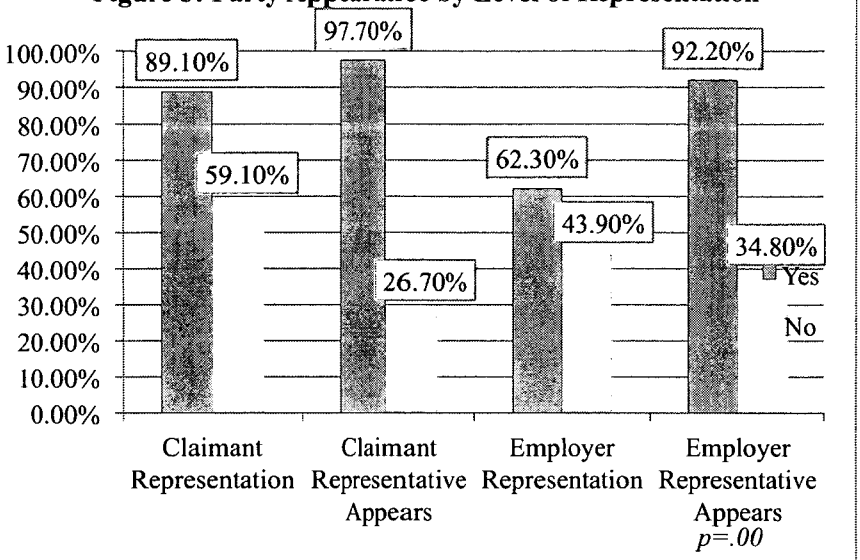


We then analyzed how representation interacts with procedural behaviors against these baseline measurements.

A. Party Appearance at Hearing

As an initial matter, we examined whether represented parties appear at the hearing more often than unrepresented parties, which they do. When a claimant has a representative, the claimant appears at the hearing at a significantly higher rate, compared to when the claimant does not have a representative. If a claimant's representative appears at the hearing (as opposed to just being a representative of record), claimants also attend the hearing at a higher rate, compared to the group in which the claimant's representative does not appear. Figure 5 describes how the same is true for employers.

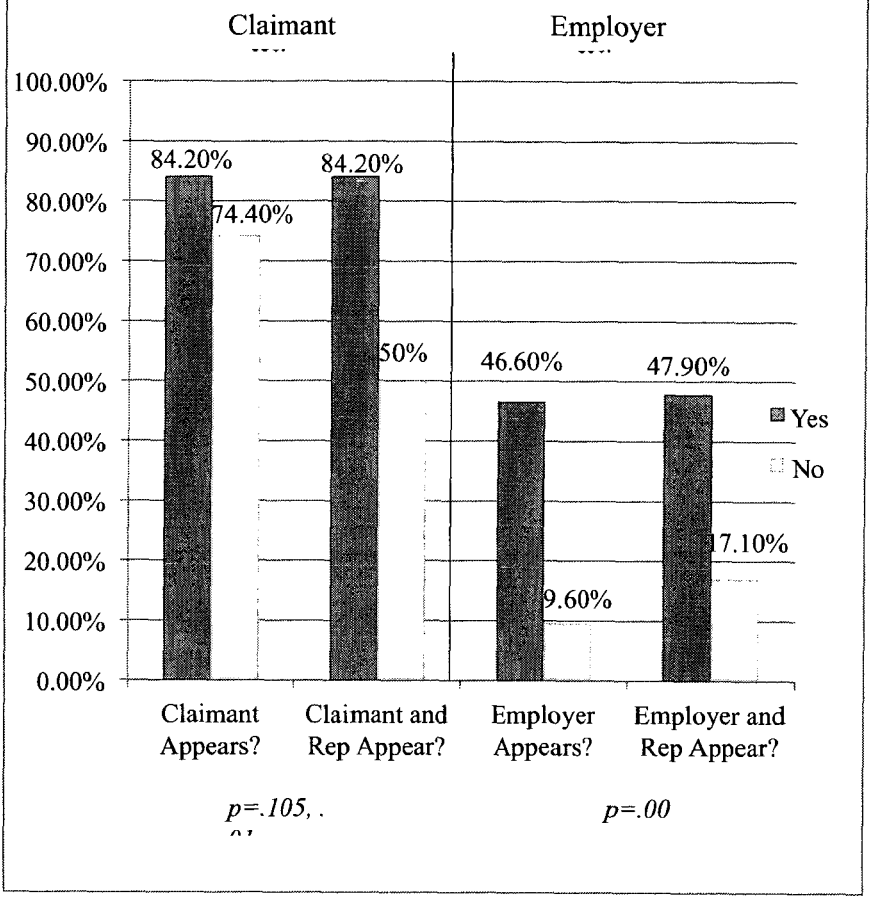
Figure 5: Party Appearance by Level of Representation



When a claimant has a representative and the claimant appears at the hearing, the win rate for those claimants is higher—though not quite statistically significant—than for those in the group of represented claimants who do not appear at their hearing.[93] Similarly, among represented claimants, when both the claimant and representative appear at a hearing, the claimant has a higher win rate compared to when only the representative appears. Figure 6 shows that employers see the same differences in significant proportions.

93. Note that represented claimants who appear at their hearing do not necessarily appear with a representative. For an explanation of why a party may have a representative of record, but that representative may not appear at the hearing, see *supra* note 72.

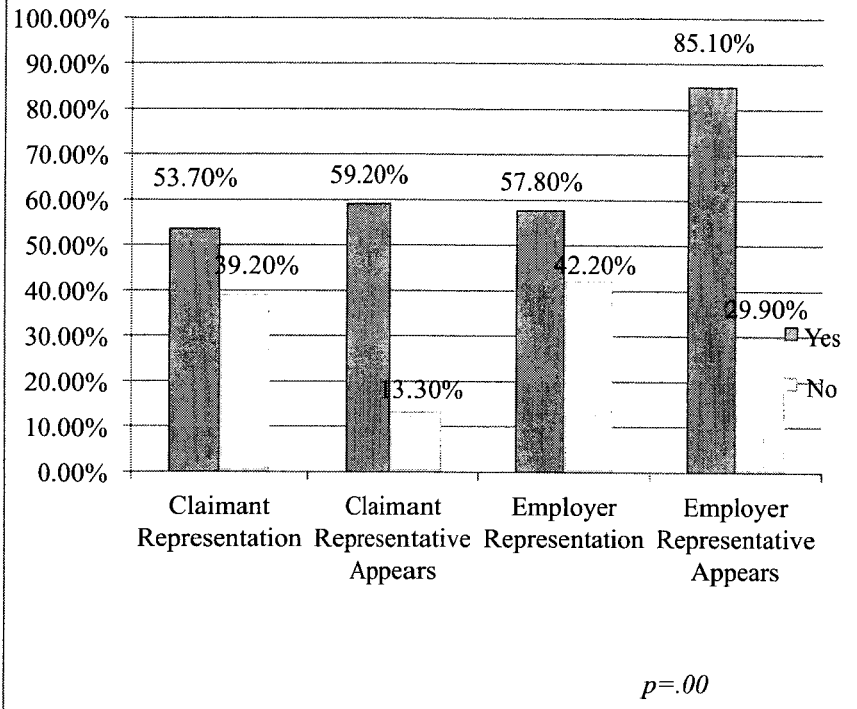
Figure 6: Represented Party Win Rates Across Appearance



B. Testimony

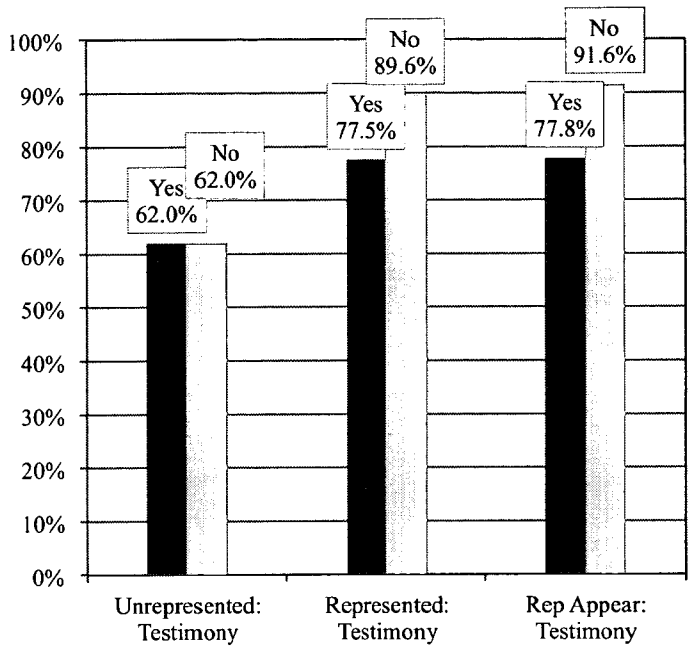
The second variable we examine is the presentation of testimony. We find that when parties have a representative, they present testimony at a higher rate compared to those who do not have a representative. In addition, among represented claimants, those whose representative does not appear present testimony at a significantly lower rate than when the representative does appear. The same is true for employers.

Figure 7: Testimony by Levels of Representation



We then examined the correlation between presentation of testimony and win rates. As Figure 8 shows, when an unrepresented claimant presents testimony of any kind, there is not a statistically significant difference in the claimant's win rate compared to when an unrepresented claimant presents no testimony. But represented claimants see higher win rates, as do claimants whose representative appears.

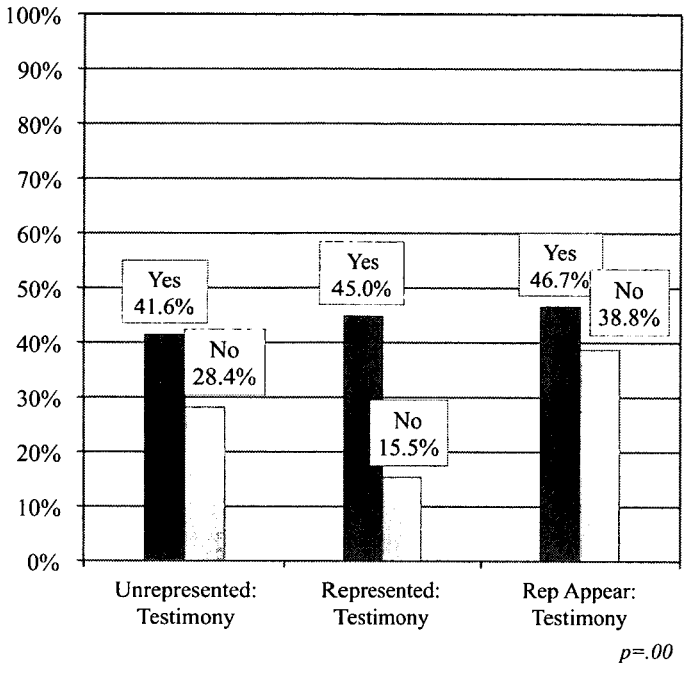
Figure 8: Represented Claimant Win Rates Across Testimony



***not statistically significant for unrepresented, p=.001 for represented, p=.00 for representative appear*

The analysis of an employer's representation and presentation of testimony demonstrates a different situation, as demonstrated in Figure 9. When an employer is unrepresented, those in the group who present testimony win at a significantly higher rate than those in the group who do not present testimony. Among represented employers, those who present testimony have a higher win rate than those in the group who did not present testimony. And there is a similar pattern among employers whose representatives appeared: those who present testimony have a higher win rate.

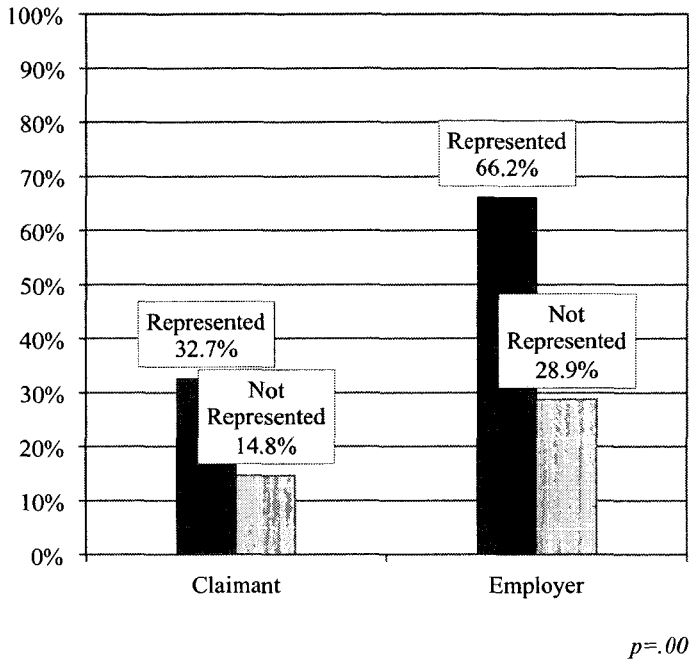
Figure 9: Represented Employer Win Rates Across Employer Testimony



C. Document Disclosure

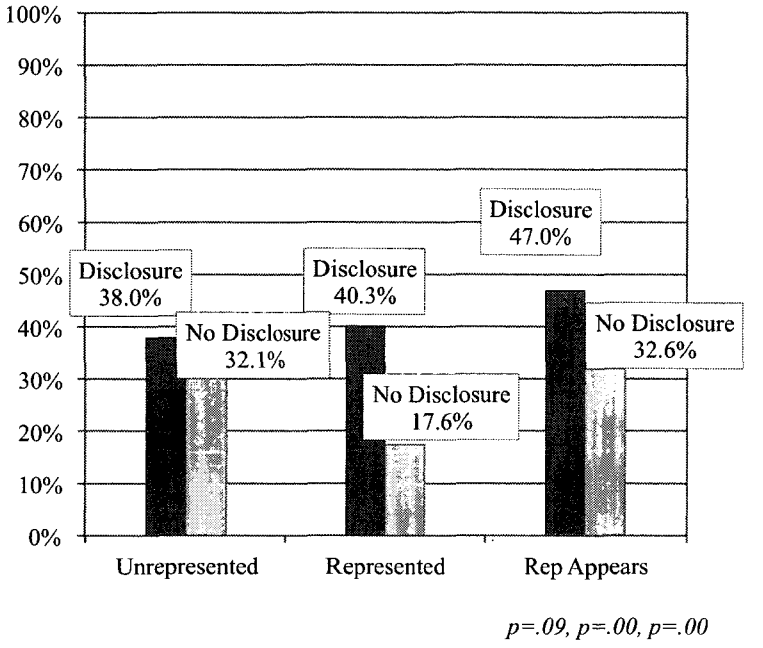
We also analyzed parties' use of the required document disclosure procedure. Both represented claimants and represented employers disclose and introduce documents at a higher rate than unrepresented claimants and unrepresented employers.

Figure 10: Document Disclosure by Levels of Representation



We next examined win rates across representation and document disclosure. When a claimant is represented, or when a representative appears at a hearing, there is no statistically significant difference in the claimant's case outcomes based on document disclosure. However, there are significant differences for employers. Represented employers, and those whose representative appears, have significantly higher win rates when disclosing documents as compared to not disclosing. Unrepresented employers also have significantly higher win rates when they disclose documents as compared to those unrepresented employers who do not disclose documents.

Figure 11: Represented Employer Win Rates Across Document Disclosure

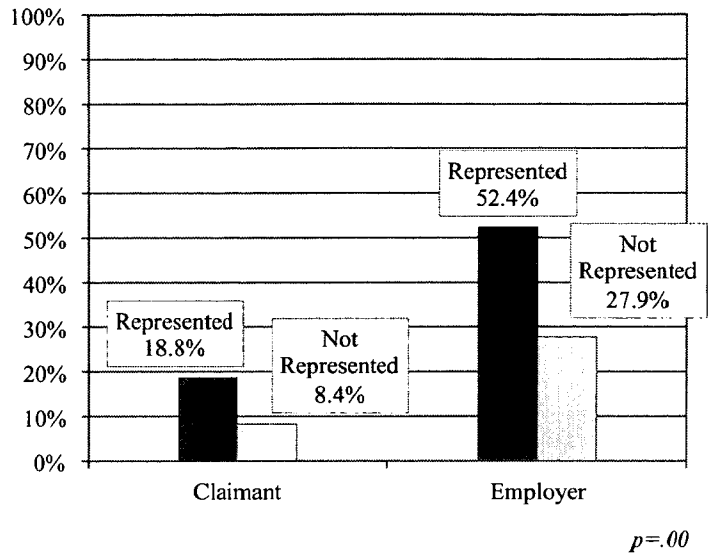


D. Introduction of Documents

The introduction of documents follows a similar pattern, with claimants and employers in the respective represented group introducing documents at a significantly higher rate than unrepresented claimants and employers.[94]

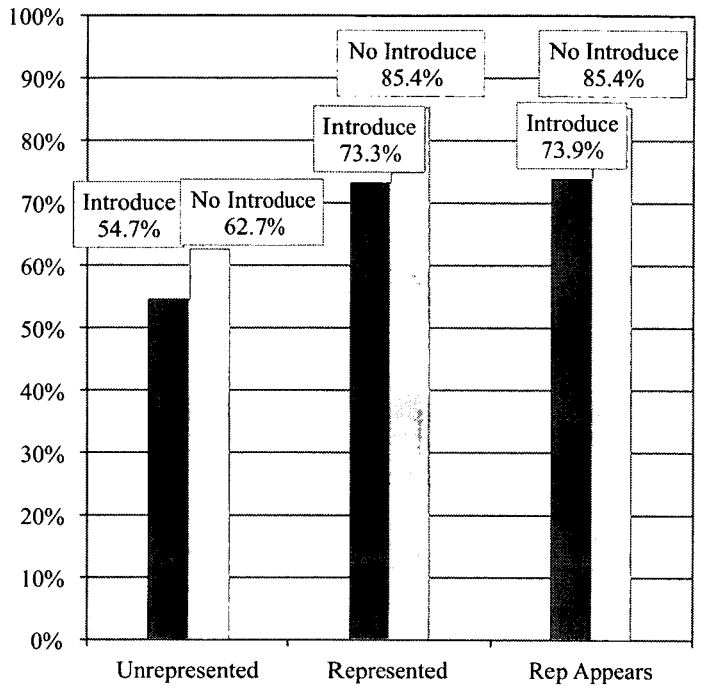
94. For both parties, the introduction of a document almost always resulted in admission of that document (95% of the time for claimants and 99% of the time for employers).

Figure 12: Document Introduction by Levels of Representation



The introduction of documents has a different relationship to case win rates for employers and claimants, as shown in Figures 13 and 14. For unrepresented claimants, represented claimants, and claimants whose representative appears, the introduction of documents is associated with a lower win rate, as compared to not introducing documents.

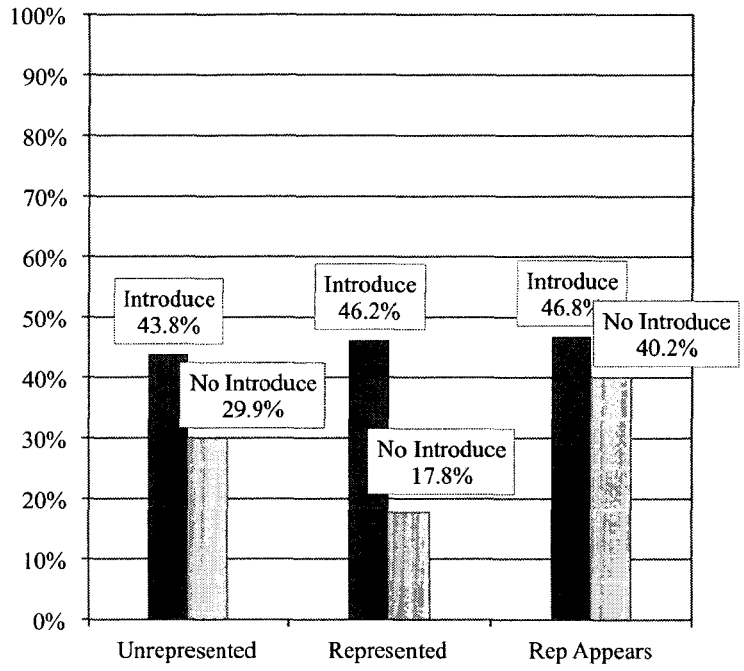
Figure 13: Represented Claimant Win Rates Across Document Introduction



p=.08, p=.01, p=.01

On the other hand, for employers, the introduction of documents is associated with a higher win rate (as compared to the win rates of the groups not introducing documents) for unrepresented and represented employers, but this difference in proportions is not statistically significant in the representative appearance comparison.

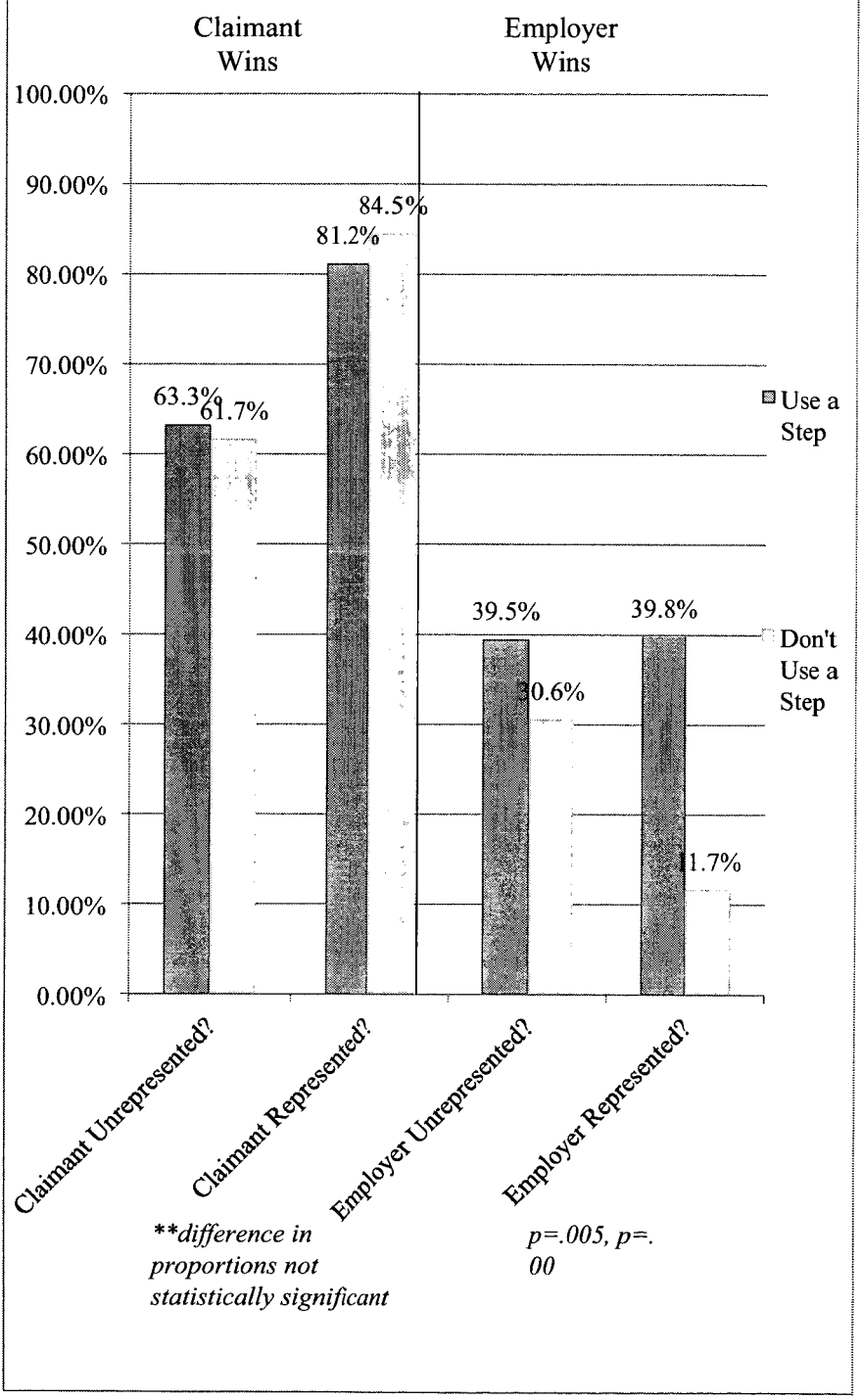
Figure 14: Represented Employer Win Rates Across Document Introduction



E. Procedures in Combination

Finally, we combined party appearance and the use of the four evidentiary steps described above into a single model to examine whether a party's use of any of these steps is advantageous and whether it is more or less advantageous for parties in represented groups. Here, we use a binary indicator—claimants and employers are separated into groups based on whether they have used any of the four variables or not.

Figure 15: Win Rates Across Combined Procedures



As shown in Figure 15, the win rate for unrepresented claimants who do not appear or use any evidentiary steps is not significantly different from the win rate for unrepresented claimants who use these procedural steps. When these four steps are combined for represented claimants, claimants see slightly, but still not significantly, lower win rates when using an evidentiary step.

However, the win rate for unrepresented employers who appear or use evidentiary steps is significantly higher than the win rate for those unrepresented employers who do not use any of these steps. And the same is true for represented employers who see proportionally higher win rates when appearing or using an evidentiary step compared to represented employers who do not use any of these steps.

IV. THEORETICAL IMPLICATIONS, POLICY RECOMMENDATIONS, AND FUTURE RESEARCH

> "The only thing less popular than a poor person these days is a poor person with a lawyer."
>
> Jonathan D. Asher, Executive Director, Legal Aid Society of Denver[95]

Though Mr. Asher was commenting on public opinion of legal aid funding two decades ago, the question remains if and how his assessment bears out in the courtroom. Our empirical results are consistent with previous studies finding that representation does help the less powerful. We add to these studies with our new results measuring the interaction between balance of power and representation. Our results show for the first time that a representative who uses court procedures is not necessarily helpful, especially if that assistance is not grounded in, what we define as, strategic expertise. These empirical findings have implications for theories of representation, and so we propose a theory of strategic expertise that captures the overlap of formal training with client and case-specific judgment. Our findings, and this concept of strategic expertise, translate to policy and practice, as well as to future research.

A. Representation and Balance of Power

Our findings support the theory that the lower a party's power relative to its opponent, the more it stands to benefit from representation. We believe this is due to the ability of better resourced parties to use functional equivalents of professional expertise, an ability that is based on a party's resources, social status, education level, and other elements of social and economic power. Thus, as a baseline matter, while some parties have advantages that would otherwise be conferred by representa-

95. Robert Pear, *As Welfare Overhaul Looms, Legal Aid for Poor Dwindles*, N.Y. TIMES, Sept. 5, 1995, at A1.

tion, others have no such advantage. This latter group will benefit the most from legal representation, particularly when it faces a more powerful opponent.

Our findings support previous studies that have found representation correlates with improved case outcomes for claimants.[96] More importantly, the data demonstrate that the relationship between representation and case outcomes is more pronounced when the balance of power is introduced into the analysis. In the modern American legal system, where civil legal representation is not guaranteed by the state, a more powerful party, such as an employer, is more likely to have the resources to obtain representation, whether it is through an in-house legal department for a large employer or through a third-party lay representative retained to control costs for a smaller employer. In this scenario, our data show that the less powerful party, such as a claimant, is at a significant disadvantage. In addition, the lower marginal advantage of representation for employers is consistent with the theory that employers come to the process with greater power—that can often approximate expertise—and, thus, have less to gain from representation than claimants. Similarly, claimants come to the process with less power and, thus, have more to gain from representation, whether it is the fact of their own representation, representation when the employer has none, or when both parties are represented.

And for both parties, this theory and the findings carry through to a representative who appears at a hearing, as opposed to simply being the representative of record. This is consistent with theories of power and expertise, as a representative who appears is more likely to affirmatively act on behalf of a party than a representative who is only of record. Although, it is important to note that the data show that representation without appearance still confers some advantage. We argue that this is because representatives can still provide expertise without appearing at a hearing—by helping the party select which evidence is important to disclose or introduce, by shaping case theory or testimony, by explaining substantive or procedural law, or through other means.

Notably, when both parties are represented, claimants see a higher proportion of favorable outcomes as compared to when both parties are unrepresented. This last observation highlights the role of party power in any question of representation and supports the idea that more powerful parties, whether through functional expertise, repeat player advantage, or simply greater resources, necessarily have an advantage in the civil legal process. The presence of representation on both sides mitigates this ad-

96. Despite the difference from previous studies in overall claimant success rates, this study's findings that represented claimants, as compared to unrepresented claimants, have a higher proportional win rate than represented employers, as compared to represented employers, is consistent with those studies. *See* KRITZER, *supra* note 40, at 34; Rubin, *supra* note 50, at 628.

vantage. Where there is no representation, the parties do not have balanced power, but when there is representation for both parties, the parties' power is more balanced.[97]

Returning to our example, when Wilma faces SGI in her unemployment benefits appeal, there is an obvious disparity in power between the parties. Wilma has never been in the court before; indeed, she has never been in any court. She earned minimum wage working for SGI and has had no income for a month while awaiting a decision on her appeal. Elaine has been in the court many times before. She has a basic understanding of what she must prove to ensure the judge denies the worker's claim for benefits. She knows the type of evidence the judge wants to see. Although she is not a lawyer, she understands the setting and the process well.

In this setting, Elaine would certainly benefit from legal representation. For example, a lawyer would understand that the testimony of a witness is better than assertions contained in a hearsay document. But we argue Elaine will do a fairly good job on her own because she has done it so many times before and learned some things along the way.[98] In comparison, the relative benefit of legal representation for Wilma is much greater. She has everything to gain from a lawyer's expertise. In addition, the fact of representation may provide Wilma with some psychological comfort and increase in power as the party who has never been to court before. A corollary issue is the symbolic effect of a powerful party. Thus, in our example, SGI's reputation in the community as a significant employer and Elaine's reputation in the court as a regular presence may be another imbalance in power that works against Wilma.

B. Representation, Use of Procedures, and Strategic Expertise

An initial finding of our research, that employers are more likely to take advantage of appearing at the hearing and evidentiary steps, can be explained in two different ways. First, the employer has the initial burden in quit cases and the entire burden in misconduct cases and, as a result, must show up and use testimony or documents to make its case. Thus, it is unsurprising that employers are more likely to appear and take ad-

97. Of course, a limitation of our study is that we do not know why some parties have representation and some do not. There are many reasons why an employer or a claimant may seek or retain counsel, and these reasons are likely to interact with our findings regarding balance of power. We hope that future work explores the interaction of these issues.

98. We recognize that there is variation in employers and claimants. For example, if Wilma had been a cashier at a store with two employees and the owner, who appears at the hearing, has never been to court before, the role of representation may be different. If the owner, like Wilma, knows nothing about the substantive law, procedures, or formalities of communication in the courtroom, he would also benefit significantly from legal representation. For example, a lawyer might introduce a crucial piece of evidence that the owner would never think to bring. However, for purposes of this project we are relying on the assumption that employers, in general, are more sophisticated and appear in court more frequently than claimants. It is our hope that future research will test our findings and theories through a more detailed examination of parties' sources of power.

vantage of the mechanisms for introducing evidence. Second, employers, whether represented or not, are more likely to be sophisticated or repeat-player actors and, thus, more likely to be aware of and take advantage of procedural mechanisms.

Further, the finding that represented parties on both sides appear, introduce testimony, and disclose, introduce, and admit documents at higher rates, as compared to unrepresented parties, is a logical result because it reflects the procedural expertise of the representative. In addition, the frequency with which employers use procedures—whether represented or not—underscores the theory of how parties' inherent power interacts with the expertise contributed by a representative. In this data, the employer uses most of the studied procedures most of the time, and the rate is slightly higher when the party is represented. This is consistent with the theory that employers come to these cases with sophistication and repeat-player experience that places them in an advantageous position, regardless of representation. Thus, as borne out by the data on representation and case outcomes, an employer wins marginally more cases when represented, as compared to employers who are not. A represented employer who uses any procedure has more favorable case outcomes compared to employers, represented or not, that do not use these procedural steps.

However, the analysis of the relationship between use of procedures and the party's case outcome reveals a more complicated picture. Our analysis of balance of power argues that claimants have more to gain from representation because they begin in a position of less power and sophistication. The data showing significant differences in use of procedural steps when a claimant is represented as compared to when she is not represented is consistent with this theory. However, our results also reveal the surprising result that when a represented claimant uses some of these steps, the claimant's win rate is lower than when the represented claimant does not use those same procedures.

The data show that a represented claimant who presents testimony or discloses or introduces documents is associated with a lower proportion of favorable case outcomes as compared to represented claimants who do not use these same steps. The same is true when the claimant presents testimony and is exaggerated when the claimant testifies. The only exception to this pattern of worse case outcomes with increased procedural participation is when the claimant appears at the hearing. When all of the procedures are analyzed together, neither represented claimants nor unrepresented claimants see significant differences in case outcomes with the use of any procedure as compared to not using any procedure. This result—contrary to our hypothesis—suggests that claimant representatives' use of procedures is in some way not effective and raises important questions about the value of representation and the type

of representation necessary to have a positive effect on a party's outcome.

There are a number of potential explanations for this surprising finding, and we argue that our theory of strategic expertise captures a number of these explanations. One explanation for this finding is that the substantive legal context of our study—where the burden of proof is placed entirely on the employer in misconduct cases and initially on the employer in voluntary quit cases—creates disincentives for a claimant to use procedural steps to introduce evidence. In these cases, a claimant automatically wins when an employer introduces no evidence. Thus, any use of procedures to introduce evidence by a represented claimant holds the inherent risk of weakening the presumption in the claimant's favor. Claimant representatives may choose to introduce documents in "closer" cases or cases where the representative perceives the case as unlikely to win and, thus, is simply using every procedure. Alternatively, it may be that represented claimants are more likely to use procedures to introduce evidence where the employer has already presented a strong case, and the representative perceives the need to introduce more evidence to counter the perceived or real lower likelihood of winning the case. Relatedly, when a representative uses a procedure to introduce evidence, there is a risk that the lawyer goes too far and introduces more evidence than is necessary to advance the claimant's case theory, ultimately weakening the claimant's case.

Another explanation may be the judge's perception of a claimant representative's procedural activity. It may be that because employers have the burden of proof a judge perceives a represented employer's use of procedures to introduce evidence as a signal that the employer has a strong case. This may be especially true when employers or their representatives are repeat players before a particular judge. The judge may similarly perceive a represented claimant's use of procedures as a sign of a weak case, interpreting introducing evidence when the burdens of proof do not require it as a desperate measure. A more cynical explanation may be that a judge may not be used to claimants having representatives, and the shift in procedural dynamics that results from a lawyer in the courtroom leads the judge to be less receptive to the claimant's case.

This pattern of better outcomes for represented employers who use procedures and worse outcomes for represented claimants who use procedures suggests that there is more to understand about how power and expertise function in civil justice settings. Each of these explanations underscores that for a representative to be effective, she must understand and adapt to the context in which she operates. As a result, we argue that the advantage provided by representation only occurs when the representative acts strategically. Thus, a representative who reflexively uses procedures, such as having a claimant testify when the claimant does not have the burden, may hurt the party. In contrast, a representative who

strategically uses procedures, such as keeping a claimant from testifying so that the claimant does not help the employer meet its burden, is more likely to help the party. This is especially true for the party without the burden—usually the claimant—as a representative for an employer who has the burden is more likely to improve outcomes by using any procedure. Similarly, a representative for a claimant who uses a procedure based on unsound strategic judgment is more likely to worsen outcomes because the presentation of evidence may carry the employer's burden and, thus, worsen the claimant's case.

Thus, we propose a third theoretical component of representative's expertise: strategic expertise. This third component of strategic expertise complements existing theories of substantive and relational expertise.[99] Specifically, strategic expertise is the ability to synthesize substantive expertise with relational expertise and to exercise judgment in applying this synthesis to a particular client's circumstance. This concept of strategic expertise explains what lawyers do to connect formal training with situational understanding and supplement it with strategic thinking and judgment as they serve their clients. Where substantive expertise is abstract, rule based, and learned primarily through formal training, and where relational expertise is grounded in relationships and learned through experience, strategic expertise involves the knowledge, judgment, and skill lawyers employ when making decisions based on a synthesis of inputs gleaned from substantive and relational expertise.[100] Strategic expertise involves combining knowledge of the underlying legal framework with the particularities of a given civil legal setting, including individual personalities and preferences, and exercising judgment to apply this knowledge to a particular client's circumstance.

Revisiting Wilma's case illustrates how lawyers can employ strategic expertise. Imagine that both Wilma and Elaine have lawyers for the hearing, and during the hearing Elaine testifies about Wilma's tenure as an employee of SGI. Elaine asks a question about Wilma's habit of lending money to fellow employees—a topic that is not relevant under the rules of evidence. In the moment that she hears the question, Wilma's

99. *See supra* notes 77–86 and accompanying text.

100. Others have attempted to define legal strategy and strategic decision-making in a variety of ways. *See, e.g.*, David R. Barnhizer, *The Purposes and Methods of American Legal Education*, 36 J. LEGAL PROF. 1, 63–64, 66–67 (2011) (differentiating strategic awareness from both substantive law and "[j]udgment, [a]nalysis, [s]ynthesis and [p]roblem-[s]olving" as an essential focus for legal education); Angela Olivia Burton, *Cultivating Ethical, Socially Responsible Lawyer Judgment: Introducing the Multiple Lawyering Intelligences Paradigm into the Clinical Setting*, 11 CLINICAL L. REV. 15, 26–27, 42–43 (2004) (observing that "strategic intelligence" is essential in exploring scenarios and choosing effective courses of action and differs from personal, narrative, logical-mathematics, categorizing and linguistic intelligences, which together contribute to a lawyer's "critical judgment"); Richard K. Neumann, Jr., *On Strategy*, 59 FORDHAM L. REV. 299, 345 (1990) (defining legal strategy as a composition of legal tactics based upon fundamental principles such as "concentration of effort on an [sic] hypothesized decisive event, planning from that event backward in time to the present, [and] generating the largest number of reasonable strategic options from which to choose").

lawyer has a decision to make: does she make a relevance objection? Her substantive expertise in the law of evidence tells her that the statement may be inadmissible and that most judges would sustain an objection. She knows the case well enough to anticipate the answer, one that she believes is not damaging for her case if it comes in (again, drawing on her substantive expertise regarding what she must prove to win the case). Turning to her relational expertise, she knows that this judge has little patience for objections as a general matter, and she has already objected on a number of issues that concern her more than this particular question. She also believes that if she objects, the judge may read it as a sign of weakness in her client's case. The attorney also knows that Wilma is confident in her advocacy and will not be concerned if she does not object to this question. In the mere seconds that she has to make this decision, she weighs all of the inputs from her substantive and relational knowledge and skill and considers how they interact to impact her chance for overall success in the case. She decides there is a greater risk to objecting than there is to letting the answer in. Thus, although an objection would be a legally and procedurally accurate choice, one that would likely have been sustained by the judge, her understanding of the human dynamics in the room, the substantive legal issues in her case, her particular client, and her strategic understanding of the choice presented led her to not object.[101]

Strategic expertise is the hallmark of quality legal representation and is inextricably linked with good judgment and zealous representation. It is the expertise that lawyers draw on when making bold choices or taking calculated risks in their work. It comes into play when a lawyer pushes the boundaries of the law to make a novel legal argument; when a lawyer presents the facts of her client's case in a way that reflects not only the merits of the case but also her impressions of the jury; when a lawyer chooses to make a lengthy closing argument before a visibly impatient judge based on the calculation that the legal and factual issues are too complex to forego thorough treatment; or when a lawyer chooses to disclose information to an opposing party because she believes it will lead to a favorable settlement, even when the disclosure is not required by formal legal procedures. Unlike substantive or relational expertise, only a representative can provide a party with strategic expertise. While a judge may be able to explain a legal concept or procedure to a pro se party, and an unbundled service provider may be able to tell a claimant to

101. Kritzer's concept of "process knowledge," described *supra* note 76, includes a lawyer's understanding of how a given legal setting typically operates, for example, knowledge about the hearing process for a particular type of case, including the process in a particular court. Our concept of strategic expertise includes the understanding of the operation of a given legal setting that is captured in Kritzer's process knowledge, but strategic expertise expands process knowledge to capture a lawyer's contextualized decision-making, which takes into account her knowledge of "typical process" as well as what this knowledge means for the specific case, client, and issue she is handling, and ultimately, how the synthesis of this information will inform her choices.

speak slowly before a certain judge, only a representative who is in a hearing with a party and knows the party's case as her advocate can lend strategic expertise at a given moment.

This theory of strategic expertise is consistent with the sociological theory that a lawyer's effect is primarily about helping a party navigate procedures and forcing a court to follow its own rules.[102] However, our view is that a lawyer using strategic expertise may push a court to enforce its own rules if that is the strategically advantageous choice in a particular factual and legal context. But it is just as likely that a lawyer makes the choice to not encourage the enforcement of a rule because that is the strategically sound choice for that client in that context.

Strategic expertise, like relational expertise, is not necessarily taught in any formal context.[103] It is perhaps sometimes innate or developed from nonprofessional experiences, but it is typically gained and developed through professional experience. It is situated and highly contextual, but it includes a deep appreciation for legal and procedural complexity. It also includes an appreciation of risk and the ability to weigh costs and benefits of choices. It necessarily involves judgment. Sometimes, strategic choices require an attorney to ignore social and cultural cues in favor of a principled legal position. Sometimes, strategy requires a lawyer to ignore legally incorrect moves by judges or opposing counsel in favor of preserving relationships. It is the expertise that guides a lawyer in choosing her battles wisely. In many ways, it is the essence of effective problem solving; it combines an appreciation of legal frameworks, an understanding of the human context in which law operates, and effective contextual judgment, and it is thus an essential component of a lawyer's professional expertise.

C. Recommendations for Policy and Practice

Readers may draw varying conclusions from our findings. Some may conclude that our data suggest that lawyers are not the solution to the civil litigation crisis, while others may conclude that our findings support full representation for all civil litigants. We do not believe that our findings tell us that representatives do not help less powerful parties. In fact, the data show that, overall, representatives can and do help less powerful parties. But there are things that representatives do that may not be helpful in certain contexts. Thus, we think the appropriate starting point to any policy change is the principle that representation is not monolithic.

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102. *See* Sandefur, *supra* note 5, at 910–11, 924; Sandefur, *supra* note 49, at 74 (describing empirical evidence suggesting that "part of what lawyers do to affect litigation outcomes may be assisting people in managing procedural complexity").

103. Though, like relational expertise, clinical legal education and other experiential curricular approaches are opportunities for law students to develop strategic expertise.

As a matter of policy, we recommend that different legal contexts call for different types of legal assistance and for representatives making different strategic choices. It may be that our theories of strategic expertise lead to the conclusion that lay representation, unbundled services, court reform, or technology-based services are the most effective solutions for particular legal contexts. But we cannot assume representation needs based on partial information. Instead, we need to understand how the balance of power and expertise interact with the particular legal context and how that translates to the role of representation and other forms of legal assistance. That said, we believe that several broad policy recommendations emerge from our analysis.

First, any policy designed to increase access to civil justice requires a particularized understanding of the balance of power in the cases and civil justice settings in question. For example, those courts with drastically unequal balances of power are likely to be legal contexts that require full representation because limited representation or nonlawyer court assistance does not provide enough expertise to offset an imbalance in power between parties. Similarly, some legal contexts are (or can be designed to be) ones where the parties are on equal footing and, thus, representation is a poor use of limited resources to assist civil litigants.

Second, our findings regarding strategic expertise suggest that partial representation or limited legal assistance may be more harmful than helpful. Our findings show that among represented claimants, those who use procedures do not fare better than those who do not use procedures, and we suggest this is closely tied to strategic expertise. This suggests that even a lawyer who does not wield appropriate strategic expertise runs the risk in certain contexts of being harmful to her client. Though it is theoretically possible that limited assistance can be designed to include strategic expertise, we believe this is a daunting challenge. Thus, it may be that limited legal assistance or unbundled representation is in fact counterproductive for a client in that circumstance.

A corollary to this recommendation is that we need effective mechanisms for making sure lawyers are using strategic expertise on behalf of their clients. This is a component of the challenge that legal education continues to face regarding how to prepare law students to be practicing attorneys. It is also a challenge for legal employers to understand how particular lawyers can share their own contextual knowledge most efficiently. Finally, this is a particular challenge for pro bono legal services. Pro bono representation often involves handling individual cases that diverge from an attorney's usual area of expertise. Our findings suggest that, for this approach to legal services to be effective, we must identify ways to ensure these attorneys have relevant strategic expertise, and do not reflexively—and harmfully—use their knowledge without an appreciation for the legal and factual context.

Our third policy recommendation is that self-help resources must find a way to convey the functional equivalent of strategic expertise to litigants. For example, in our data, burdens of proof are a powerful legal concept that shape strategic choices and ultimate outcomes in many cases. And, like many courts with largely pro se parties, the site of our study has resources available for pro se litigants in unemployment insurance appeals.[104] Yet, none of these resources explain how the burdens of proof function in these cases, even though a basic instruction like "if the employer does not appear and you do, you will win" would be meaningful for many litigants. If self-help resources are going to continue to play a major role in access to justice reforms and if they are to be effective, they must evolve to convey some equivalent to strategic expertise to pro se litigants.

Our final policy recommendation concerns pro se court reform. Though we are not willing to abandon representation as a powerful tool for increasing access to justice, we recognize that pro se court reform is also an important strategy.[105] We believe that our findings suggest that pro se court reform rightly focuses on increasing the navigability of courts for unrepresented individuals, but it must also account for situations when representatives do appear. As our findings demonstrate, the balance of power and representation is as significant as the presence or absence of representation for a single party. Thus, even in the most pro se-friendly court, the unusual appearance of a representative may shift the power dynamic and, thus, complicate the litigants' experiences of justice. If pro se court reform is to be an effective access to justice strategy, then it must account for these balance of power dynamics.

D. Areas for Future Research

In addition to insights for policy reform, our findings raise new questions for future research in this study and others.[106] One issue raised by our analysis is whether and how the type of representation affects the represented party's advantage. For example, in our sample, employers have nonlawyer representatives in 38% of all cases while claimants have nonlawyer representatives, mostly student attorneys, in 2% of all cases. Other studies have shown that nonlawyer representatives are less effec-

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104. *See Department of Employment Services*, D.C. OFF. ADMIN. HEARINGS, http://oah.dc.gov/node/173242 (last visited Nov. 24, 2015).

105. *See* Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 787–88 (2015). *See generally* Benjamin H. Barton, *Against Civil* Gideon *(and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227 (2010) (emphasizing the importance of focusing energy and resources on pro se court reform due the shortcomings of the "Civil Gideon" approach).

106. *See, e.g.*, Dalié Jiménez et al., *Improving the Lives of Individuals in Financial Distress Using a Randomized Control Trial: A Research and Clinical Approach*, 20 GEO. J. ON POVERTY L. & POL'Y 449, 451 (2013) ("Our hope is that, in describing our project in detail, we will clarify the process and encourage other to dip their toes in, seek out an empirically-minded partner if needed, and start testing hypotheses.").

tive than lawyer representatives.[107] This suggests a number of questions for future research. Do nonlawyer representatives help parties less than lawyers? Does this analysis change relative to the power of the represented party or the balance of representation in the case? Could the high proportion of nonlawyer representation explain this Article's finding that employers gain less advantage from representation than claimants? What is it that lawyers do for a party, as compared to what nonlawyers do, that makes them more helpful? What is the nature of nonlawyer expertise versus lawyer expertise? These questions naturally tie to questions of strategic expertise. If, as we theorize, lawyers contribute strategic expertise in a way that lay representatives cannot, then the data should bear this out. Employers with attorneys who show up should win more than employers with lay representatives, and this should be especially true when these representatives appear at the hearing. In addition, analysis of the variation in actors may reveal different insights. Does expertise function differently for different representative types? Are there differences in how expertise functions for individual representatives within a given category of representatives? Does it function differently for representatives who are repeat players as compared to those who are not? The role of representative expertise, which leads to increased engagement in the legal process but that can, paradoxically, lead to worse case outcomes when exercised inappropriately, also suggests areas for future inquiry. Does the use of procedure and its success vary by the type of representative? Is a lawyer more successful than a nonlawyer at using procedures, suggesting that lawyers do contribute unique, or at least less common, strategic expertise? These questions of representative type are especially important for our civil legal system. We continue to struggle with achievable ways to provide civil litigants with effective access to legal systems, and we continue to debate solutions ranging from guaranteed attorney representation to limited legal advice to self-help resources. Yet, we are trying to create change without understanding which of these types of representation is effective in which contexts. Thus, understanding representation type in context is a crucial part of this conversation, and a future article will focus on some of these questions.

An additional area of inquiry is how the presence of representation in a particular court or type of case might itself impact the dynamics of power balance and expertise. Put another way, when representatives are repeat players in a legal context, does that presence create systemic change that alters or reduces the need for representation? Are there types of cases—in our data and generally—where representation has been consistently present, and are there measurable changes in behavior or outcomes in those cases even when representation is no longer present?

107. KRITZER, *supra* note 40, at 76–77.

Another set of questions concerns how parties come to have representation. Qualitative research into the selection criteria representatives use to take clients may help us understand selection in context, as might qualitative research into how employers and claimants come to seek out or obtain representation. Further, developing controlled or randomized study designs that take these factors into account will enhance our understanding of this important component of representation in context.

Analysis of procedures other than those used to introduce evidence may reveal additional insights into representation and expertise. Is there a difference between those procedures that happen in a hearing and those that happen outside the hearing, such as motion practice? Does expertise function differently with regard to procedures that do not implicate the burdens of proof, such as a motion to continue as compared to a motion to dismiss on the merits? Does analysis of how expertise actually functions pose critical questions about theories of client-centeredness and how a lawyer should enable her client's voice and narrative in the legal process? Are a representative's actions outside the hearing important to the analysis of expertise? Are there procedures which representatives use more and with more success, such as pretrial motions, requests for continuances, or requests for phone hearings, that have different relationships to case outcomes than procedures in the hearing?

We also believe our findings raise important questions about the sources of parties' power and how they affect the balance of power between the parties. One identified source of power is substantive law; in this study the burden of proof is an example of this source of power for a claimant and her representative. An area for future research is theorizing a typology of sources of power and how these sources of power are different in different legal contexts. Another source of power is procedural rules, and this source of power may shift depending on how representatives and parties use it. For example, a representative who makes frequent use of a procedure that has not been previously used may shift the balance of power in that legal setting. Thus, another area for future research is the existence of these sources of power and how use of them by representatives shifts the balance of power between the parties. Are there characteristics of parties that can predict the functional expertise the party wields without representation?

In addition, there is much to learn about how the characteristics of a case interact with the balance of power and representation. For example, in unemployment cases, the burden of proof varies depending on the theory of the case, and so we hope to explore how this variable interacts with the balance of power and representation. Analysis regarding the type of case may provide more insight into the use of procedures and strategic expertise. It may be that claimants' use of procedures to introduce evidence in a quit case—where the claimant bears part of the burden of proof—has a different relationship to case outcomes than in a

misconduct case—where the employer bears the entire burden. And if there is not variation in the use of procedures and case outcomes, that may provide important insight into whether representatives for claimants are in fact contributing strategic expertise that translates to effective representation. An additional layer of analysis could also include which party files the appeal, as this may help understand the party's interest in the case or motivation to use procedures. Does the type of case change the expertise dynamic? Is it more or less important to have a lawyer's expertise when you are a party with the burden or a party without the burden? Similarly, does this expertise operate differently in cases where the party on the other side is the government as opposed to an employer? In addition, is there a way to measure the factual strength of a case to explore the interaction of that variable with balance of power and representation?

Finally, we believe there is a compelling need for analysis of the role of judges. Do different individual judges or their backgrounds result in different case outcomes relative to use of procedures? What is the role of judges in analyses of representation in context? What role does the judge play in exacerbating or mitigating the balance of power and representation between the parties in the hearing? If one party is unrepresented, does the judge—intentionally or unintentionally—change her behavior to level the playing field? How does strategic expertise, and particularly the absence of it, affect a judge's perception of a party and that party's case outcomes? Does the presence or absence of a representative exercising strategic expertise interact with the judge's procedural or substantive choices in the hearing? Are judges appropriate and effective actors in mitigating an imbalance of power or lack of expertise? Some of these questions may be answered by additional analysis of this data set, and some may be understood better through qualitative research.

All of these questions for future exploration underscore the central concept of this project: to understand when, how, and why representation matters, we must engage in the complexity of the legal process and parties' experiences in it. The corollary to embracing complexity in our research efforts is understanding how these questions and their empirical results affect the reality of the civil justice system.

CONCLUSION

We cannot understand civil justice outcomes, party experiences, or the role of representation without an appreciation of context. This Article begins a conversation about the context in which representation operates. Our analysis of the balance of power and the role of expertise can be replicated across a range of civil justice settings, from other administrative courts to immigration proceedings to municipal and state district courts. These issues can and should be explored in other areas of sub-

stantive law, particularly those affecting the vast majority of litigants in American courts, such as housing, family, and consumer law.

Beyond the specific questions about representation raised in this Article, this research project and others like it add to our base of knowledge and understanding regarding the real-world operation of civil justice in America—a necessary step in solving problems facing the civil justice system. Despite the recent resurgence of interest in access to justice issues, there is still much that we do not know about how the civil justice system actually operates.[108] Even with ongoing conversations about the crisis in civil justice among those who work in the trenches of legal services and on access to justice research, it is all too clear that we do not yet have the theory, the data, or the analysis needed to change our civil justice system for the better. Studies such as this one advance our understanding of the nuanced dynamics of legal representation and legal processes in context. Just as importantly, this work also increases our understanding of what is actually happening, on a day-to-day basis, in our nation's civil courts.

METHODOLOGICAL APPENDIX

This Article is part of a broader study based on the broadest and deepest collection of data about representation in recent years. The study is informed by our experience representing claimants in unemployment insurance appeal hearings before the District of Columbia Office of Administrative Hearings. Though we did not conduct formal qualitative observations of these hearings, two of the authors have supervised clinical law students in these cases over the course of five years and in more than a hundred cases combined. This clinical practice has led to conversations with other representatives, judges, and court staff about various issues concerning representation in this context. The questions raised by the authors' experiences in these cases were the impetus for this project; the relationships developed during these cases led to access to the data for this study; and the authors' observations contribute to the hypotheses in this Article.

To identify a universe of cases for this Article, we collected unemployment benefits appeals hearing data from the District of Columbia Office of Administrative Hearings for the year 2012. This data set encompasses 1,794 unique cases over the study period.[109] In order to ensure the greatest utility of the data, coded variables include the following:

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108. *See* Albiston & Sandefur, *supra* note 2, at 117–20 (identifying a lack of information about the demand for civil legal services including how individuals understand and interact with law and the justice system).

109. The data discussed in this Article are the result of a larger effort to collect data on all unemployment insurance appeals in the District of Columbia for 2011, 2012, and 2013. We anticipate that this data set will be available for the future research proposed at the conclusion of this

- a party's representation (or lack thereof),
- the type of representation (lawyers, third parties, clinical students, lay representatives),
- the presence of representation at the hearing (as representatives do not necessarily attend the hearing),
- the appearance of parties at the hearing,
- the participation of parties in different procedural elements of the case, and
- the length of time for procedural steps and cases to be resolved.

As a key goal of the study is to understand the context of representation, we attempted to code every possible procedural element of each case, though only a subset of these procedures are addressed in this Article.[110] The coded variables include the following:

- dates of the eligibility period,
- date and substance of the underlying agency (claims) determination,
- date of filing of the appeal,
- date and number of document disclosures,
- number of documents introduced,
- number of documents admitted,
- date and number of witnesses disclosed,
- date and outcome of requests for subpoena,
- date of any pretrial motions filed and their outcomes,[111]
- date of any hearings held,
- the appearance of parties at the hearing(s),
- the appearance of representatives at the hearing(s),
- any appearance and testimony by witnesses,
- telephone appearances,
- use of interpreter,
- verbal motion for judgment at a hearing,
- verbal voluntary dismissal at a hearing,
- date of any posthearing motions and their outcomes,
- final procedural outcome, and

Article and will include approximately 7,000 unique cases, approximately 5,200 of which concern the circumstances of separation from employment.

110. Some procedures, such as disclosure of witnesses, are excluded from this Article because of small sample sizes in our one-year data set. Other procedures, such as the use of motions, are not considered because we believe they are more complex and potentially implicate other areas of inquiry. Thus we plan to address them in future articles.

111. Pretrial motions include those to withdraw the appeal, withdraw as representative, expedite the final order, continue the hearing, for a new hearing or to reopen a case, for relief from a final order, for reconsideration, for subpoena, for telephone hearing, to compel, noting intent not to appear, for judgment, for extension of time, to file under seal, to add a party, to quash, for an interpreter, to consolidate cases, to appear pro hac vice, to supplement the record, and to remand, as well as responses to these motions.

- final substantive outcome.

To collect the data, we engaged in a three-step process. First, we downloaded data from the court's case-management system. Second, we supplemented and verified this data through review of each paper case file, conducted according to a comprehensive collection protocol. Third, we performed supplemental two-tier data checks of the paper case files and reviewed the collected data for both internal consistency and consistency with court procedures. We then coded the collected data according to a comprehensive coding plan to allow for the use of statistical software for analysis.

This Article focuses on a subset of the data: all unemployment appeals where the circumstances of separation are at issue, regardless of which parties appeared at the hearing. This is not a sample of available cases but rather every such case in the District of Columbia in 2012. This data set captures the breadth of circumstances where representation may have a correlation to outcomes and is a larger and broader sample than earlier studies. It does not, however, include the subset of unemployment appeals regarding underlying questions of eligibility and benefit calculation, as those appeals involve a state agency rather than the employer as the opposing party.[112]

We use a combination of cross tabulations and difference in proportions tests to demonstrate patterns of relationships between the variables of interest present in the data. Cross tabulation allows us to demonstrate basic patterns of correlation in the data, and difference in proportions tests allow us to further investigate the relationships of interest through statistical testing of the comparison of groups. Cross tabulation is a descriptive statistical tool that summarizes data into contingency tables by grouping the frequency of interrelation between variables.[113] Difference in proportions tests allow us to determine if certain outcomes of interest (e.g., winning or losing an appeal) can be attributed to a statistically significant difference between groups based on the presence or absence of an additional characteristic of interest (e.g., having representation or not).[114] In this initial examination of the data, we seek to identify meaningful patterns in the data that may be further tested by more complex empirical methodology in future work.

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112. The results presented in this paper include only cases where the legal issue is a claimant's qualification for benefits. We have made the analytical choice of separating the two data sets because the parties, the nature of representation, the hearing process, and the legal and factual issues involved in eligibility and qualification cases are substantively different and would make a combined analysis unworkable. In future work, we hope to explore the particular dynamics of eligibility cases, which also raise issues of power and legal expertise, albeit in different ways.

113. PHILIP H. POLLOCK III, THE ESSENTIALS OF POLITICAL ANALYSIS 59–61 (4th ed. 2012).

114. ALAN C. ACOCK, A GENTLE INTRODUCTION TO STATA 139–42 (2d ed. 2008).

We recognize the criticisms lodged against observational studies about the impact of representation. Though our access to data and the ethical challenges of randomizing representation mean this study is not based on a randomized design, it is based on all unemployment cases, rather than a sample, in the relevant time period.[115] We note that we do not call what we do "causal" and instead use statistical methods to compare groups and to demonstrate the correlative relationships between representation and case and procedural outcomes. While we recognize the limitations of our analysis, we believe our observations are still meaningful. Even though it is not operating from a random sample, our approach of using a complete set of cases to look at differences between groups provides important insights into the questions of representation, balance of power, and strategic expertise that frame future work to test the theories we develop in this Article.

115. An example of the logistical and ethical challenges of randomizing the contextual questions we raise is: even if one could randomize ethically the fact of representation for a party, it is hard to imagine how to randomize ethically whether a particular party presented testimony or introduced a document, in order to measure the corresponding case outcomes.

HEIEN V. NORTH CAROLINA: MISTAKEN CONCLUSIONS ON MISTAKES OF LAW

ABSTRACT

The Fourth Amendment protects individuals against unreasonable searches and seizures. Traditionally, the primary mechanism for enforcing the Fourth Amendment has been the exclusionary rule. If a search was conducted in violation of the Fourth Amendment, any evidence of the defendant's illegal conduct was excluded from the defendant's criminal trial. The main rationale for the exclusionary rule is that when evidence is excluded, it deters police officers from future Fourth Amendment violations.

After deterrence became the primary justification for the exclusionary rule in the 1960s, the United States Supreme Court, in *United States v. Calandra*, declared that unless police officers can be deterred, the exclusionary remedy serves no purpose whatsoever. In subsequent cases, when police violated the Fourth Amendment, but acted reasonably in "good faith," the Court concluded that the exclusionary rule did not apply because the officer could not be deterred. The Court has since expanded the good-faith exception to an increasingly broad range of situations.

This Case Comment analyzes the Court's most recent expansion of the good-faith exception in the context of police mistakes of law. *Heien v. North Carolina* is the first Supreme Court case to hold that police officers who make (reasonable) mistakes of substantive law do not violate the Fourth Amendment. In effect, the Court not only expanded the circumstances to which the good-faith exception applies, but also made good faith an exception to the Fourth Amendment's requirements, rather than merely an exception to the exclusionary rule. Now, instead of deciding whether the search or seizure was reasonable, as required by the Fourth Amendment's text, the Court decides the convoluted metaquestion of whether it was reasonable for a police officer to believe the search was reasonable. This decision not only further erodes Fourth Amendment protections and stunts the evolution of Fourth Amendment doctrine, but also creates a perverse double standard for the criminal law maxim that "ignorance of the law is no excuse."

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INTRODUCTION

Early one morning in 2009, Maynor Vasquez and Nicholas Heien were driving down a major interstate in North Carolina.[1] Vasquez was driving, while Heien lay across the back seat.[2] Meanwhile, Officer Matt Darrisse sat on the side of the interstate watching traffic when he noticed that Vasquez looked "stiff and nervous" as he drove by.[3] Darisse pulled onto the interstate and began to follow Vasquez's car.[4] When Darisse noticed that one of the rear brake lights was not working, he pulled Vasquez over, mistakenly believing that state law required two working brake lights.[5] After giving Vasquez a citation, he got permission from both men to search the car and subsequently found a bag of cocaine.[6] Heien, who was the owner of the car, was sentenced to two years in pris-

1. Heien v. North Carolina, 135 S. Ct. 530, 534 (2014).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 534–35.
6. *Id.* at 534.

on for drug trafficking.[7] He challenged the stop as a violation of the Fourth Amendment.[8]

In 2014, the Supreme Court granted certiorari in *Heien v. North Carolina*[9] to review the question of "[w]hether a police officer's mistake of law can provide the individualized suspicion that the Fourth Amendment requires to justify a traffic stop."[10] In an 8-1 decision, the Court held that "[t]o be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.'"[11]

This Case Comment argues that *Heien* was wrongly decided for a number of reasons. First, it provides police officers with a legal justification to circumvent Fourth Amendment protections and to stop drivers for violating laws that do not actually exist. Second, the decision creates a perverse double standard for the basic tenet that "ignorance of the law is no excuse."[12] Police officers are now permitted to interpret vague laws in individualized, "reasonable" ways, but citizens are still expected to know and follow every law, regardless of how vague it is.[13] In other words, citizens, most of whom have no legal education, are held to a higher standard regarding knowledge of the criminal code than the very people who are trained and entrusted to understand and enforce it.

Allowing an exception to the Fourth Amendment for police mistakes of law also seriously undermines the protections that the Fourth Amendment provides individuals. The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no [w]arrants shall issue, but upon probable cause . . . ."[14] The Court routinely analyzes criminal Fourth Amendment cases using three basic steps.[15] First, there must be a search, meaning the person must have a "reasonable expectation of privacy"[16] or property interest[17] in the area

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7. Petition for a Writ of Certiorari at 3–5, Heien v. North Carolina, 135 S. Ct. 530 (2014) (No. 13-604).

8. *Id.* at 3–4.

9. 135 S. Ct. 530 (2014).

10. Petition for a Writ of Certiorari, *supra* note 7, at 1; *see also Heien*, 135 S. Ct. at 535.

11. *Heien*, 135 S. Ct. at 533, 536 (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).

12. Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687, 743 (2011) ("It is a hallmark of substantive criminal law that ignorance of the law is no defense."); Robert L. Misner, *Limiting* Leon*: A Mistake of Law Analogy*, 77 J. CRIM. L. & CRIMINOLOGY 507, 509 (1986) (explaining that the rationale for this strict liability standard is that the refusal to reward ignorance ensures "that the proper standard of conduct will be learned and respected by others").

13. *See Heien*, 135 S. Ct. at 536–40.

14. U.S. CONST. amend. IV.

15. Marceau, *supra* note 12, at 733.

16. Katz v. United States, 389 U.S. 347, 351 (1967) (holding that the Fourth Amendment protects "people, not places"); *Id.* at 360 (Harlan, J., concurring) (noting that the Fourth Amend-

searched.[18] Second, the search must be reasonable, meaning the officer must have had probable cause that the person was doing something illegal.[19] Third, if the search was unreasonable, the Court invokes the exclusionary remedy, meaning that the jury is barred from considering evidence of the defendant's illegal conduct that was obtained during the search.[20] The analysis in *Heien* comes in at the second step of this framework because the Court held that the Fourth Amendment is not violated if the officer makes an objectively reasonable mistake when interpreting the law.[21]

Previous Supreme Court cases that analyze police officer's "good-faith"[22] mistakes in the context of searches and seizures focus on the third step in the above framework[23]—whether the defendant should have access to the exclusionary remedy.[24] In these cases, the Court continually

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ment's protection applies as long as the person had a "reasonable expectation of privacy" in the area searched).

17. In *United States v. Jones*, the Court considered whether the government's attachment of a GPS device to a vehicle, and its use of that device to monitor the vehicle's movements, constituted a search under the Fourth Amendment. 132 S. Ct. 945 (2012). The Court explained that the government's physical intrusion on an area, unlike an intrusion on an "effect," is of no Fourth Amendment significance because there is no meaningful interference with an individual's possessory property interests. *Id.* at 953.

18. Marceau, *supra* note 12, at 733.

19. *See id.* at 733, 751–54. Reasonableness comes in various forms in the different contexts of Fourth Amendment analysis. Generally speaking, a search and seizure is unreasonable if it was conducted without a warrant or if it was based on a warrant that was issued without probable cause. *See* Sam Kamin & Justin Marceau, *Double Reasonableness and the Fourth Amendment*, 68 U. MIAMI L. REV. 589, 595–98 (2014). In exigent circumstances, where obtaining a warrant would be impractical, the officer can conduct a search as long as he has probable cause for believing that the person committed a crime. *Id.* at 598–99. In the context of traffic stops, officers must have reasonable suspicion to stop a driver. *See id.* at 624–25.

20. Marceau, *supra* note 12, at 733. The exclusionary rule is the primary remedy for criminal Fourth Amendment cases. *See* Orin S. Kerr, *Fourth Amendment Remedies and Development of the Law: A Comment on* Camreta v. Greene *and* Davis v. United States, 2011 CATO SUP. CT. REV. 237, 239–40. In civil cases there are a variety of remedies in addition to the exclusionary rule. *See id.* at 241–44. These mostly arise in the context of damages against individual government agents and municipalities as well as injunctive or declaratory relief. *See id.*

21. Heien v. North Carolina, 135 S. Ct. 530, 534 (2014).

22. When police act reasonably, but violate the Fourth Amendment, the Court calls it "good-faith." However, unlike the ordinary meaning of good faith, which refers to subjectively good intentions, good faith in the context of the Fourth Amendment refers to whether the officer made an objectively reasonable mistake. Sherry F. Colb, *U.S. Supreme Court Considers Whether the Fourth Amendment Allows Reasonable Mistakes of Substantive Law*, VERDICT (May 5, 2014), https://verdict.justia.com/2014/05/05/supreme-court-considers-whether-fourth-amendment-allows-reasonable-mistakes-substantive-law-2.

23. *See, e.g.*, Herring v. United States, 555 U.S. 135, 138–39, 146–48 (2009) (holding that as long as the officer is negligent in attenuating the arrest, he is acting in good faith, and the jury should not be barred from considering all of the evidence); Arizona v. Evans, 514 U.S. 1, 3–4, 14 (1995) (refusing exclusion when an officer mistakenly believed that a warrant had been issued for an individual's arrest); Illinois v. Krull, 480 U.S. 340, 350–52, 359–60 (1987) (holding that the exclusionary remedy is unavailable when legislators violate the Fourth Amendment); United States v. Leon, 468 U.S. 897, 913–14 (1984) (holding that the exclusionary rule is unavailable when judges violate the Fourth Amendment).

24. There is one exception to this. Five years before the Court explicitly adopted the good-faith exception in *United States v. Leon*, it decided *Michigan v. DeFillippo*, which essentially used the good-faith justification to hold that an officer's reasonable reliance on a law that was later invali-

held that the officers' mistakes did violate the Fourth Amendment; however, because the officers reasonably believed they had satisfied the probable cause requirement (i.e., they acted in good faith), they did not have mental states that could be deterred through legal sanctions. As such, the supposed sole justification for the exclusionary rule did not apply, and the evidence was admitted.[25]

Heien essentially shifted the good-faith exception from a question of remedy to a question of right. Consequently, the availability of the Fourth Amendment's protections will no longer turn on whether the search or seizure was reasonable, as the text of the Fourth Amendment requires. Instead, the validity of a search or seizure will turn on the convoluted metaquestion of whether it is reasonable for the police officer to believe the search was reasonable. This runs the risk of suppressing any meaningful development of the Fourth Amendment because instead of analyzing many of the critical and evolving aspects of reasonable searches and seizures, the Court will decide whether it was reasonable for the officer to make a mistake about the relevant law.

In short, the *Heien* decision shows that the Court has not only expanded the good-faith exception to include police mistakes of substantive law, but also has begun to use the good-faith exception to limit the availability of the Fourth Amendment right, in addition to the Fourth Amendment remedy. Expanding this exception both in degree and application will cause the Fourth Amendment's general guarantee to be free from unreasonable searches to only apply if the search involves egregious officer conduct and obvious culpability.[26] Over time, as remedies fade from the Court's analyses, there will be less of a need to litigate Fourth Amendment cases, and the doctrine will stagnate and lose its living character.[27] But most importantly, under *Heien*, if a law is unclear, citizens are punished instead of the government.

Part I of this Case Comment will trace the emergence of deterrence as the primary justification for the exclusionary remedy and show how the Court's focus on officer culpability began the era of good-faith exceptions. It will then summarize the current state of the good-faith excep-

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dated for void-for-vagueness grounds did not violate the Fourth Amendment itself. *DeFillippo*, 443 U.S. 31 (1979). Once the good-faith exception was expressly adopted in *Leon*, the Court only used it to bar defendants' access to the exclusionary remedy. *See id.* at 35–36, 39–40.

25. David Gray, *A Spectacular Non Sequitur: The Supreme Court's Contemporary Fourth Amendment Exclusionary Rule Jurisprudence*, 50 AM. CRIM. L. REV. 1, 30–31 (2013).

26. On the day *Herring* was decided, Tom Goldstein, a lawyer who has argued almost two-dozen cases before the Supreme Court, blogged, "Today, the Supreme Court holds that negligent errors by the police generally do not trigger the exclusionary rule. . . . Put another way, the Supreme Court today extended the good faith exception to ordinary police conduct." Tom Goldstein, *The Surpassing Significance of* Herring, SCOTUSBLOG (Jan. 14, 2009, 11:32 AM), http://www.scotusblog.com/wp/the-surpassing-significance-of-herring/. *Heien* merely extends this notion through the mistake of law exception.

27. *See* Marceau, *supra* note 12, at 732.

tion to show how it has significantly eroded the exclusionary remedy and paved a path for allowing police mistakes of law. Part II provides a brief summary of the facts of *Heien* as well as the majority, concurring, and dissenting opinions. Part III analyzes how *Heien*'s extension of the good-faith exception has narrowed the scope of the Fourth Amendment right and precluded any discussion of the Fourth Amendment's exclusionary remedy. Now, as long as the officer makes an objectively reasonable mistake, the Fourth Amendment is nothing more than a holographic promise that disappears when invoked.

I. BACKGROUND

A. The Fourth Amendment's Protections and the Importance of the Exclusionary Rule

The exclusionary rule emerged as the primary remedy for Fourth Amendment violations in *Weeks v. United States*.[28] The *Weeks* Court emphasized that a law enforcement officer's Fourth Amendment violations could not be approved by judges under any circumstances for two key reasons.[29] First, courts are bound by the duty to uphold the Constitution.[30] Second, if personal property can be seized and "used in evidence against a citizen accused of an offense, the protection of the 4th Amendment" to be free from unreasonable searches and seizures "is of no value, and . . . might as well be stricken from the Constitution."[31] The Court emphasized that remedies define rights and that, without the exclusionary rule, police officers have no incentive to refrain from conducting unreasonable searches and seizures.[32] Additionally, the Court stressed that judicial integrity would be threatened if Fourth Amendment violations were approved by judicial decision.[33] These foundational justifications made up the backbone of the Fourth Amendment, and in effect, what was reasonable was narrowly construed in all contexts, making the exclusionary rule a natural adjunct to Fourth Amendment violations.[34] However, at the time *Weeks* was decided, the Fourth Amendment only applied to fed-

28. 232 U.S. 383 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961). In *Weeks*, a federal marshal entered the defendant's house without a warrant and seized papers that were later admitted in trial as proof of the defendant's lottery crimes. *Id.* at 388–89. The Court held that the evidence should be excluded because the seizure violated the defendant's Fourth Amendment rights. *Id.* at 398.

29. *See id.* at 393–94.

30. *Id.* at 393 ("The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established be [sic] years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.").

31. *Id.*

32. *See id.*

33. *See id.* at 394.

34. *See* Gray, *supra* note 25, at 14–15.

eral officers because the Bill of Rights had not yet been extended to the states.[35]

It was not until 1949, in *Wolf v. Colorado*,[36] that the Court incorporated the Fourth Amendment to the states.[37] The majority opinion in *Wolf* emphasized that the exclusionary rule is both an individual remedy to the person whose Fourth Amendment rights have been violated as well as a general deterrent aimed at law enforcement officers.[38] Nevertheless, the Court declined to extend application of the exclusionary rule because it decided that it would be best for states to fashion their own remedies to Fourth Amendment violations.[39] However, in 1961, in *Mapp v. Ohio*,[40] the Court incorporated the exclusionary rule to the states when it confirmed that other remedies had proved to be "worthless and futile" when it came to punishing and deterring law enforcement misconduct.[41] The Court also emphasized that the exclusionary rule is an essential part of the right to privacy embodied in the Fourth Amendment and that failing to require exclusion when law enforcement agents violate the Fourth Amendment would be "to grant the right but in reality to withhold its privilege and enjoyment."[42]

In addition to providing a framework for the expansion of the exclusionary rule's application, *Weeks*, *Wolf*, and *Mapp* demonstrate that deterring police officers was initially viewed as only a partial justification for exclusion that helped strengthen its application rather than fully support it.[43] However, starting in the 1960s, deterrence began to emerge as the exclusionary rule's most important justification.[44] In *Elkins v. United States*,[45] Justice Stewart explicitly stated that the exclusionary rule's "purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[46] Eventually, in *United States v. Calandra*,[47] the Court declined

35. *See* Marceau, *supra* note 12, at 700–01.
36. 338 U.S. 25 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).
37. *Id.* at 27–28, 33.
38. *Id.* at 30–31.
39. *Id.* at 31–33.
40. 367 U.S. 643 (1961).
41. *Id.* at 651–53, 657–58.
42. *Id.* at 655–56.
43. *See id.* at 659 (explaining that judicial integrity is another imperative consideration of the exclusionary rule); *see also* Robert M. Bloom & David H. Fentin, *"A More Majestic Conception": The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47, 47, 53 (2010) ("Judicial integrity was the original reason for adopting the exclusionary rule in the Supreme Court case of *Weeks v. United States* . . . ."); Gray, *supra* note 25, at 17 (discussing how in *Wolf v. Colorado* "the Court had fully embraced punishment and deterrence as partial justifications of the exclusionary rule").
44. *See* Gray, *supra* note 25, at 17–18.
45. 364 U.S. 206 (1960).
46. *Id.* at 217. *Elkins* barred use of the so-called "silver platter" doctrine, which allowed federal prosecutors to avoid the exclusionary rule remedy by encouraging state officers to unlawfully obtain evidence on their behalf. *Id.* at 208. The Court emphasized the importance of preventing

to recognize any justification for the exclusionary rule other than deterring law enforcement officers.[48] Significantly, *Calandra* marked the shift in Fourth Amendment jurisprudence from using deterrence as a justification for invoking the exclusionary remedy to a justification for barring application of the exclusionary remedy.[49] The Court accomplished this by setting forth the notion that if the exclusionary rule does not have the effect of deterring the police officer, it has no purpose whatsoever.[50] This shift acted as a catalyst for allowing the Court to use a theory of police culpability and punishment to guide its practices.[51] But the difficulty in proving that an officer's mistake was objectively unreasonable has created an increasing number of ever-expanding good-faith exceptions that have been slowly reshaping the exclusionary remedy's role in Fourth Amendment criminal procedure.[52]

B. The Expansion of the Good-Faith Exception

The most important exception that stemmed from using deterrence to bar exclusion came up in *United States v. Leon*.[53] There the Court established that when an officer violates the Fourth Amendment, but reasonably believes that he has satisfied the legal probable cause standard, he is acting in good faith.[54] Accordingly, because the officer did not have a mental state that could be deterred, evidence of the defendant's illegal conduct was not suppressed.[55] In *Leon*, police officers obtained a search warrant to enter Leon's residence and subsequently found a large quantity of illegal drugs.[56] Later, the warrant was held to have been invalid because it was issued without probable cause.[57] The Court initially attempted to make *Leon*'s holding a narrow exception by only applying it to excuse an officer's reasonable reliance on a warrant that was later invalidated.[58] However, over time, the Court began to routinely rely on *Leon*'s reasoning—the exclusionary rule "cannot be expected, and

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courts from serving as "accomplices in the willful disobedience of a Constitution they are sworn to uphold." *Id.* at 223.

47. 414 U.S. 338 (1974).

48. *Id.* at 347. *Calandra* held that the exclusionary rule does not apply to grand jury investigations. *Id.* at 351–52. The Court explained that it is unlikely that police would carry out an unlawful search and seizure in an effort to gather information to ask questions at a grand jury proceeding and as such, applying the exclusionary rule in such cases would not deter police misconduct. *Id.*

49. *See* Gray, *supra* note 25, at 20.

50. *See Calandra*, 414 U.S. at 350–52. According to the *Calandra* Court, the exclusionary rule was nothing more than a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *Id.* at 348.

51. *See* Gray, *supra* note 25, at 22–23.

52. *See* Bloom & Fentin, *supra* note 43, at 57–59; *see also* Marceau, *supra* note 12, at 733.

53. 468 U.S. 897 (1984).

54. *Id.* at 913.

55. *See id.* at 923–24.

56. *Id.* at 901–02.

57. *Id.* at 903–04.

58. Marceau, *supra* note 12, at 739.

should not be applied, to deter objectively reasonable law enforcement activity"[59]—as a basis for expanding the good-faith exception.[60]

In 2009, in *Herring v. United States*,[61] the Court held that an officer's good-faith reliance on a clerk's mistake would also preclude application of the exclusionary rule because at the time of the search, the officer reasonably believed he had satisfied the necessary probable cause requirement.[62] Significantly, the *Herring* Court created a new standard for invoking the good-faith exception by explaining that as long as the officer was merely negligent in conducting a search or seizure, he does not have a mental state that can be deterred, and thus, the jury should not be barred from considering all the evidence.[63] However, the notion that punishing negligent behavior cannot be deterred through sanctions runs completely contrary to our entire system of tort law.[64] Indeed, as Justice Ginsberg pointed out in her dissent, almost all of tort law is based on the premise that liability for negligence incentivizes people to act with greater care.[65]

Herring also directly contradicted almost all of the Supreme Court's exclusionary-remedy precedent by stating, "exclusion 'has always been our last resort, not our first impulse.'"[66] Going forward, the Court shifted away from viewing the exclusionary rule as a natural adjunct to a Fourth Amendment violation and started viewing it as an extraordinary step that should only be used in cases involving flagrant police misconduct.[67]

Two years later, the good-faith rationale was extended by *Davis v. United States*,[68] which held that an officer's reasonable reliance on a binding appellate precedent, which was later overruled by a Supreme

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59. *Leon*, 468 U.S. at 919.

60. *See, e.g.*, Davis v. United States, 131 S. Ct. 2419, 2426–28 (2011); Herring v. United States, 555 U.S. 135, 139–44 (2009); Arizona v. Evans, 514 U.S. 1, 10–12, 14 (1995); Illinois v. Krull, 480 U.S. 340, 347–51 (1987); Massachusetts v. Sheppard, 468 U.S. 981, 987–91 (1984).

61. 555 U.S. 135 (2009).

62. *Id.* at 144–46; *see also* Kamin & Marceau, *supra* note 19, at 591 (explaining that a search can be sufficiently unreasonable to violate the defendant's right, but not so unreasonable that he should have access to the exclusionary remedy).

63. *See Herring*, 555 U.S. at 147–48.

64. *Id.* at 153 (Ginsberg, J., dissenting) ("The exclusionary rule, the Court suggests, is capable of only marginal deterrence when the misconduct at issue is merely careless, not intentional or reckless. The suggestion runs counter to a foundational premise of tort law—that liability for negligence, *i.e.*, lack of due care, creates an incentive to act with greater care." (citation omitted)).

65. *Id.*

66. *Id.* at 140 (majority opinion) (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006)); *see also id.* at 137 ("Our cases establish that such suppression is not an automatic consequence of a Fourth Amendment violation. Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct.").

67. *See* Kamin & Marceau, *supra* note 19, at 618 ("[T]he exclusionary rule now requires a fact-specific inquiry into the culpability of the officer, and where an officer was acting reasonably, even when the Fourth Amendment was violated, exclusion is not permitted.").

68. 131 S. Ct. 2419, 2428–29 (2011).

Court case, does not trigger application of the exclusionary rule.[69] Once again, the Court analyzed whether the police officer acted in good faith and subsequently held that the seizure was sufficiently unreasonable to violate the defendant's Fourth Amendment right, but because the officers were acting reasonably, there was no justification for the exclusionary remedy.[70]

C. The Emergence of Police Mistakes of Law

The Court also used the good-faith exception to broaden related exceptions like mistake of fact and mistake of law.[71] Mistake of fact has long been viewed as insufficient to trigger the exclusionary rule because probable cause and reasonable suspicion do not require meticulous accuracy.[72] However, unlike mistake of fact, mistake of law has historically never served as an exception to the exclusionary rule because it contradicts the most important maxim of substantive criminal law: ignorance of the law is no excuse.[73] The rationale behind a strict liability standard for mistake of law is that refusing to reward ignorance will encourage citizens and law enforcement alike to learn and respect the law.[74] However, after *Herring*, some courts[75] began to acknowledge that, in certain cir-

69. *Id.* at 2428–29. In *Davis*, police officers conducted a traffic stop and arrested the defendant for giving a false name. *Id.* at 2425. They subsequently searched his car and found a gun. *Id.* The Court held that the evidence of the gun should not be suppressed because the officer acted in objectively reasonable good faith. *Id.* at 2428–29.

70. *Id.*

71. Gray, *supra* note 25, at 38–40; Marceau, *supra* note 12, at 742–54.

72. Marceau, *supra* note 12, at 742–43 (explaining that lower courts have historically acknowledged that the maxim has no less force in the context of the good-faith exception to the exclusionary rule: "Even a good faith mistake of law by an officer cannot form the basis for reasonable suspicion, because 'there is no good-faith exception to the exclusionary rule for police who do not act in accordance with governing law.'" (quoting United States v. King, 244 F.3d 736, 739 (2001))).

73. *See id.* at 743–44; *see also* Albert W. Alschuler, Term Paper, Herring v. United States*: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 488–89 (2009).

74. *See* Gray, *supra* note 25, at 43; Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L.J. 69, 91 (2011) ("Reciprocal expectations of law-abidingness between government and citizens can scarcely be expected to endure if one party—the government—need not uphold its end of the bargain." (footnote omitted)).

75. In 2005, the Eighth Circuit Court of Appeals was the first Court to hold, in *United States v. Martin*, that police can make objectively reasonable mistakes of law. 411 F.3d 998 (8th Cir. 2005). The officer pulled over a Native American driver because he only had one working light and subsequently discovered that Martin had a pound of marijuana in the car. *Id.* at 1000. It was undisputed that the officer mistakenly understood the Motor Vehicle Code to require two working brake lights, when it actually only required one. *See id.* However, the Court held that the search and seizure did not violate the Fourth Amendment and explained that "the validity of a stop depends on whether the officers actions were objectively reasonable in the circumstances, and in mistake cases the question is simply whether the mistake, whether of law or fact, was an objectively reasonable one." *Id.* at 1001; *see also* Logan, *supra* note 74, at 80–81 (discussing how, in addition to the Eighth Circuit, the D.C. Circuit, as well as the state appellate courts in Georgia, Mississippi, Ohio, and South Dakota have condoned what they consider to be reasonable mistakes of law).

cumstances, mistakes of law bar exclusion because of the good-faith exception.[76]

Herring's effect on subsequent cases involving police mistakes began a new phase of limiting the use of the exclusionary rule to instances where law enforcement officers have knowledge that their conduct is unconstitutional.[77] If the officer lacks knowledge that his conduct is unconstitutional, there is no way to deter him, and therefore, his conduct is reasonable.[78] Under this approach, the blamelessness of a law enforcement officer, not a Fourth Amendment violation, determines the availability of exclusion.[79] *Heien* essentially moved the good-faith justification outlined in *Herring* from a question of remedy to a question of right by holding that as long as the officer's basis for probable cause is based on an "objectively reasonable" mistake of the law, there is no Fourth Amendment violation in the first place.[80]

Police mistakes of law can be divided into three broad categories.[81] The first category concerns whether a law that was invoked by a police officer as a basis for an arrest, but later found unconstitutional, violates the Fourth Amendment.[82] In *Michigan v. DeFillippo*,[83] the Court held that the search was still reasonable and thus did not violate the Fourth Amendment because law enforcement should not be required to anticipate that a court would later overturn particular laws.[84] However, exclusion is still available when the statute is "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws."[85]

The second category involves mistakes that relate to Fourth Amendment procedure, such as when a warrant is required and what

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76. *See* Marceau, *supra* note 12, at 745 ("There is a sense that *Herring* has ushered in, despite protestations by the Court to the contrary, an era of exclusion that is markedly more focused on the culpability of the officer—in assessing the deterrence benefit of the exclusionary rule, the relative culpability of the offending officer has moved to the forefront of the remedial analysis.").

77. *See, e.g.*, United States v. McCane, 573 F.3d 1037, 1044 (10th Cir. 2009) ("[E]vidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." (quoting Herring v. United States, 555 U.S. 135, 144–46 (2009))).

78. Marceau, *supra* note 12, at 745.

79. *Id.*

80. Heien v. North Carolina, 135 S. Ct. 530, 539–40 (2014).

81. Marceau, *supra* note 12, at 744–45.

82. Logan, *supra* note 74, at 76.

83. 443 U.S. 31 (1979). In *DeFillippo*, a Detroit city ordinance authorized police to stop and question individuals if they had probable cause that the person was doing something illegal. *Id.* at 33. Officers found DeFillippo in an alley with a woman who was in the process of lowering her slacks. *Id.* When asked for identification, DeFillippo gave inconsistent and evasive responses. *Id.* He was subsequently arrested and searched, and the police found illegal drugs. *Id.* at 34. The ordinance was later invalidated on void-for-vagueness grounds. *Id.* at 35.

84. *Id.* at 37–38.

85. *Id.* at 38.

level of suspicion[86] is required for a warrantless stop or arrest.[87] In these circumstances, the mistake involves the application of the Fourth Amendment itself, as opposed to an extrinsic law.[88] For example, in *Stoner v. California*,[89] the police searched the petitioner's hotel room without a warrant and without consent from the petitioner.[90] Instead, they obtained permission from the hotel's night-desk clerk.[91] The Court unanimously held that the search was unreasonable because the police did not have a warrant.[92] As such, evidence found in the hotel room was excluded.[93]

The third category of police mistakes of law involves misinterpretations of settled law.[94] In these situations, courts analyze the reasonableness of an officer's interpretation of the law, which now hinges on whether the officer acted in good faith and whether his behavior is something that can be deterred.[95] Police mistakes of substantive law have remained one of the last circumstances where the good-faith exception does not apply and where a defendant can realistically rely on the exclusionary remedy.[96] However, *Heien v. North Carolina* closed in this gap by holding that an officer's objectively reasonable mistake of law provides the necessary reasonable suspicion to preclude any application of the Fourth Amendment's protections.[97] In effect, ignorance of the law is an excuse.

II. HEIEN V. NORTH CAROLINA

A. Facts

In April 2010, a North Carolina policeman named Sargent Matt Darisse sat in his patrol car observing traffic on a major interstate.[98] Dar-

86. Reasonable suspicion is a standard used in criminal procedure that is less stringent than probable cause. Reasonable suspicion is sufficient to satisfy brief stops and detentions, but it is not enough to justify a full search. Terry v. Ohio, 392 U.S. 1, 20–22 (1968) (holding that a brief stop is only valid if the officers have an objectively reasonable suspicion to believe that a law is being violated).

87. Logan, *supra* note 74, at 77.

88. *See id.*

89. 376 U.S. 483 (1964).

90. *Id.* at 484–85.

91. *Id.* at 485.

92. *Id.* at 490.

93. *Id.*

94. Marceau, *supra* note 12, at 744.

95. Logan, *supra* note 74, at 78–79. There is a fear that, after *Herring*, courts will begin to hold that as long as the police officer was negligent in making the arrest, the behavior is reasonable, and the Fourth Amendment's protections barred. Marceau, *supra* note 12, at 741 ("[T]here is a palpable fear that the 'sweeping language' from [*Herring*] will be used to establish an understanding of the good faith exception as 'a general exception to exclusion for negligent—rather than reckless or deliberate—police misconduct.'" (quoting *1. Fourth Amendment -- Exclusionary Rule*, 123 HARV. L. REV. 153, 157 (2009))).

96. *See* Logan, *supra* note 74, at 79.

97. *See* Heien v. North Carolina, 135 S. Ct. 530, 536 (2014).

98. *Id.* at 534.

isse noticed that the driver of a passing car looked "stiff and nervous," so he started following in his car.[99] After following for several miles, Darisse noticed that only one of the brake lights of the car was working, so he pulled the driver over.[100] When he asked the driver of the car, Maynor Javier Vasquez, for his license and registration, he noticed that the owner of the car, Nicholas Brady Heien, was lying across the rear seat.[101] There were no problems with the documents, and Darisse issued a warning ticket.[102] However, Darisse became suspicious when the two men gave inconsistent answers about their destination and acted nervous.[103] Vasquez and Heien answered further questions, and when Darisse asked whether he could search the car, the men consented.[104] After a thorough search of the car, Darisse found a sandwich bag that contained cocaine, and both men were arrested.[105]

B. Procedural History

The trial court denied Heien's motion to suppress the evidence and concluded that the faulty brake light gave Darisse reasonable suspicion to stop the vehicle.[106] "Heien pleaded guilty but reserved his right to appeal the suppression decision."[107] The North Carolina Court of Appeals reversed, holding that the stop was invalid "because driving with only one . . . brake light was not [technically] a violation of North Carolina law."[108] The relevant provision of the vehicle code states that a car must be "equipped with a stop lamp on the rear of the vehicle,"[109] and it was undisputed that Heien had one working brake light. The State appealed, and the North Carolina Supreme Court reversed and concluded that Darisse could have reasonably read the statute to require that both brake lights need to be in working order.[110] The case was remanded to the North Carolina Court of Appeals, which affirmed the trial court's denial of the

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99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 535.
107. *Id.*
108. *Id.*
109. Section 20-129(d) of the North Carolina General Statutes provides in relevant part: "Rear Lamps. -- Every motor vehicle . . . shall have all originally equipped rear lamps or the equivalent in good working order . . . ." Subsection (g) provides:

> No person shall sell or operate on the highways of the State any motor vehicle, motorcycle or motor-driven cycle, manufactured after December 31, 1955, unless it shall be equipped with a stop lamp on the rear of the vehicle. The stop lamp shall display a red or amber light visible from a distance of not less than 100 feet to the rear in normal sunlight, and shall be actuated upon application of the service (foot) brake. The stop lamp may be incorporated into a unit with one or more other rear lamps.

N.C. GEN. STAT. ANN. §§ 20-129(d), (g) (2009).
110. *Heien*, 135 S. Ct. at 535.

motion to suppress.[111] The Supreme Court then granted certiorari to review the question of "[w]hether a police officer's mistake of law can provide the individualized suspicion that the Fourth Amendment requires to justify a traffic stop."[112]

C. Majority Opinion

Chief Justice Roberts authored the majority opinion, and Justices Scalia, Kennedy, Thomas, Ginsberg, Breyer, Alito, and Kagan joined.[113] The opinion affirmed the state court's ruling that reasonable suspicion can rest on a mistake of law.[114] Justice Roberts began by emphasizing that the Court has long held that "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'"[115] However, "[t]o be reasonable is not to be perfect," and therefore, the Fourth Amendment allows some mistakes on behalf of law enforcement officers.[116] The opinion stressed that the limiting factor is that "the mistakes must be those of reasonable men."[117]

Justice Roberts then delved into justifying mistakes of substantive law by explaining that a reasonable person can confuse the law just as much as he could confuse the facts, and both are equally compatible with the concept of reasonable suspicion.[118] Indeed, to justify this type of seizure, officers only need reasonable suspicion instead of probable cause.[119] Reasonable suspicion, the Court explained, is defined as "a particularized and objective basis for suspecting the particular person stopped" broke the law.[120] The Court went on to explain that reasonable suspicion arises from both "an officer's understanding of the facts and his understanding of the relevant law."[121] After mentioning that there are no recent precedents that address substantive mistakes of law in the context of the Fourth Amendment, the opinion stressed that the concept has appeared in numerous cases since the early 1800s.[122] It also recognized that there were no cases that were directly on point but explained a contrary conclusion would be difficult to reconcile with *DeFillippo*, which held that there is no Fourth Amendment violation if government searches are based on statutes that are later declared unconstitutional.[123]

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111. *Id.*
112. Brief for Petitioner-Appellant, Heien v. North Carolina, 135 S. Ct. 530 (2014) (No. 13-604), 2014 WL 2601475, at *1.
113. *Heien*, 135 S. Ct. at 533.
114. *Id.* at 534.
115. *Id.* at 536 (quoting Riley v. California, 134 S. Ct. 2473, 2482 (2014)).
116. *Id.*
117. *Id.* (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).
118. *Id.*
119. *Id.*
120. *Id.* (quoting Navarette v. California, 134 S. Ct. 1683, 1687–88 (2014)).
121. *Id.*
122. *Id.* at 536–37.
123. *Id.* at 537–38.

Justice Roberts then rejected Heien's argument that *DeFillippo* was a case solely about the exclusionary rule by explaining that *DeFillippo*'s marginal discussion[124] of the exclusionary rule does not displace the holding that the search did not violate the Fourth Amendment.[125] It then drew a parallel to *Heien* by explaining that "there was no violation of the Fourth Amendment" because the officer's mistake about whether both brake lights were required by the vehicle code was reasonable.[126] Heien's second argument attacked the notion that the Fourth Amendment's tolerance of mistake of fact should extend to mistake of law because mistake of law is plainly a question of the officer's knowledge rather than a judgment the officer made on the fly while working in the field.[127] Justice Roberts addressed this argument by pointing out that an officer may suddenly confront a situation in the field where the statute is unclear, which makes mistake of law and mistake of fact one category that hinges on reasonableness, rather than two separate categories.[128] The opinion also rejected the suggestion that the decision would discourage police from learning the law because the mistake must still be "*objectively* reasonable."[129]

The last major point that the Court addressed was that ignorance of the law is still no excuse.[130] In cases like this one, police are trying to implement the Fourth Amendment, not break the law.[131] Thus, when law enforcement officers reasonably believe that others have broken the law, they may stop them to investigate without violating the Fourth Amendment.[132]

D. Concurring Opinion

Justice Kagan, with whom Justice Ginsberg joined, agreed with the majority opinion that the "'Fourth Amendment tolerates only . . . *objectively* reasonable mistakes of law.'"[133] Justice Kagan's first main point was that an officer's subjective understanding is irrelevant and that the government cannot defend the officer using mistake of law if the officer was unaware or untrained in the law.[134] Her second point was that "if [a] statute is genuinely ambiguous," then the mistake is reasonable.[135] If the statute is not genuinely ambiguous, the statute must be "really difficult"

124. The Court pointed out that in *DeFillippo*, the Court stated in a footnote that that suppression of the evidence found on DeFillippo would serve none of the purposes of the exclusionary rule. *Id.* at 538.
125. *Id.*
126. *See id.* at 539.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 540.
131. *Id.*
132. *Id.*
133. *Id.* (Kagan, J., concurring) (quoting *Id.* at 539 (majority opinion) (alteration in original)).
134. *Id.* at 541.
135. *Id.*

to understand or a "very hard question of statutory interpretation."[136] The opinion concluded by speculating that the vehicle code posed a difficult question of interpretation because it had conflicting signals as to whether the brake light requirement was to be taken in the singular or plural.[137]

E. Dissenting Opinion

Justice Sotomayor began her dissent by agreeing with the majority opinion that "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'"[138] However, she promptly pointed out that "a fixed legal yardstick" would make it easier to administer this notion rather than a vague standard of reasonable legal mistakes.[139] She emphasized that the state of the law should always trump an individual's misunderstanding of the law because, unlike facts, the meaning of the law is not indefinite.[140] As such, it is a court's job to interpret the law, not a police officer's.[141] She also pointed out that permitting mistakes of law to justify seizures has the effect of preventing the clarification of the law because courts no longer need to clarify laws through decisions; they merely need to decide if the officer's interpretation was reasonable.[142] Additionally, Justice Sotomayor pointed out that *DeFillippo* was not a case about mistake of law at all because it simply concerned the validity of a law.[143] Thus, the Court was wrong in justifying the decision in *Heien* using *DeFillippo*.[144] She concluded by explaining that she would hold that "an officer's mistake of law, no matter how reasonable, cannot support the individualized suspicion necessary to justify a seizure under the Fourth Amendment."[145]

III. ANALYSIS

The *Heien* decision further erodes the general guarantee to be free from unreasonable searches and seizures because it allows police to enforce nonexistent laws without violating the Fourth Amendment. Indeed, as long as a police officer makes an objectively reasonable mistake (i.e., he is acting in good faith), when interpreting and enforcing the law, it is the citizen who is punished instead of the government. Expanding the good-faith exception in this way not only limits the scope of the Fourth Amendment right, but also expands the factual scenarios where the Court will preclude any discussion of the exclusionary remedy.

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136. *Id.* (quoting Transcript of Oral Argument at 50, Heien v. North Carolina, 135 S. Ct. 530 (2014) (No. 13-604)).
137. *Id.* at 541–42.
138. *Id.* at 542 (Sotomayor, J., dissenting) (quoting Riley v. California, 134 S. Ct. 2473, 2482 (2014)).
139. *Id.*
140. *Id.* at 542–43.
141. *Id.* at 543.
142. *Id.* at 542–43.
143. *Id.* at 546.
144. *See id.* at 546–47.
145. *Id.* at 547.

The following analysis proceeds in three main sections. Section A will discuss how the Court accomplished this expansion. Section A.1 will show how the Court broadened the holding in *DeFillippo* to justify allowing police mistakes of law, and Section A.2 will show how the Court combined police mistakes of law and mistakes of fact into one category. Section B will show how *Heien*'s expansion of the good-faith exception is procedurally eroding the Fourth Amendment and stunting the development of the Fourth Amendment's doctrine. Section C will discuss the implications of allowing police to make mistakes of substantive law. Section C.1 will show how the expansion of police discretion will disproportionately impact minorities, and Section C.2 will show how allowing police mistakes of law threatens judicial integrity, undermines the expectation that the law is "definite and knowable," and disincentivizes legislators to make laws that are clear and concise.

A. The Unlimited Scope of Reasonable Mistakes of Law

Since the Court first started making good-faith exceptions to the exclusionary rule, it has struggled to find a way to limit each exception to a narrow range of circumstances.[146] As a result, all of the exceptions have followed a trend of expanding to encompass an increasingly broad range of situations.[147] *Heien* is unique in the expansion of the good-faith exception because it not only gives police officers a legal justification to use a nonexistent law to circumvent Fourth Amendment protections, but also contradicts the most important maxim of substantive criminal law that "ignorance of the law is no excuse."[148] The Court accomplished this disturbing expansion in two significant ways. First, it broadened the holding in *DeFillippo* to justify allowing a law enforcement officer to make a reasonable mistake of substantive law. Second, the Court erased the differences between mistake of law and mistake of fact by combining them into one broad category.[149] Now, as long as the officer makes an objectively reasonable mistake, the Fourth Amendment is nothing more than a holographic protection that disappears when invoked.

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146. *See* Marceau, *supra* note 12, at 733.

147. *See id.*

148. Notably, Heien argued that because the maxim ignorance of the law is no excuse applies to citizens who break the law, it should also apply to police. In the majority opinion, the Court responded to this argument by explaining that ignorance of the law does not apply because Heien "is not appealing a brake light ticket; he is appealing a cocaine-trafficking conviction as to which there is no asserted mistake of fact or law." *Heien*, 135 S. Ct. at 540. But the ultimate effect of this decision is that the Court no longer holds police officers accountable to knowing and abiding by the rule of law. The phrases "reasonable mistake of law" and "ignorance of the law" essentially mean the same thing. *See* Alschuler, *supra* note 73, at 488–89 (explaining that the good-faith exception in *Leon* weakens the exclusionary rule because it undermined the familiar rule of strict liability: ignorance of the law is no excuse).

149. *See Heien*, 135 S. Ct. at 536–37.

1. The Vague Limit on Objectively Reasonable Mistakes

Throughout the past decade, the Court has made a routine of using search and seizure precedents in a way that ignores any limitations on good-faith exceptions yet bolsters the notion that, if the police officer acted reasonably, deterrence cannot be achieved.[150] The source of this problem dates back to *Leon*, which was initially intended to limit the good-faith exception to situations that involve an officer's reasonable reliance on a warrant that is later invalidated.[151] However, in subsequent cases,[152] the Court refused to acknowledge that the good-faith exception only applies to invalidated warrants and simply explained that if the officer reasonably believes he has satisfied the probable cause requirement, the exclusionary rule serves no purpose whatsoever.[153]

The Court used the same tactic in *Heien* to expand DeFillippo's mistake of law limitations. In *Heien* the Court's central justification for expanding the good-faith exception to include mistakes of substantive law was that a contrary ruling would contradict the Court's holding in *DeFillippo*.[154] However, *DeFillippo* was intended to set precedent only in circumstances where the law enforcement officer relied on a law that was later deemed unconstitutional.[155] In contrast, *Heien* had nothing to do with a law that was later deemed unconstitutional. It involved a police officer's interpretation of an ambiguous law and whether his interpretation was reasonable.[156] Yet, instead of limiting DeFillippo's narrow ruling by recognizing that it does not overlap with the facts of *Heien*, the Court justified allowing police mistakes of substantive law by implying that, in both cases, the officers acted reasonably.[157]

Moreover, instead of providing a clear standard to limit the scope of reasonable mistakes, the Court provided an extremely vague and expansive standard by stating that the only "limit is that 'the mistakes must be those of reasonable men.'"[158] In essence, it remains entirely unclear how much law a reasonable police officer is supposed to know. Do reasonable police officers know the most recent Supreme Court cases interpreting the laws? Are police officers acting reasonably if they simply follow the

150. *See* Gray, *supra* note 25, at 19–22 (discussing the Court's contemporary deterrence-only approach).

151. *See* United States v. Leon, 468 U.S. 897, 922–23 (1984).

152. Herring v. United States, 555 U.S. 135, 138–39 (2009) (holding that as long as the officer is negligent in attenuating the arrest, he is acting in good faith, and the jury should not be barred from considering all of the evidence); Arizona v. Evans, 514 U.S. 1, 14–16 (1995) (refusing exclusion when an officer mistakenly believed that a warrant had issued for an individual's arrest); Illinois v. Krull, 480 U.S. 340, 355 (1987) (holding that the exclusionary remedy is unavailable when legislators violate the Fourth Amendment.).

153. *See* Gray, *supra* note 25, at 39–41.

154. *See Heien*, 135 S. Ct. at 538–39.

155. *See* Michigan v. DeFillippo, 443 U.S. 31, 39 (1979).

156. *Heien*, 135 S. Ct. at 535.

157. *See id.* at 538–39.

158. *Id.* at 536 (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).

text of the statutes as they appear on their computers, or do they need to continue to study the laws? Is a police officer still acting reasonably if she bases her decisions on what she was taught in police academy but does not actually know what the law says? In *Heien*, it seems likely that the police officer may have never read the statute concerning brake lights and that he may have just assumed that driving with only one working brake light violated the law. Later in the opinion, Justice Roberts explained that there is no Fourth Amendment violation if the mistake of law simply relates to the question of "whether it was reasonable for an officer to suspect that the defendant's conduct was illegal."[159] Thus, as long as the officer has an inkling of suspicion that a person is doing something illegal, he can circumvent the Fourth Amendment to find out.

2. Reasonable Mistakes of Law Are Inherently Different from Reasonable Mistakes of Fact

In addition to using precedent as a justification for expanding the mistake of law exception, the Court also expanded the breadth of reasonable mistakes by combining mistake of law and mistake of fact into one category.[160] The Court prefaced this notion when it explained that to be "reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes."[161] It went on to explain that reasonable mistakes of law and fact are equally compatible with the concept of reasonable suspicion because reasonable suspicion "arises from the combination of an officer's understanding of the facts and his understanding of the relevant law."[162] However, the ultimate effect of expanding police mistakes to include all mistakes of law is that it causes the existence of the Fourth Amendment to be entirely dependent on the reasonableness of the officer's understanding of the law.

There are important practical distinctions that the Court ignored when it combined mistakes of law and fact. First, officers have always had some leeway in making probable-cause determinations because factual scenarios are almost always somewhat ambiguous.[163] As Justice Sotomayor pointed out, "what is generally demanded of the many *factual determinations* . . . is not that they always be correct, but that they always be reasonable."[164] This leeway makes sense considering that an officer's understanding of the facts is often a combination of quick observations

159. *Id.* at 539.
160. *See id.* at 536.
161. *Id.*
162. *Id.*
163. *See id.* at 542–43 (Sotomayor, J., dissenting).
164. *Id.* at 543 (quoting Illinois v. Rodriguez, 497 U.S. 177, 185 (1990)).

and assessments of human behavior.[165] In contrast, interpretation of the law does not require human behavior observations or inquiry.[166]

Furthermore, officers are often expected to make factual determinations under time pressure, especially in the context of traffic stops.[167] The Court has taken this into consideration by explaining that "[t]he calculus of reasonableness must" take into account "the fact that police officers . . . often [need] to make split-second judgments" in situations that are tense and unpredictable.[168] In contrast, officers are not under time pressure to learn the law while on patrol duty.[169] Rather, police officers should know and understand the law before they are given a duty to enforce it. Considering the advancements in police training and technology, it is extremely unfair for the Court to pronounce that police do not have to know every facet of the law, but citizens do.[170] The absurdity of this approach becomes even more apparent when one considers that when a police officer is off duty, and is driving as a citizen, he has a duty to know every nuance of the law, but as soon as he puts on his uniform and badge, he has no such duty. In sum, trying to figure out what the law entails is not something that should involve spur-of-the-moment decision-making; rather, it is a function of prior training, practice, and various forms of technology. Indeed, the notion that the law is "definite and knowable" is at the core of our legal system.[171]

Justice Sotomayor addressed this in her dissent by explaining that the Court has always emphasized that the facts leading up to the search, in combination with the law, are what provide a basis for probable cause—"not an officer's conception of the rule of law," and certainly not "an officer's reasonable misunderstanding about the law."[172] She went on to emphasize that there is "scarcely a peep" in the history of the Fourth Amendment suggesting that an officer's understanding of the law is intended to factor into the reasonableness metric.[173] In fact, *Heien* contradicts the long line of precedents explaining that the principle components of reasonable suspicion and probable cause have always been an officer's assessment of the facts weighed against rule of law, not an officer's as-

165. *Id.* at 542–43.
166. *Id.* at 543.
167. *Id.*
168. Graham v. Connor, 490 U.S. 386, 396–97 (1989) (discussing the scope of reasonableness in the context of police stops).
169. *Heien*, 135 S. Ct. at 543 (Sotomayor, J., dissenting).
170. Logan, *supra* note 74, at 84 (discussing how the argument that laws are too voluminous and complex is "especially unjustified given unprecedented improvements in the educational backgrounds of police and ready access to substantive law, including via dashboard computers").
171. *Heien*, 135 S. Ct. at 543 (Sotomayor, J., dissenting); *cf.* Logan, *supra* note 74, at 83 ("The expectation that the law be 'definite and knowable' is no more tenable for police today than it is for the lay public." (footnote omitted)).
172. *Heien*, 135 S. Ct. at 542 (Sotomayor, J., dissenting).
173. *Id.* at 543.

sessment of the law.[174] Ultimately, the effect of combining mistakes of law and fact into one category is that the availability of Fourth Amendment protections now hinge on the reasonableness of the officer's knowledge and understanding of the law.

B. Eliminating Discussion of the Exclusionary Remedy Will Stunt Meaningful Development of the Fourth Amendment

Other Supreme Court cases that discuss police officers' mistakes in the context of searches and seizures hold that the mistakes violate the Fourth Amendment right; however, because the officer acted reasonably, there is no justification for the exclusionary remedy.[175] In contrast, the *Heien* Court discussed the police officer's legal error in the context of the scope of the right, thereby precluding any discussion of the exclusionary remedy.[176] Over time, this approach runs the risk of limiting any meaningful development of the Fourth Amendment because, instead of deciding whether the search and seizure was reasonable, the Court decides whether it was reasonable for the officer to make a mistake about the relevant law. As remedies fade from the Court's analyses, there will be less of a need to litigate Fourth Amendment cases, and the doctrine will stagnate and lose its living character.[177] In short, *Heien* demonstrates that the Court is much more concerned with short-term implications of officer culpability and deterrence than the long-term development of the Fourth Amendment.

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174. *See, e.g.*, Devenpeck v. Alford, 543 U.S. 146, 153 (2004) (explaining that an arresting officer's state of mind does not factor into the probable-cause inquiry, "except for *the facts* that he knows" (emphasis added)); Ornelas v. United States, 517 U.S. 690, 696 (1996) (explaining that the principal components of probable cause are "the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause"); Illinois v. Rodriguez, 497 U.S. 177, 185 (1990) ("[W]hat is generally demanded of the many *factual determinations* that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable." (emphasis added)); Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982) ("[T]he issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated."); Terry v. Ohio, 392 U.S. 1, 21–22 (1968) (framing the question as to whether the "facts" give rise to reasonable suspicion).

175. *See, e.g.*, Herring v. United States, 555 U.S. 135, 147–48 (2009) (holding that the exclusionary rule is not invoked when the officer acts in good faith but is simply negligent in making an arrest); Arizona v. Evans, 514 U.S. 1, 15–16 (1995) (refusing to apply the exclusionary rule when an officer mistakenly believed that a warrant had issued for an individual's arrest); Illinois v. Krull, 480 U.S. 340, 349 (1987) (extending the "good faith" exception to the exclusionary rule to cover cases in which police carry out a search or seizure pursuant to the authority of a statute that a court later determines violates the Fourth Amendment); United States v. Leon, 468 U.S. 897, 913 (1984) (creating a good-faith exception to the exclusionary rule when a warrant is issued by a "detached and neutral" judge). The only other case to hold that an officer's legal error did not violate the Fourth Amendment right was *Michigan v. DeFillippo*, which held that an officer's reliance on a law that was later invalidated for void-for-vagueness grounds did not violate the Fourth Amendment. 443 U.S. 31, 39–40 (1979).

176. *Heien*, 135 S. Ct. at 536–40.

177. Marceau, *supra* note 12, at 731.

The exclusionary rule's ability to develop the Fourth Amendment's guarantee to be free from unreasonable searches and seizures becomes abundantly clear when one compares the Fourth Amendment's development before and after the exclusionary rule was automatically applied.[178] Simply put, before the exclusionary rule existed, the Court rarely addressed the meaning of the Fourth Amendment, and as such, Fourth Amendment law never evolved or developed.[179] In contrast, when the Court automatically applied the exclusionary rule, the content of the Fourth Amendment was thoroughly explained.[180] Today, the Court is somewhere in the middle of these two extremes, which can partially be attributed to the growing list of good-faith exceptions to the exclusionary remedy.[181] However, after *Heien*, the Court will likely use the good-faith exception to narrow the scope of the Fourth Amendment right, in addition to the remedy, which will provide enough momentum to begin a new era where the exclusionary rule is only applied in cases with flagrant officer conduct.[182]

Indeed, the *Heien* Court continued the trend of applying *Herring* and *Davis*'s assessment of the reasonableness of the officer's conduct (i.e., the good-faith exception). However, instead of admitting the evidence of cocaine found in Heien's car by barring the exclusionary remedy, the Court justified admitting the evidence by holding that the search did not violate *Heien*'s Fourth Amendment right.[183] This procedurally different way of using the good-faith exception contracts the scope of the Fourth Amendment's protections by causing the validity of the search or seizure to hinge on the convoluted metaquestion of whether it is reasonable for a police officer to believe the search was reasonable.[184] Notably, none of the Justices in the majority or concurring opinions discussed the validity of the search or the exclusionary remedy. Instead, they vaguely navigated the scope of "objectively reasonable" mistakes.[185] The majority opinion ambiguously stated that "[t]he limit is that 'the mistakes must be those of reasonable men.'"[186] Justice Kagan's concurring opinion made the standard slightly more lucid when she explained that a mistake

178. *See id.* at 731–32.

179. *Id.* ("If . . . violations of the Fourth Amendment are understood to result in a nearly absolute and automatic application of the exclusionary rule, as the Court seemed to anticipate in *Katz v. United States*, then courts adjudicating criminal cases will have no choice but to carefully and precisely articulate the content of the Fourth Amendment." (footnote omitted)).

180. *Id.*

181. *Id.* at 732.

182. *See* Kamin & Marceau, *supra* note 19, at 615–18 ("Taken together, *Hudson*, *Herring*, and *Davis* represent a fundamental reworking of the exclusionary rule.").

183. Heien v. North Carolina, 135 S. Ct. 530, 539 (2014) ("Here, by contrast, the mistake of law relates to the antecedent question of whether it was reasonable for an officer to suspect that the defendant's conduct was illegal. If so, there was no violation of the Fourth Amendment in the first place.").

184. *See id.*

185. *Id.* (emphasis omitted).

186. *Id.* at 536 (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).

of law is only reasonable if judges would take opposite positions on what it says.[187] But when the contours of the Fourth Amendment right are articulated in the context of the officer's mistake, rather than the validity of a search or seizure, the Court has no incentive to reach the merits of the case.[188] The Court seems to have forgotten that when it first began to meaningfully develop the Fourth Amendment, it emphasized that remedies define rights and that without the exclusionary remedy police officers have no incentive to refrain from conducting unreasonable searches and seizures.[189]

C. The Implications of Allowing Reasonable Mistakes of Substantive Law

Police should not be excused from making mistakes of law because when police become interpreters of the law, in addition to merely enforcers, it undermines our criminal justice system and disserves many of our basic rule-of-law values. Allowing police to make mistakes of law not only creates a perverse double standard for the well-known maxim "ignorance of the law is no excuse," but also deprives individuals of their physical liberty and causes police officers to violate their own sworn duty to enforce the law.[190] Indeed, *Heien v. North Carolina* gave the Court an opportunity to put legal bounds on an already discretionary law enforcement system. Instead, the Court essentially gave police officers a license to stop individuals based on whatever subjective criteria they see fit. As long as police officers can point to one of the numerous ambiguously worded traffic codes as a legal justification, they will no longer violate the Fourth Amendment. This endorsement of police discretion will not only exacerbate the problem of racially charged traffic stops, but also will threaten judicial integrity, undermine the expectation that the law is clear and knowable, and disincentivize legislators to make laws that are clear and concise.

1. The Expansion of Police Discretion Will Have a Disproportionate Effect on Minorities

For the last half-century, courts have played an important role in interpreting and clarifying substantive criminal laws after they have been codified by legislatures.[191] However, allowing police officers to take over the role of interpreting substantive criminal laws signifies "a [major] departure from this institutional arrangement."[192] Indeed, allowing police

187. *See id.* at 541 (Kagan, J., concurring).

188. *See* Marceau, *supra* note 12, at 695.

189. Weeks v. United States, 232 U.S. 383, 393 (1914) ("If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

190. Logan, *supra* note 74, at 70.

191. *Id.* at 95.

192. *Id.*

officers to make mistakes of law will encourage officers to interpret laws in ways that best serve the government's crime control interests because the only limit on their mistakes is that they must be "mistakes . . . of reasonable men."[193] This endorsement of police discretion will remove any incentive for police officers to refrain from conducting racially charged traffic stops because they will be able to stop an individual based on any ambiguously worded traffic code.

There is a dire need for the Court to better address the problems that stem from racial tension between police officers and minorities. Indeed, there is widespread agreement that the War on Drugs has exacerbated racial profiling in the context of traffic stops and that allegations of racism remain prevalent throughout American streets and courtrooms.[194] In just the past few months, the deaths of Levar Jones,[195] Walter Scott,[196] and Samuel Dubose,[197] all of whom were black men that were shot by a white police officer during a traffic stop, have illuminated that the racial tension between minorities and law enforcement is in dire need of being more seriously addressed. But these scenarios provide just a sampling of the nationwide problem. According to the Justice Department's 2012 statistics, black drivers are 31% more likely to be pulled over than white drivers,[198] more than twice as likely to be subject to police searches as white drivers, and more than twice as likely to not be given any reason

193. *See* Heien v. North Carolina, 135 S. Ct. 530, 536 (2014); Logan, *supra* note 74, at 95.

194. *See, e.g.*, Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 254 (2002) ("The War on Drugs . . . is a new occasion for the employment of traditional techniques of discriminating against racial minorities."); Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 257–59 (2009) ("The costs and benefits of [the] . . . 'war on drugs' [has been] fiercely debated. . . . [But there is no dispute] "that this ostensibly race-neutral effort has been waged primarily against black Americans.").

195. A white police officer stopped Levar Jones for a seatbelt violation. Jason Hanna et al., *Video Shows Trooper Shooting Unarmed Man, South Carolina Police Say*, CNN (Sept. 26, 2014, 8:53 AM), http://www.cnn.com/2014/09/25/justice/south-carolina-trooper-shooting/. When Jones reached for his wallet, the officer thought he was reaching for his gun and shot him. *See id.*

196. A white police officer stopped Walter Scott because he had broken brake light. Dana Ford, *South Carolina Ex-Police Officer Indicted in Walter Scott Killing*, CNN (Jun. 8, 2015, 5:30 PM), http://www.cnn.com/2015/06/08/us/south-carolina-slager-indictment-walter-scott/. "[A] dash cam video . . . shows the two men talking before Scott gets out of the car and runs." *Id.* It then shows the police officer chasing him and then shooting him. *Id.*

197. A white police officer stopped Samuel DuBose "because his car didn't have a front license plate." Charles M. Blow, Op-Ed., *The Shooting of Samuel DuBose*, N.Y. TIMES (July 29, 2015), http://www.nytimes.com/2015/07/30/opinion/charles-blow-the-shooting-of-samuel-dubose.html?_r=0. His body camera shows the officer taking out his gun and shooting DuBose in his car without any provocation. *Id.* The officer then lied about the stop to authorities and said he was being "dragged by the vehicle and had to fire his weapon." *Id.* (quoting Officer Tensing's information report).

198. Christopher Ingraham, *You Really Can Get Pulled over for Driving While Black Federal Statistics Show*, WASH. POST (Sept. 9, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/09/09/you-really-can-get-pulled-over-for-driving-while-black-federal-statistics-show/.

for the traffic stop.[199] In light of these statistics, as long as the Court continues to expand police discretion and ignore the role that the Fourth Amendment plays in protecting people from racial profiling,[200] discrimination is unlikely to be ameliorated.

In *Heien*, the majority opinion explained that "[r]easonable suspicion arises from . . . an officer's understanding of the relevant facts and his understanding of the relevant law."[201] Applied to the facts, Sergeant Darisse's mistaken understanding of the brake light traffic law provided the necessary reasonable suspicion to stop and search Heien's car.[202] However, the Court failed to acknowledge an important aspect of the "reasonable suspicion" that began the case. Sergeant Matt Darisse was sitting on the side of a major interstate watching cars drive by when he noticed that a Hispanic driver, Maynor Vasquez, looked "stiff and nervous" because he was "gripping the steering wheel at a 10 and 2 position and looking straight ahead."[203] In other words, Vasquez was followed for being Hispanic and driving a beat-up car in North Carolina.

Putting aside Darisse's reliance on the brake light law that led to the Court's mistake of law discussion, it is important to note that there are so many traffic violations that it has become "virtually impossible for a driver to not commit an infraction."[204] As such, a police officer can follow a car for a short time and almost always find a reason to pull the person over.[205] Considering that minority drivers are much more likely to be pulled over than Caucasian drivers, it is difficult to ignore the role that race plays in the process.[206]

Before *Heien* was decided, the Rutherford Institute[207] attempted to draw the Court's attention to this problem by submitting an amicus curi-

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199. LYNN LANGTON & MATTHEW DUROSE, U.S. DEP'T OF JUSTICE, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011, at 1, 9, 17 (2013), http://www.bjs.gov/content/pub/pdf/pbtss11.pdf.

200. *See* Sherry F. Colb, *Stopping a Moving Target*, 3 RUTGERS RACE & L. REV. 191, 204–06 (2001) (explaining that one of the evils that the Fourth Amendment was to protect against is unbridled discretion of law enforcement agents).

201. Heien v. North Carolina, 135 S. Ct. 530, 536 (2014).

202. *See id.* at 535–36.

203. Dahlia Lithwick, *The Supreme Court Ignores the Lessons of Ferguson*, SLATE (Dec. 16, 2014, 2:51 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/12/heien_v_north_carolina_as_the_rest_of_the_country_worries_about_police_overreach.html (quoting Officer Matt Darisse's suppression hearing testimony).

204. Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 252 (2010).

205. *Id.*

206. Furthermore, in *Whren v. United States*, the Court held that a police officer's subjective motivation for stopping an individual is irrelevant and that the only inquiry is whether there is probable cause. 517 U.S. 806, 818–19 (1996). Consequently, even if the police officer has unconstitutional intentions for the stop, as long as he can conjure up a basis for probable cause based on a traffic code, there is no Fourth Amendment violation. *See id.*

207. The Rutherford Institute is a non-profit conservative legal organization dedicated to the defense of civil, especially religious, liberties and human rights. *See generally* RUTHERFORD INST., https://www.rutherford.org/.

ae brief thoroughly discussing how traffic stops disproportionately affect discrete and insular minorities.[208] The brief emphasized that the expansion of police discretion as it relates to "mistakes of law will . . . have the effect of encouraging and increasing the number of legally baseless searches."[209] In other words, it gives officers a broader range of legal justifications to hide racially charged motives. Unfortunately, Justice Sotomayor was the only one to recognize this. In her dissent, she explained that expanding police discretion to include reasonable mistakes of law "further erod[es] Fourth Amendment[] protection of civil liberties in a context where that protection has already been worn down."[210]

2. Other Implications of Allowing Police to Make Mistakes of Substantive Law

The concept that the U.S. government is "a government of laws, and not of men" was first established by John Adams in 1780.[211] Since then, this principle has been repeated in dozens of Supreme Court decisions and emphasized as an important part of guaranteeing all citizens equal protection under the law.[212] However, *Heien* turned this notion on its head by defending the work of law enforcement officers, even if it eradicates the protections of the fundamental rights embedded in the Fourth Amendment. In effect, if the Fourth Amendment is controlled by "men" and not by "law," it will threaten judicial integrity, undermine the expectation that the law is "definite and knowable," and disincentivize legislators to make laws that are clear and concise.[213]

First, allowing police mistakes of law significantly undermines judicial authority because instead of interpreting and clarifying statutory language, courts will instead feel the need to analyze whether the police officer's interpretation of the law was reasonable.[214] The problem with allowing courts to resolve cases without interpreting the law is that most cases that involve police mistakes of law arise in the context of low-level offenses, like traffic codes, which are often worded in ambiguous ways and are in desperate need of clarification.[215] If each law enforcement officer is able to interpret these laws in different, yet "reasonable," ways, they will never be clarified, which burdens citizens and law enforcement alike.[216] This not only portrays the message that the "suggestion box" for

208. Brief of The Rutherford Institute, Amicus Curiae in Support of the Petitioner at 1–3, Heien v. North Carolina, 135 S. Ct. 530 (2014) (No. 13-604).

209. *Id.* at 5.

210. Heien v. North Carolina, 135 S. Ct. 530, 543 (2014) (Sotomayor, J., dissenting).

211. Clifford W. Taylor, *A Government of Laws, and Not of Men*, 22 T.M. COOLEY L. REV. 199, 199 (2005) (quoting the Massachusetts Constitution of 1780).

212. *Id.*

213. *See* Logan, *supra* note 74, at 83, 95–98 (discussing the implications of police mistakes of law on separation of powers).

214. *Id.* at 95–96.

215. *See id.* at 95–98.

216. *See id.*

interpreting the law is always open, but also discourages police officers from learning and applying the law in a consistent way. In essence, it seriously undermines the foundational democratic principle that the law must be "definite and knowable."[217]

The majority opinion attempted to address this problem by pointing out that the objectively reasonable limit will provide enough of an incentive for police officers to continue to learn the law.[218] However, the Court ignored the fact that even if a police officer knows the law extremely well, he will still be able to use any ambiguous low-level offense to justify his search.[219] Moreover, the Court refused to acknowledge that police departments are far from being neutral and detached arbitrators in the judicial system, mostly because their primary goal is to appear to have a robust system of crime control.[220] Police departments are not condemned for arresting too many criminals; however, they are condemned when they appear to be too soft on criminals, which is a threat if police officers always narrowly construe statutes.[221] To make things worse, police officers often lack direct oversight because most are employed by county, local, or municipal governments, which often have extremely decentralized accountability.[222] Simply put, allowing law enforcement officers to assume the role of interpreters of the law will have the effect of usurping judicial authority because courts will no longer be obliged to interpret statutory language and clarify the law; they will merely need to decide if the officer's interpretation was reasonable.[223] In effect, vague laws will become free tickets for police to circumvent Fourth Amendment protections and to search individuals at their discretion.

Validating police mistakes of law also undermines legislative accountability because when courts eliminate application of the exclusionary rule, legislators have little incentive to write laws that are clear and concise.[224] It is important to note that legislators and law enforcement officials often work together to design policies that effectively bring the guilty to punishment. Accordingly, courts are reluctant to intervene or impose any substantive limits on this collective effort.[225] By the same token, courts' only significant tool for condemning Fourth Amendment policies is through the application of the exclusionary rule.[226] Thus, when courts withhold its application, legislators have little incentive to make clear laws because they are no longer sensitized to losing cases where

217. *Id.* at 83.
218. *See* Heien v. North Carolina, 135 S. Ct. 530, 540 (2014).
219. Logan, *supra* note 74, at 83.
220. *Id.* at 98.
221. *Id.*
222. *See id.* at 98–99.
223. *See Heien*, 135 S. Ct. at 543 (Sotomayor, J., dissenting).
224. *See* Logan, *supra* note 74, at 101–02.
225. *Id.*
226. *See id.*

evidence has been excluded.[227] As a result, police will have an even broader range of unclear substantive laws, which will give them more discretion in justifying unreasonable searches.[228]

CONCLUSION

Heien gives officers a legal justification to stop individuals at their discretion and to use an ambiguous law as a free ticket to circumvent Fourth Amendment protections. It also creates a perverse double standard for the basic tenet—ignorance of the law is no excuse—by allowing police officers to interpret laws in ways that best serve their interests, but requiring citizens to know and follow every law, regardless of how ambiguous it is. But what is particularly unique about *Heien* is that it expanded the good-faith exception in both degree and application; it limited the factual scenarios where the Court discusses the application of the exclusionary remedy and shifted the analysis of "objectively reasonable mistakes" from a question of remedy to a question of right. In doing so, *Heien* seriously undermined the protections that the Fourth Amendment provides individuals. Now, the availability of the Fourth Amendment right to be free from unreasonable searches and seizures no longer hinges on whether the search or seizure was reasonable, as the text of the Fourth Amendment requires. Instead, the validity of a search or seizure turns on the convoluted metaquestion of whether it is reasonable for a police officer to believe the search was reasonable.

Katherine Sanford[*]

227. *Id.* ("When courts indulge police legal misunderstandings, especially relative to textually uncertain laws, and withhold application of the exclusionary rule, legislators, likely politically sensitized to the 'loss' of the more serious cases from which the seizures emanate, have less incentive to avoid textual imprecision." (footnote omitted)).

228. *See id.*

*. J.D. Candidate 2017. I would like to thank Professors Justin Marceau and Ian Farrell for all of their assistance throughout the editing process. I would also like to thank the *Denver Law Review* Executive Board and Staff Editors, whose hard work made this Case Comment possible.

WILLIAMS-YULEE V. FLORIDA BAR: JUDICIAL ELECTIONS, IMPARTIALITY, AND THE THREAT TO FREE SPEECH

ABSTRACT

Judicial elections have been controversial for many years. The debate surrounding them has heightened as spending in judicial elections has increased in recent years. Critics of judicial elections fear that the electoral process compromises judicial impartiality and independence. Supporters argue that such fears are overblown and that democratically elected judiciaries are superior to ones appointed by other branches of government.

Some states have attempted to regulate judicial elections in order to preserve the appearance and reality of judicial impartiality. In particular, states have sought to limit the content of judicial candidates' speech during elections. Until recently, the Court has not favored such efforts. However, in *Williams-Yulee v. Florida Bar*, the Court for the first time upheld a state's regulation on judicial candidates' speech during an election, holding that Florida's ban on direct financial solicitation from a judicial candidate does not violate the First Amendment.

This Comment argues that, while preserving the appearance and reality of judicial impartiality is necessary to ensure a respected and just judiciary, the Court should not have allowed Florida's ban on direct campaign solicitation by judicial candidates to stand. This Comment argues that the ban violates the First Amendment and that the Court's holding runs against long-standing principles of freedom of speech in elections. Further, this Comment argues that states should appoint their judiciaries. However, such reform is politically unlikely, and therefore states should at least consider reforming their judicial recusal procedures to improve the appearance and reality of judicial impartiality.

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INTRODUCTION

Judicial elections are not new to this country,[1] but they have been the subject of criticism for over one hundred years.[2] In particular, critics have suggested that judicial elections compromise the appearance and reality of judicial impartiality and independence by pressuring judges to cater their rulings to please the public and their campaigns' financial contributors.[3] Further, the presence of increasing amounts of money in judicial elections[4] only makes this pressure more intense, and judges can appear biased in favor of financial contributors when those persons or groups appear before them in court.[5] Prominent members of the Court have advocated putting an end to judicial elections,[6] but thus far state

1. *See* Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 310 (2003).
2. Republican Party of Minn. v. White, 536 U.S. 765, 791 (2002) (O'Connor, J., concurring).
3. *See, e.g., id.* at 789–90.
4. James J. Sample et al., *The New Politics of Judicial Elections*, 94 Judicature 50, 51–52 (2010).
5. *White*, 536 U.S. at 788–89 (O'Connor, J., concurring).
6. *See, e.g., id.* at 788–92.

governments and bar associations have sought to limit the influence of the electorate on the judiciary through other means.[7] Most troublingly, states have sought to limit what judges can and cannot say while campaigning to maintain the ideal nature and image of the judiciary.[8]

Until recently, the Court has been suspect of speech restrictions in judicial elections and has generally upheld the rights of judicial candidates to engage in all forms of campaign speech.[9] With its decision in *Williams-Yulee v. Florida Bar*,[10] the Court for the first time upheld a state's restriction on judicial campaign speech, specifically Florida's ban on direct solicitation of money by judicial candidates.[11] The Court held that Florida's restrictions are permitted under the First Amendment to preserve a state's compelling interest in judicial impartiality and independence.[12] This Comment will begin with an overview of the Court's First Amendment theory and analysis and provide a brief history of judicial elections. Next, this Comment will review the Court's recent decisions surrounding judicial elections and provide a description of the Court's opinion in *Williams-Yulee*. This Comment will then argue that, while the appearance and reality of judicial impartiality is necessary to a properly functioning judiciary and should be preserved, the Court should not undermine fundamental First Amendment principles in preserving judicial impartiality. The most effective way to preserve judicial impartiality would be to end judicial elections, but this solution is unlikely in the current political climate. Therefore, this Comment will explore alternative solutions, such as reforming judicial recusal procedures.

I. BACKGROUND

A. First Amendment Speech Theory and Analysis

The First Amendment of the U.S. Constitution states: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[13] This Amendment generally affords people the right to express their views regardless of the content of those views.[14] The right to free speech has been considered especially important when speech is political in nature.[15] The latter proposition derives its support from one of the principle theories offered as justification for freedom of speech: self-

7. *See id.* at 768–69 (majority opinion); *see also* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 888–90 (2009).
8. *See White*, 536 U.S. at 768–69.
9. *See id.* at 776–77.
10. 135 S. Ct 1656 (2015).
11. *Id.* at 1662.
12. *Id.* at 1665.
13. U.S. CONST. amend. I.
14. *See Williams-Yulee*, 135 S. Ct at 1682–83 (Kennedy, J., dissenting); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95–96 (1972).
15. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (stating the First Amendment has its "fullest and most urgent application precisely to the conduct of campaigns for political office").

governance.[16] This theory holds that freedom of speech is essential to democracy and representative government.[17] In order for democracy to function properly, candidates and citizens must be able to speak openly about political issues.[18] First Amendment scholar Alexander Meiklejohn[19] wrote that "[s]elf-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express."[20] For this reason, Meiklejohn argued that any public speech affecting the issues of self-governance could not be regulated by the government.[21]

Despite its broad language, the First Amendment does not prevent the government from regulating any speech.[22] To determine if a government regulation of speech violates the First Amendment, the Court must decide if the law in question regulates speech based on its content or if the law is "content-neutral."[23] If the law regulates speech based on its content, then it is considered "presumptively invalid,"[24] and the government must meet the judicial standard of strict scrutiny to justify the regulation.[25]

Strict scrutiny is the most demanding standard of judicial review,[26] and laws typically do not survive its application.[27] To be upheld under

16. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 954–57 (4th ed. 2011); KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 6–7 (2d ed. 2003).

17. CHEMERINSKY, *supra* note 16, at 954; SULLIVAN & GUNTHER, *supra* note 16, at 6–7.

18. CHEMERINSKY, *supra* note 16, at 954.

19. Alexander Meiklejohn (1872–1964) was a philosopher and a staunch advocate for free speech. Eugene Cerruti, *"Dancing in the Courthouse": The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 284–85 (1995). Meiklejohn is considered to be a "seminal figure" in First Amendment theory. *Id.* at 283; *see also* Joseph Russomanno, *The "Central Meaning" and Path Dependence: The Madison-Meiklejohn-Brennan Nexus*, 20 COMM. L. & POL'Y 117, 128 (2015) ("Alexander Meiklejohn is the 'father of modern [F]irst [A]mendment theory.'" (alteration in original) (quoting Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782, 782 (1986))); Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1111 (1993).

20. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255.

21. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 24–26 (1948).

22. Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 (1961) ("[W]e reject the view that freedom of speech and association, as protected by the First and Fourteenth Amendments, are 'absolutes,' not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment." (citation omitted)); Schenck v. United States, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.").

23. Turner Broad. Sys., Inc. v. FEC, 512 U.S. 622, 642–43 (1994).

24. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

25. United States v. Playboy Entm't Grp., 529 U.S. 803, 813 (2000); *see also Turner*, 512 U.S. at 641.

26. CHEMERINSKY, *supra* note 16, at 554.

strict scrutiny, the Court must find the law necessary to achieve a compelling government purpose.[28] In order for the law to be "necessary," it must be the least restrictive means of accomplishing the government's purpose.[29] The Court has frequently stated that a law must be "narrowly tailored" to be the least restrictive means of achieving a government purpose.[30] In determining if a law is narrowly tailored, the Court considers the extent to which the law is underinclusive or overinclusive.[31] In the context of free speech analysis, a law is underinclusive if it does not apply to all speech that is connected to the government's purpose in enacting the law.[32] A law is overinclusive if it applies to speech not connected to the government's purpose in enacting the law.[33]

Importantly, the Court has held that the First Amendment does not protect the speech of government employees made in the scope of their professional duties.[34] In *Garcetti v. Ceballos*,[35] the Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[36] However, the First Amendment does protect the speech of government employees when their speech is made "as a citizen" and addresses "matters of public concern."[37]

B. Judicial Elections and Recent Case Law

Judicial elections have been the subject of serious debate since the founding of this nation.[38] In Article III of the U.S. Constitution, the Founders chose to insulate the federal judiciary from the electorate by having the President appoint judges for life, subject to confirmation by the Senate.[39] The Founders thought the differing roles of judges and oth-

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27. *Id.*; *see also* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing strict scrutiny as "'strict' in theory and fatal in fact").

28. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); Sugarman v. Dougall, 413 U.S. 634, 643 (1973).

29. CHEMERINSKY, *supra* note 16, at 554.

30. Grutter v. Bollinger, 539 U.S. 306, 326 (2003); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991); Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987).

31. CHEMERINSKY, *supra* note 16, at 689–90.

32. *See* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 349–51 (1949) (discussing the concept of underinclusivity generally).

33. *See id.* at 351 (discussing overinclusivity generally).

34. Garcetti v. Ceballos, 547 U.S. 410, 426 (2006). For a discussion of the importance of this holding, see *infra* Section III.B.

35. 547 U.S. 410 (2006).

36. *Id.* at 421.

37. Pickering v. Bd. of Educ. of High Sch. Dist. 205, Will Cty., Ill., 391 U.S. 563, 568 (1968).

38. Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1672–73 (2015); Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J. 31, 34–37 (1986); Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 2 (1995).

39. Dimino, *supra* note 1, at 306–10.

er politicians to be essential to the functioning of the federal government, and maintaining judicial independence and impartiality is considered "the foundational principle—of Article III."[40] Further, the Founders thought that a judiciary independent of the voting public was essential to the protection of minority viewpoints from a possibly tyrannical majority.[41] In *The Federalist No. 78*, Alexander Hamilton stated the following:

> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.[42]

However, the states were left open to determine how their judges would be selected, and throughout the nineteenth century, many states decided on judicial elections.[43] While a majority of states have held judicial elections since the early twentieth century, progressive reformers in the 1920s and 1930s advocated for judicial appointment.[44] In an attempt to regulate candidate speech in judicial elections, the American Bar Association (ABA) first drafted guidelines for judicial electoral conduct in 1924, and in 1972 the ABA amended its Canons of Judicial Ethics to prohibit judicial candidates from promising certain conduct during their time in office or from announcing their personal opinions on legal or political questions.[45] Numerous states adopted the ABA's amended cannons, and these state laws would eventually be challenged as violations of the First Amendment's guarantee of free speech.[46]

In *Republican Party of Minnesota v. White*,[47] a group of judicial candidates and political organizations challenged Minnesota's adoption

40. *Id.* at 306.

41. Scott W. Gaylord, *Unconventional Wisdom: The Roberts Court's Proper Support of Judicial Elections*, 2011 MICH. ST. L. REV. 1521, 1526. "Tyranny of the majority" is a term used to describe the oppression of minority groups and viewpoints by a majority in a democracy. LANI GUINIER, THE TYRANNY OF THE MAJORITY 1–3 (1994). Majority tyranny can arise in heterogeneous democratic societies where the majority cannot be said to represent the interests of the entire populous. *Id.* at 3 ("The majority is likely to be . . . indifferent to the concerns of the minority."). "The tyranny of the majority, according to [James] Madison, requires safeguards to protect 'one part of the society against the injustice of the other part.'" *Id.* (quoting THE FEDERALIST NO. 51 (James Madison)).

42. THE FEDERALIST NO. 78, at 440 (Alexander Hamilton) (Issac Kramnick ed., 1987).

43. Gaylord, *supra* note 41, at 1522; Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1261–62 (2008) (stating that by 1909 thirty-five states selected their judges by partisan election).

44. Gaylord, *supra* note 41, at 1530; *see also* Geyh, *supra* note 43, at 1261–62.

45. Dimino, *supra* note 1, at 314.

46. *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 768–70 (2002). A clause prohibiting judges from announcing their personal opinions on legal or political questions have been referred to as an "announce clause." *Id.* at 768.

47. 536 U.S. 765 (2002).

of an "announce clause"[48] as an unconstitutional abridgment of speech under the First Amendment.[49] The Court ruled the announce clause was unconstitutional. It reasoned that the clause imposed a restriction on speech based on its content and that the content in question, the political viewpoints of candidates, is speech that is afforded the utmost protection under the First Amendment.[50]

Further, the Court reasoned that Minnesota failed to meet the burden of strict scrutiny, which requires that a state law or regulation abridging speech protected by the First Amendment be narrowly tailored to serve a compelling state interest.[51] The Court held that Minnesota had a compelling interest in maintaining the impartiality of its judiciary in appearance and reality.[52] However, the Court also held that the announce clause was not narrowly tailored to serve that interest because the clause restricted all speech associated with the particular legal or political views of the judicial candidates.[53]

Moreover, the Court held that the possibility of bias resulting from a judge's preconceived views on legal issues does not violate a litigant's due process right to an impartial trial.[54] The Court reiterated this point by asserting that a judicial candidate whose mind "was a complete *tabula rasa* in the area of constitutional adjudication" would be unfit to serve as a judge.[55] Further, even if Minnesota had characterized its interest as assuring litigants an "open-minded[]" judge, the announce clause would still fail under strict scrutiny because a judge's speech during a campaign is potentially only a small portion of his or her overall speech on political issues.[56] Finally, Justice Kennedy asserted that Minnesota could adequately maintain its interest in judicial impartiality through robust recusal standards.[57]

The majority opinion in *White* established that judicial elections would be held to basically the same First Amendment standards as other political elections[58] and that a litigant's due process rights are not necessarily infringed by a judge's speech during an election.[59] However,

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48. *Id.* at 769–70. The "announce clause" stated "that a 'candidate for a judicial office, including an incumbent judge,' shall not 'announce his or her views on disputed legal or political issues.'" *Id.* at 768 (quoting MINN. CODE OF JUDICIAL CONDUCT r. 5(A)(3)(d)(i) (2000)). Minnesota's clause was based on Cannon 7(B) of the 1972 ABA Model Code of Judicial Conduct. *Id.*; *see* MODEL CODE OF JUDICIAL CONDUCT Canon 7(B) (AM. BAR ASS'N 1972).

49. *White*, 536 U.S. at 773–74.

50. Gaylord, *supra* note 41, at 1535.

51. *See White*, 536 U.S. at 774–77. *See generally supra* Section I.A.

52. *White*, 536 U.S. at 775–76.

53. *Id.* at 776.

54. *Id.* at 782–83.

55. *Id.* at 778 (quoting Laird v. Tatum, 409 U.S. 824, 835 (1972)).

56. *See id.* at 79–80.

57. *Id.* at 794 (Kennedy, J., concurring).

58. Dimino, *supra* note 1, at 318.

59. *See* Gaylord, *supra* note 41, at 1535.

Caperton v. A.T. Massey Coal Co.[60] provided the Court with an instance to examine the role of financial contributions in judicial elections.[61] The Court ruled that the due process rights of a litigant can be violated when an adverse party who financially contributed to a judge's campaign subsequently comes before that judge in a court proceeding.[62]

In *Caperton*, Justice Brent Benjamin, a West Virginia appellate judge, refused to recuse himself from presiding over the appeal of a $50 million verdict against a corporation run by Donald Blankenship, a contributor to Benjamin's judicial campaign.[63] The jury verdict against the corporation was awarded shortly before the 2004 West Virginia Supreme Court of Appeals elections, and Blankenship provided more than $500,000 to Benjamin's campaign through independent expenditures.[64] Further, Blankenship donated nearly $2.5 million to a political organization that supported Benjamin's campaign.[65] These contributions were greater than the total amount spent by all of Benjamin's other supporters on the campaign and three times what was spent by Benjamin's own committee.[66]

The Court held that there is a significant "probability of bias" where "a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."[67] Further, the Court held that the CEO's contributions rose to the level of being "significant and disproportionate" and that Justice Benjamin's failure to recuse himself violated Caperton's due process rights to a fair trial.[68] The opinion did not rule in any way against the ability of individuals to contribute financially to judicial elections. Rather, the opinion established that judicial impartiality could be preserved in extreme cases through the "probability of bias" recusal rule, as well as through state regulations on judicial conduct.[69]

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60. 556 U.S. 868 (2009).
61. *Id.* at 872.
62. *See* Gaylord, *supra* note 41, at 1539.
63. *Caperton*, 556 U.S. at 873–75.
64. *Id.* at 873.
65. *Id.*
66. *See id.* at 873.
67. *Id.* at 884.
68. *Id.* at 872, 885.
69. Gaylord, *supra* note 41, at 1539–40 (quoting *Caperton*, 556 U.S. at 884); *see also Caperton*, 556 U.S. at 889–90. The current ABA Model Code of Judicial Conduct requires that a judge "shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." MODEL CODE OF JUDICIAL CONDUCT r. 2.11(A) (AM. BAR ASS'N 2010). A more recent provision requires judges to recuse themselves when they know a party or their attorney donated money to their campaign, but the actual dollar amount that requires recusal is left for states to decide. MODEL CODE OF JUDICIAL CONDUCT r. 2.11(A)(4) (AM. BAR ASS'N 2010). Numerous states adopting the Model Code have either declined to include Canon 2.11(A)(4) or have altered the language significantly. *See* AM. BAR ASS'N CPR POLICY IMPLEMENTATION COMM., COMPARISON OF ABA MODEL JUDICIAL CODE AND STATE VARIATIONS (2015) [hereinafter ABA, COMPARISON],

While *Caperton* is an illustration of the apparent harm judicial elections can cause to judicial impartiality, the Court's decision in *Citizens United v. Federal Election Commission* [70] drastically heightened many people's fear that judicial elections inevitably erode judicial integrity in appearance and actuality.[71] In *Citizens United*, the Court held that the First Amendment protects the political speech of corporations, including independent campaign expenditures in all elections, and that Congress and state legislatures may not censor corporate speech on the basis of its content.[72] Critics of the decision suggested that this ruling guaranteed greater financial expenditures in judicial elections because states could no longer limit corporate spending on those campaigns.[73] Therefore, judicial elections could now be "conducted amid unlimited corporate spending," further destroying the public's confidence in an impartial and independent judiciary by suggesting that corporations could influence judicial decision-making through massive campaign contributions.[74]

The combined effect of *White* and *Citizens United* created the impression that the Court would continue to affirm the First Amendment's guarantee of free speech in judicial elections over a state's interest in limiting that speech.[75] While the Court has acknowledged that states have an interest in preserving judicial impartiality,[76] the Court has been comfortable with preserving that interest through the recusal process alone.[77] Further, the Court has downplayed the difference between judges and

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http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2_11.authcheckdam.pdf.

70. 558 U.S. 310 (2010).

71. Gaylord, *supra* note 41, at 1541–43.

72. *Citizens United*, 558 U.S. at 342–44, 365.

73. Gaylord, *supra* note 41, at 1543.

74. *Id.*; Paul D. Carrington, *Public Funding of Judicial Campaigns: The North Carolina Experience and the Activism of the Supreme Court*, 89 N.C. L. REV. 1965, 1984 (2011); *see also* Vernon Valentine Palmer & John Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 TUL. L. REV. 1291 (2008) (presenting empirical data demonstrating that campaign contributions influenced the decisions of the Louisiana Supreme Court when donors appeared before them in court); Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1 (presenting evidence that justices on the Ohio Supreme Court voted in favor of campaign contributors seventy percent of the time).

75. In *White*, the Court held that the First Amendment protects judicial campaign speech. Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (holding that Minnesota's restriction on judicial candidates announcing their views is a violation of the First Amendment). In *Citizens United*, the Court held that the First Amendment protects independent expenditures by corporations in elections. 558 U.S. at 342–44, 365. These cases show the Court's history of supporting free speech over states' attempts to regulate speech in elections, suggesting that this Court would continue to show support for more electoral speech in future cases.

76. Gaylord, *supra* note 41, at 1535 (summarizing the holding of *White*).

77. *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 884 (2009) (holding that judicial recusal is required when "a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."); *White*, 536 U.S. at 794 (Kennedy, J., concurring) (stating that states can "adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards" to protect judicial integrity).

other elected officials, arguing that both are basically afforded the same speech rights in campaigns under the First Amendment.[78]

II. *WILLIAMS-YULEE V. FLORIDA BAR*

A. Facts

In September 2009, Williams-Yulee campaigned unsuccessfully for a seat on the county court of Hillsborough County, Florida.[79] At the onset of her campaign, Williams-Yulee drafted and mailed a letter to the public in which she announced her candidacy and asked for campaign contributions.[80] Following the campaign, the Florida Bar brought a complaint against Williams-Yulee alleging that her letter violated the Rules Regulating the Florida Bar.[81] The rules require that judicial candidates abide by the Florida Code of Judicial Conduct, which includes a "ban on personal solicitation of campaign funds."[82] Specifically, Canon 7C(1) states that judicial candidates "shall not personally solicit campaign funds . . . but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign."[83] Williams-Yulee did not dispute that she had drafted and signed a letter asking for campaign contributions.[84] Instead, she argued that Canon 7C(1) was a violation of the First Amendment, which protected her right to solicit campaign contributions directly.[85]

B. Procedural History

The Florida Supreme Court appointed a referee to make a recommendation on the case, and the referee determined in a hearing that Williams-Yulee should be found guilty.[86] The Florida Supreme Court accepted the referee's determination, ruling that while Canon 7C(1) is a restriction on speech, the canon met the demands of strict scrutiny as required by the First Amendment.[87] The United States Supreme Court granted certiorari.[88]

C. Opinion of the Court

Chief Justice Roberts authored the opinion of the Court.[89] Justices Breyer, Sotomayor, and Kagan joined the Chief Justice in his full opin-

78. *See White*, 536 U.S. at 784.
79. Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1663 (2015).
80. *Id.*
81. *Id.*
82. *Id.* at 1663–64.
83. *Id.* at 1663 (quoting FLA. CODE OF JUDICIAL CONDUCT r. 7C(1) (2014)).
84. *Id.* at 1664.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 1662.

ion, and Justice Ginsburg joined him except as to Part II.[90] The Court affirmed the Florida Supreme Court's ruling, finding that Canon 7C(1) satisfies the demands of strict scrutiny and is therefore permitted under the First Amendment.[91] Chief Justice Roberts began by holding that the Court should apply strict scrutiny in this case because the Court has "long recognized, [that] speech about public issues and the qualifications of candidates for elected office commands the highest level of First Amendment protection."[92] Further, Chief Justice Roberts reasoned that a lesser standard of review would be "a poor fit for this case."[93] He stated that all parties admit that the Canon 7C(1) infringes on Williams-Yulee's speech based on its content, and therefore the Court must review the law under strict scrutiny as required by the First Amendment.[94]

The Court then considered if Canon 7C(1) met the demands of strict scrutiny and concluded that it did.[95] Chief Justice Roberts asserted that the Canon was adopted to serve the state's interest in maintaining the integrity of the judiciary—in appearance and in actuality—and that the Court's precedents have long recognized such an end as a compelling "state interest of the highest order."[96] He then declared that, while both parties spent time comparing Canon 7C(1) to campaign financing restrictions in other types of elections, such comparisons were not warranted because judges serve a different public function than other elected officials.[97] He argued that judges are not to consider their campaign supporters or donors in their rulings.[98] Rather, they are expected to be neutral, evenhanded adjudicators.[99] As a result, he concludes that judicial elections may be regulated differently from other elections.[100]

Further, the Chief Justice stated that the mere possibility of a judge giving campaign contributors an unfair advantage in judicial proceedings is enough to justify Florida's enactment of Canon 7C(1).[101] He reasoned that when judges directly solicit members of the public and the bar for campaign money, the result is the "unavoidable appearance" that judges might no longer perform their duties in an impartial manner.[102] Moreover, Justice Roberts stated that such solicitation can create a fear amongst

90. *Id.* at 1656.
91. *Id.* at 1662, 1670.
92. *Id.* at 1665.
93. *Id.*
94. *Id.* at 1664–65.
95. *Id.* at 1665–66.
96. *Id.* (quoting Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 889 (2009)).
97. *Id.* at 1667.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 1667–68.
102. *Id.* at 1667.

lawyers and litigants that if they do not contribute to a judge's campaign, they will suffer a disadvantage in that judge's courtroom.[103]

Next, the Chief Justice addressed whether Canon 7C(1) is narrowly tailored to fit Florida's compelling interest in maintaining judicial integrity.[104] He began by addressing Williams-Yulee's argument that Canon 7C(1) is underinclusive because it does not prohibit other potentially compromising forms of campaign fund solicitation, such as the solicitation by campaign committees and personal thank-you notes written by judges to their financial contributors.[105] The Chief Justice dismissed this argument, stating that while underinclusiveness can be problematic for a law seeking to survive strict scrutiny, the First Amendment has no "free-standing 'underinclusiveness limitation.'"[106] Further, he held that states are not required to eliminate all threats to their compelling interest in a single action.[107] Justice Roberts stated that Florida reasonably concluded that personal campaign solicitations are a greater threat to the appearance of judicial impartiality than committee solicitations or personal thank-you notes.[108] Therefore, he held that Canon 7C(1) does not fail under strict scrutiny for failing to prohibit other forms of judicial speech.[109]

The Chief Justice then addressed Williams-Yulee's argument that Canon 7C(1) is unconstitutional because it restricts too much judicial speech and that it is not the least restrictive means of advancing Florida's interest.[110] He concluded otherwise, asserting that Canon 7C(1)'s prohibition of personal campaign solicitations by judges is a "narrow slice of speech"[111] and that Florida is allowed to regulate personal campaign solicitations by judges in any form in which they might occur.[112] Finally, his opinion considered Williams-Yulee's contention that Florida's interests would be better served through recusal procedures and campaign finance limitations.[113] Chief Justice Roberts disagreed, asserting that such recusal rules could shut down some jurisdictions where judges received a large amount of contributions from lawyers and litigants. Further, he reasoned that a "flood of postelection recusal motions" could be harmful to the appearance of judicial impartiality and "thereby exacerbate the very appearance problem the state is trying to solve."[114] Justice Roberts also expressed concern that recusal procedures could incentivize lawyers to contribute to judicial campaigns "solely as a means to trigger [a

103. *Id.* at 1668.
104. *Id.* at 1668–72.
105. *Id.* at 1668.
106. *Id.* (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 387 (1992)).
107. *Id.*
108. *Id.* at 1669.
109. *Id.* at 1669–70.
110. *Id.* at 1670.
111. *Id.*
112. *Id.* at 1671.
113. *Id.*
114. *Id.* at 1671–72.

judge's] later recusal" and thereby allow for forum shopping.[115] On the subject of campaign contributions, he reasoned that a state may conclude that small contributions can affect the appearance of judicial impartiality just as significantly as large ones.[116]

D. Justice Breyer's Concurring Opinion

Justice Breyer's short concurrence expressed his view that the scrutiny levels applied by the Court in various contexts should be viewed as guidelines rather than strict rules.[117] He cited previous cases where he voiced this position but did not provide any additional reasoning.[118]

E. Justice Ginsburg's Concurring Opinion

Justice Ginsburg wrote a separate opinion in response to Part II[119] of the majority opinion to express her view that strict scrutiny should not be applied to state actions regulating speech in judicial elections.[120] She reasoned that judges are different from politicians and that rules regulating other political elections should not be applied to judicial elections.[121] She held that while recent Court decisions, such as *Citizens United*, have greatly increased the potential for "monied interests . . . 'in representative politics,'" such judgments should not apply to judicial elections because judges are "not 'expected to be responsive to [the] concerns' of constituents."[122] Further, Justice Ginsburg argued that applying the standards of other elections to judicial elections blurs the distinction between judges and politicians, citing how unbridled spending in judicial elections has "threaten[ed] both the appearance and actuality of judicial independence."[123] She concluded that states should be allowed to balance the interest of having an impartial judiciary free of improper financial influence with the constitutional interest in freedom of speech.[124]

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115. *Id.* at 1672.

116. *Id.*

117. *Id.* at 1673 (Breyer, J., concurring).

118. *Id.* Justice Breyer's opinion reads as follows:

> As I have previously said, I view this Court's doctrine referring to tiers of scrutiny as guidelines informing our approach to the case at hand, not tests to be mechanically applied. See, *e.g., United States v. Alvarez*, 567 U.S. ——, ——, 132 S.Ct. 2537, 2551–2553, 183 L.Ed.2d 574 (2012) (BREYER, J., concurring in judgment); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 400–403, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (BREYER, J., concurring). On that understanding, I join the Court's opinion.

Id.

119. Part II of the majority opinion held Canon 7C(1) must survive strict scrutiny analysis if it is to be held constitutional under the First Amendment. *See id.* at 1664–65 (majority opinion).

120. *Id.* at 1673 (Ginsburg, J., concurring).

121. *Id.*

122. *Id.* at 1673–74 (second alteration in original) (first quoting McConnell v. FEC, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part and dissenting in part); then quoting McCutcheon v. FEC, 134 S. Ct. 1434, 1441 (2014)).

123. *Id.* at 1674–75.

124. *Id.* at 1675.

F. Justice Scalia's Dissenting Opinion

Justice Scalia, joined by Justice Thomas, authored the first dissent.[125] He began by stating that all speech is fully protected under the First Amendment unless there is a longstanding tradition of regulating the speech at issue and that there is no such history pertaining to judicial campaign speech.[126] Justice Scalia then argued that, while Florida likely has a compelling interest in maintaining the appearance of judicial impartiality, Canon 7C(1) is not narrowly tailored to address Florida's interest.[127] He stated that Florida's definition of its interest in the "public confidence in judicial integrity" is vague and that the Court ignores aspects of that interest throughout its opinion when addressing other forms of judicial speech, such as committee solicitation and personal thank-you notes.[128]

Justice Scalia moved on to conclude that Florida did not meet its burden of demonstrating that personal solicitation by judicial candidates significantly diminishes the public's trust in the judiciary.[129] Further, he argued that our nation's long history of judicial elections allowing personal solicitations suggests that such speech does not trouble the public.[130] Next, Justice Scalia argued that Canon 7C(1) is vastly overinclusive because the canon unnecessarily bans all personal solicitation, even those that do not threaten the public's confidence in the integrity of the judiciary, such as the mass mailing at issue.[131] Further, he argued that Canon 7C(1) fails to prohibit all personal solicitations by judicial candidates, pointing out that judges are not prohibited from asking for personal gifts from campaign supporters.[132] Justice Scalia went on to state that the First Amendment prohibits the abridgment of speech based on its content and that the Court's opinion violates this principle by prohibiting personal campaign solicitations by judges but not personal solicitation by judges for other purposes.[133] He concluded that the true motivation behind Canon 7C(1) appears to be a general hostility towards judicial elections.[134]

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125. *Id.* (Scalia, J., dissenting).
126. *Id.* at 1676.
127. *Id.* at 1676–77.
128. *Id.* at 1677–78 (quoting *id.* at 1666 (majority opinion)).
129. *Id.* at 1678–79 (Scalia, J., dissenting).
130. *Id.* at 1678.
131. *Id.* at 1679.
132. *Id.* at 1680.
133. *Id.* at 1681.
134. *Id.* at 1681–82 ("Canon 7C(1)'s scope suggests that it has nothing to do with the appearances created by judges' [sic] asking for money, and everything to do with hostility toward judicial campaigning. How else to explain the Florida Supreme Court's decision to ban *all* personal appeals for campaign funds (even when the solicitee could never appear before the candidate), but to tolerate appeals for other kinds of funds (even when the solicitee will surely appear before the candidate)? It should come as no surprise that the ABA, whose model rules the Florida Supreme Court followed when framing Canon 7C(1), opposes judicial elections . . . .").

G. Justice Kennedy's Dissenting Opinion

Justice Kennedy argued that the Court's opinion is based on the premise that "the public lacks the necessary judgment to make an informed choice" in judicial elections and that judicial elections should be regulated differently than other political elections because of the special nature of judges.[135] While he admitted that Florida may have a compelling interest in protecting the appearance and reality of judicial integrity, Justice Kennedy argued that this interest does not trump basic First Amendment principles.[136] He gave an example of how a qualified but underfunded and less well-known judicial candidate could suffer a severe disadvantage in an election and argued that the canon effectively curtails beneficial debate in the public sphere where a candidate cannot get his message out.[137] Justice Kennedy also stated that the Court's opinion greatly weakens the strict scrutiny standard by creating precedent to undermine it, describing the opinion as a "guide to eviscerating strict scrutiny any time the Court encounters speech it dislikes."[138]

H. Justice Alito's Dissenting Opinion

Justice Alito stated that he largely agreed with the analyses of Justice Scalia and Justice Kennedy.[139] He expressed his view that, while Florida has a compelling interest in maintaining the impartiality and integrity of the judiciary, Canon 7C(1) "is not narrowly tailored to serve that interest."[140] Like Justice Scalia, he pointed out that the Canon restricts forms of speech that do not threaten judicial integrity or the public's perception of it.[141] Further, he echoed Justice Kennedy's concern that the majority opinion weakens strict scrutiny by providing such a poor analysis of when a law is "narrowly tailored."[142]

III. ANALYSIS

In *Williams-Yulee*, the Court went against the trend established by *White* and *Citizens United* by identifying an area where the scope of First Amendment protections is not the same in judicial elections as it is in other elections.[143] By ruling that states can prevent judicial candidates

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135. *Id.* at 1683 (Kennedy, J., dissenting).
136. *Id.*
137. *Id.* at 1683–85.
138. *Id.* at 1685.
139. *Id.* (Alito, J., dissenting).
140. *Id.*
141. *Id.*
142. *Id.*
143. *See* Citizens United v. FEC, 558 U.S. 310, 312 (2010) (holding that a federal statute barring independent corporate expenditures for electioneering communications violated the First Amendment); Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (holding that Minnesota's restriction on judicial candidates announcing their views is a violation of the First Amendment). *Williams-Yulee*, however, held that Florida's restriction on direct campaign fund solicitation by judicial candidates was not a violation of the First Amendment. 135 S. Ct. at 1666.

from personally soliciting campaign funds, the Court withheld a right from judicial candidates that their legislative and executive counterparts enjoy.[144] In so ruling, the Court justified its decision primarily on the notion that judges serve a different function than politicians and that difference allows judicial elections to be regulated differently than other elections.[145]

This analysis will first argue that, ideally, judges should serve a different role than politicians, but judicial elections cause judges to behave very similarly to politicians. Next, this part will consider how best to achieve the ideals of judicial impartiality and independence by addressing speech restrictions and recusal procedures.[146] This part also will argue that the Court's decision in *Williams-Yulee* is undesirable because judicial impartiality should not come at the expense of fundamental First Amendment principles. Finally, this part will suggest that the best way to ensure judicial impartiality is to encourage states to get rid of their judicial election systems and to adopt lifetime judicial appointment regimes.

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144. *See* Lauren Garcia, Note, *Curbing Corruption or Campaign Contributions? The Ambiguous Prosecution of "Implicit" Quid Pro Quos Under the Federal Funds Bribery Statute*, 65 Rutgers L. Rev. 229, 230 (2012) ("American election campaigns and political platforms have historically been privately funded; public officials have an interest in soliciting contributions in order to represent and serve their constituents.").

145. *See Williams-Yulee*, 135 S. Ct. at 1667.

146. This Comment will not address merit selection—also known as the Missouri Plan. *See* James Bopp, Jr., *The Perils of Merit Selection*, 46 IND. L. REV. 87, 92 (2013). While this method of judicial selection varies amongst the states that have adopted it, the process usually involves judicial appointment by the state's governor from a list of candidates selected by a judicial vacancy commission. *Id.* After serving on the bench for a period of time, the judge's performance is evaluated by a retention election where voters decide whether the judge should be retained. Dimino, *supra* note 1, at 374 n.436. Proponents of merit selection maintain that merit selection eliminates much of "the influence of campaign contributions" in judicial elections. Bopp, *supra*, at 93. However, there is evidence that retention elections have become increasingly politicized, and spending has increased in retention elections dramatically. *See Williams-Yulee*, 135 S. Ct. at 1674–75 (Ginsberg, J., concurring); BILLY CORRIHER, MERIT SELECTION AND RETENTION ELECTIONS KEEP JUDGES OUT OF POLITICS 1 n.7 (2012), https://cdn.americanprogress.org/wp-content/uploads/2012/11/JudicialElectionsPart3-C4-2.pdf. These facts suggest that merit selection systems, while arguably a better system than contested elections, may now suffer from some of the same impartiality issues as contested elections, although likely to a much lesser degree.

Another potential solution that is beyond the scope of this Comment is public financing for judicial candidates. Public financing—first adopted by North Carolina in 2002—is a system where states offer public money to judicial candidates in order to lessen the need for solicitation of private campaign money. Gaylord, *supra* note 41, at 1543. While this method is a promising solution in theory to the issues of judicial impartiality created judicial elections, the viability of public financing took a hit after the Court's ruling in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*. *See* 131 S. Ct. 2806, 2813 (2011). Arizona's "matching funds" provision allowed a candidate to receive additional campaign money to match a privately funded candidate's fundraising when the privately funded candidate's campaign expenditures exceeded the initial amount granted to publicly funded candidates. *Id.* The Court ruled the provision was unconstitutional because it imposed an impermissible penalty on candidates who choose to "robustly exercise[] [their] First Amendment right[s]." *Id.* at 2818 (third alteration in original) (quoting Davis v. FEC, 554 U.S. 724, 739 (2008)). Further, the Court held Arizona's rule violated the First Amendment by incorporating independent expenditures made by third parties in calculating if the privately funded candidate had exceeded the public spending cap. *Id.* at 2819. By eliminating the option of "matching funds," the Court took away many candidates' incentive to rely on public financing, since use of state funds usually comes with restrictions on how the money can be used and how much private money a candidate can raise in addition. Gaylord, *supra* note 41, at 1543–44, 1548.

However, such sweeping adoption of the federal system is politically unlikely.[147] Therefore, this part will conclude that pursuing more rigorous and automatic recusal procedures may be the only politically feasible way of solving at least some of the impartiality problems posed by judicial elections.

A. Judicial Elections Compromise the Role of the Judiciary

In the opinion of the Court, Chief Justice Roberts stated that "[j]udges are not politicians," and, unlike politicians, judges are not supposed to be responsive to the desires of their supporters and financial contributors in the performance of their duties.[148] Judges are to "'observe the utmost fairness,' striving to be 'perfectly and completely independent, with nothing to influence or [control them] but God and [their] conscience.'"[149] Recognizing the unique role of judges, the Founders were correct to enshrine a mechanism in the Constitution to protect judicial independence and impartiality. The proper function of society depends on a fair and balanced judiciary, and the public must perceive the judiciary as being fair and balanced to honor its rulings.[150] Without a properly functioning judiciary, people may begin to lose faith in the courts as administrators of justice and could resort to "violent, extralegal and possibly criminal practices" to resolve their disputes.[151]

What assures a fair and balanced judiciary in Article III is a judicial appointment system where judges serve for life "during good Behaviour [sic]."[152] Life appointment allows judges to be unconcerned with public opinion, financial contributors, or "congressional or presidential reaction to any particular ruling."[153] In theory, this allows judges to apply the law to the facts presented to them without feeling beholden to any special interest or pressure.

The idea of perfect judicial impartiality, even in an appointment system like that of the federal government's, is never completely attainable. Judges are human beings, and like all other human beings, they harbor some biases based on their personal experiences and beliefs.[154] But

147. *See infra* Section III.E.

148. *Williams-Yulee*, 135 S. Ct. at 1662, 1667.

149. *Id.* at 1667 (quoting *Address of John Marshall, in* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–1830, at 616 (1830)).

150. Norman L. Greene, *How Great is America's Tolerance for Judicial Bias? An Inquiry into the Supreme Court's Decisions in* Caperton *and* Citizens United, *Their Implications for Judicial Elections, and Their Effect on the Rule of Law in the United States*, 112 W. VA. L. REV. 873, 884–85 (2010).

151. Okechukwu Oko, *Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria*, 31 BROOK. J. INT'L L. 9, 19 (2005).

152. U.S. CONST. art. III, § 1.

153. Dimino, *supra* note 1, at 306.

154. *See* LAURA KALMAN, LEGAL REALISM AT YALE: 1927–1960, at 6–7 (1986) (emphasizing how legal realists believe judicial "idiosyncrasy," such as a judges political, social, and economic views, can subconsciously affect judicial decision-making).

this degree of impartiality is acceptable so long as a judge applies the law based on what he or she believes the appropriate and just result should be. What is undesirable, however, is a judge who rules not based on his or her own understanding of the law or justice but rather in response to outside pressures from members of the public and financial contributors who desire a particular result regardless of what the law is or should be. Unfortunately, the latter behavior is inevitable under a system where voters elect judges, which in effect requires judges to behave just like other politicians who respond to the electorate and their financial supporters in the performance of their duties.[155]

Few people would be impervious to the fact that they may lose their job when they are accountable to the public and the public is dissatisfied with their decisions.[156] Indeed, the influence of public opinion on the decisions of an elected judge has been likened to "a crocodile in your bathtub . . . [y]ou know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving."[157] Similarly, a judge cannot help but feel the pressure of ruling in favor of a financial contributor to his or her campaign when that contributor appears before them in court.[158] Even if they were able to resist that pressure, the appearance of impartiality and justice can nonetheless be diminished in the eyes of the public.[159] Thus, judicial elections create a serious problem for states that have adopted them but nonetheless wish to preserve the impartiality of their judiciary.

Some commentators have suggested that states chose judicial elections over judicial appointment systems because these states value democracy and accountability to the public over the appearance and actuality of judicial impartiality and independence.[160] Indeed, accountability

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155. *See* Dimino, *supra* note 1, at 348. Studies have shown that independent judicial decisionmaking is compromised when judges are elected: "[J]udges, just like other politicians, tailor their decisionmaking to the necessities of campaigns, changing their behavior in response to the expected reaction of the electorate." *Id.* at 347–48; *see also* CHRIS W. BONNEAU, THE FEDERALIST SOC'Y, A SURVEY OF EMPIRICAL EVIDENCE CONCERNING JUDICIAL ELECTIONS 7 (2012), http://www.fedsoc.org/library/doclib/20120719_Bonneau2012WP.pdf ("[T]he evidence is pretty clear that elected judges are responsive to their constituencies when it comes time to make decisions on the bench.").

156. *See* Republican Party of Minn. v. White, 536 U.S. 765, 789 (2002) (O'Connor, J., concurring) ("Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects.").

157. Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (1997) (paraphrasing the late Honorable Otto Kaus).

158. *See White*, 536 U.S. at 790.

159. *Id.*

160. *See, e.g.*, Dimino, *supra* note 1, at 347; Matthew Schneider, *Why Merit Selection of State Court Judges Lacks Merit*, 56 WAYNE L. REV. 609, 621–22 (2010). Caleb Nelson, Professor of Law at the University of Virginia, has summarized various contemporary and historical opinions on why states chose judicial elections throughout the mid-1800s. Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 190–91 (1993). He notes that most scholars suggest the transition occurred as part of a wave of populist support for democracy. *Id.*; *see also White*, 536 U.S. at 791 ("[B]eginning with Georgia in 1812, States began adopting systems for judicial elections. From the 1830's until the 1850's, as part

plays an important role in the other branches of government, but to demand the judiciary be accountable to the public undermines the purpose of having an independent judiciary.[161] Elected judicial figures become politicians subject to the influence of the public and can fail to fulfill their role as a check on the other branches and protector of minority rights from a potentially tyrannical majority.[162]

B. The Court Should Not Abridge First Amendment Principles to Achieve Judicial Impartiality and Independence

Despite the threats to judicial independence and impartiality created by judicial elections, a majority of states today have judicial elections in some form or fashion.[163] In an attempt to protect the appearance and reality of judicial impartiality, many states have sought to regulate judicial speech during campaigns in an effort to eliminate some of the pressure created by the electoral process.[164] While the Court in *White* weakened the scope of what speech states can regulate,[165] in *Williams-Yulee* the Court upheld restrictions on judicial campaign speech in service of maintaining judicial independence and impartiality.[166] The Court's support of Florida's interest in judicial impartiality in *Williams-Yulee* is admirable; however, the means chosen to preserve that interest are troubling. By prohibiting personal solicitation of campaign funds by judicial candidates, the Court weakens the power of the First Amendment right to free speech in an area that right is supposed to be at its most powerful.[167]

In *Williams-Yulee*, the majority justifies the abridgement of judicial candidates' speech on the notion that judges are not like politicians, and this difference justifies regulating judicial elections differently than other elections.[168] In so doing, the majority implicitly emphasizes the distinction between judge, or potential judge, and candidate, suggesting that one's status as a judge, or one's pursuit of that status, "condition[s] the exercise of free speech" in a judicial election.[169] Indeed, the Court holds

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of the Jacksonian movement toward greater popular control of public office, this trend accelerated . . . ." (citation omitted)).

161. *See generally* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995) (discussing the importance of an independent judiciary in maintaining constitutional safeguards for minority rights and the dangers an elected judiciary poses to that role).

162. *See id.* at 727.

163. Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1662 (2015).

164. *See* Dimino, *supra* note 1, at 314.

165. Republican Party of Minn. v. White, 536 U.S. 765, 787–88 (2002) (holding that Minnesota's "announce clause" was a violation of the First Amendment).

166. *Williams-Yulee*, 135 S. Ct. at 1673.

167. *See id.* at 1682–83 (Kennedy, J., dissenting).

168. *Id.* at 1662 (majority opinion).

169. BRIAN K. PINAIRE, THE CONSTITUTION OF ELECTORAL SPEECH LAW: THE SUPREME COURT AND FREEDOM OF EXPRESSION IN CAMPAIGNS AND ELECTIONS 73 (2008) (explaining that the judge/candidate distinction was relied upon by the dissenting justices in *White*). Many of the same arguments offered by the dissent in *White* are offered in *Williams-Yulee* by the majority.

judges to different First Amendment standards than ordinary citizens.[170] Judges are currently prevented from endorsing political candidates, soliciting charitable contributions, and participating in certain organizations, all of which are speech restrictions justified in the name of preserving judicial "dignity, integrity, and impartiality."[171] While not all judicial candidates are governmental "employees," one might argue that judicial candidates are "similarly situated" to governmental employees and that content-based restrictions on their speech are justified to protect judicial impartiality.[172]

While one might consider the restrictions on judicial and government employees' speech to be violations of the First Amendment,[173] the fundamental issue with comparing content-based speech restrictions imposed on sitting judges and those imposed on judicial candidates is that judicial candidates are candidates in an election first, and judges, or potential judges, second.[174] Speech restrictions of the kind addressed in *Williams-Yulee* do not "restrict the speech of judges because they are judges," but rather "regulate the content of candidate speech merely because the speakers are candidates."[175] And while judges are not afforded full First Amendment protection in their capacity as government employees, candidates in elections should be granted the full protective force of the First Amendment.[176]

As mentioned previously, the First Amendment provides special protection for political speech because of its importance to the democratic process.[177] Candidate speech is a form of political speech and is at the heart of the primary justification for the First Amendment: self-governance.[178] Under the self-governance theory, candidate speech is protected because it is essential for voters to make informed decisions on which candidate to vote for.[179]

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170. Charles Gardner Geyh, *The Jekyll and Hyde of First Amendment Limits on the Regulation of Judicial Campaign Speech*, 68 VAND. L. REV. EN BANC 83, 93 (2015); *see also* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (holding that government employee speech is not protected by the First Amendment when an employee makes a statement pursuant to his or her official duties).

171. Geyh, *supra* note 169, at 93; *see also* Rodney A. Smolla, *Regulating the Speech of Judges and Lawyers: The First Amendment and the Soul of the Profession*, 66 FLA. L. REV. 961, 971 (2014) ("Judges, of course, are government employees, and fall under the government employee rule established in *Garcetti v. Ceballos*.").

172. Geyh, *supra* note 171, at 94–95.

173. This issue, while interesting, is beyond the scope of this Comment.

174. *See* Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1682–83 (2015) (Kennedy, J., dissenting) (emphasizing a judicial candidate's status as a candidate in an election); Republican Party of Minn. v. White, 536 U.S. 765, 796 (2002) (Kennedy, J., dissenting).

175. *White*, 536 U.S. at 796 (Kennedy, J., concurring).

176. *See Williams-Yulee*, 135 S. Ct. at 1682–83 (Kennedy, J., dissenting).

177. *See supra* Section I.A.

178. *See supra* Section I.A; *see* also Weaver v. Bonner, 309 F.3d 1312, 1319 (11th Cir. 2002) ("A candidate's speech during an election campaign 'occupies the core of the protection afforded by the First Amendment.'" (quoting McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 (1995))).

179. Buckley v. Valeo, 424 U.S. 1, 14–15 (1976) ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential,

Applying these principles to the facts of *Williams-Yulee*, the majority, in allowing states to prohibit judges from directly soliciting campaign funds from the public, has regulated political speech that is important for self-governance and democracy. While asking for money may not seem particularly significant to self-governance, "[w]hen a candidate asks someone for a campaign contribution, he tends . . . also to talk about his qualifications for office and his views on public issues."[180] Certainly, judicial candidates have other ways of communicating their qualifications and views to voters, but a ban on direct campaign fund solicitation eliminates one important context in which those views can be communicated.[181] Further, restricting a judicial candidate's ability to directly solicit campaign funds inhibits the ability of "low profile" challengers to raise money and prevents them from reaching the public to the same extent as other candidates.[182] The result is a "dead weight" on public debate—the sort of weight the First Amendment is designed to prevent.[183]

While the Court in *Williams-Yulee* justifies the abridgement of speech as serving the ends of judicial impartiality and independence,[184] those interests simply do not trump the importance of preserving the First Amendment right to freedom of speech for electoral candidates. As Justice Kennedy stated in *White*, "restrictions on political speech are 'expressly and positively forbidden by' the First Amendment."[185] Simply put, once a State has chosen to hold judicial elections, "the First Amendment protects the candidate's right to speak and the public's ensuing right to open and robust debate,"[186] and "[t]he State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech."[187] The importance of maintaining free discourse and open debate in elections throughout our society is simply too great to be overcome by the interest of judicial impartial-

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for the identities of those who are elected will inevitably shape the course that we follow as a nation."), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).

180. *Williams-Yulee*, 135 S. Ct. at 1676 (Scalia, J., dissenting); *see also* Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796 (1988).

181. *See Williams-Yulee*, 135 S. Ct. at 1676 (Scalia, J., dissenting). Candidates can share their qualifications and campaign platforms with the public by giving political speeches, purchasing advertisements on television and in newspapers, participating in debates, etc.

182. *Id.* at 1683 (Kennedy, J., dissenting); *see also* Carey v. Wolnitzek, 614 F.3d 189, 204 (6th Cir. 2010).

183. *Williams-Yulee*, 135 S. Ct. at 1683 (Kennedy, J., dissenting) (describing the majority's ruling as "dead weight" tied to public debate by illustrating how "low profile" judicial challengers are disadvantaged by restrictions on direct solicitation).

184. *Id.* at 1666 (majority opinion) ("We have recognized the 'vital state interest' in safeguarding 'public confidence in the fairness and integrity of the nation's elected judges.'" (quoting Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 889 (2009))).

185. Republican Party of Minn. v. White, 536 U.S. 765, 795 (2002) (Kennedy, J., concurring) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 274 (1964)).

186. *Williams-Yulee*, 135 S. Ct. at 1684 (Kennedy, J., dissenting).

187. *White*, 536 U.S. at 795 (Kennedy, J., concurring).

ity.[188] Thus, *Williams-Yulee* provides the wrong way of solving the problem of judicial impartiality. The decision solves that problem only marginally while undermining one of the fundamental justifications for the First Amendment.

C. Recusal as a Speech-Protecting Option in Maintaining Judicial Impartiality

In her argument to the Court, Williams-Yulee suggested that Florida could preserve its interest in judicial impartiality through recusal procedures.[189] Williams-Yulee is not alone in this contention; many commentators have suggested that recusal procedures offer a viable solution to the inherent tension between judicial elections and judicial impartiality.[190] In his concurring opinion in *White*, Justice Kennedy reasoned that states concerned over judicial impartiality "may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards."[191] However, the Court rejected Williams-Yulee's argument, reasoning that recusal procedures could overwhelm some jurisdictions, exacerbate concerns over the appearance of impartiality, and incentivize lawyers to donate to judicial campaigns for the sole purpose of triggering recusal.[192]

The majority opinion in *Williams-Yulee* is correct to hold that current recusal procedures are inadequate protections of judicial impartiality.[193] In *Caperton*, the Court established that the Constitution only requires judicial recusal in extreme cases where the "probability of bias" is overwhelming.[194] As previously mentioned,[195] the current ABA Model Code of Judicial Conduct suggests that judges should recuse themselves when they know a party or their attorney donated money to their campaign,[196] but numerous states have not adopted this provision.[197] These facts indicate that judges are not required to recuse themselves when confronted by campaign contributors in almost all cases. Further, the

188. *Williams-Yulee*, 135 S. Ct. at 1682–83 (Kennedy, J., dissenting) ("The Court's decision in this case imperils the content neutrality essential both for individual speech and the election process."); *see also Carey*, 614 F.3d at 204–05 ("[I]t is tempting to say that *any* limitation on a candidate's right to ask for a campaign contribution is one limitation too many.").

189. *Williams-Yulee*, 135 S. Ct. at 1671.

190. Genelle I. Belmas & Jason M. Shepard, *Speaking from the Bench: Judicial Campaigns, Judges' Speech, and the First Amendment*, 58 DRAKE L. REV. 709, 733–35 (2010); Molly McLucas, *The Need for Effective Recusal Standards for an Elected Judiciary*, 42 LOY. L.A. L. REV. 671 (2009); David K. Stott, Comment, *Zero-Sum Judicial Elections: Balancing Free Speech and Impartiality Through Recusal Reform*, 2009 BYU L. REV. 481, 481–82 (2009).

191. *White*, 536 U.S. at 794 (Kennedy, J., concurring).

192. *Williams-Yulee*, 135 S. Ct. at 1671–72.

193. *See id.*

194. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 884 (2009).

195. *See* sources cited *supra* note 69.

196. MODEL CODE OF JUDICIAL CONDUCT r. 2.11(A)(4) (AM. BAR ASS'N 2010).

197. *See* ABA, COMPARISON, *supra* note 69, at 3–16.

most serious problem with recusal procedures as they exist now is that the procedures ask judges to recuse themselves.

Recusals currently occur either when judges recuse themselves for meeting one of their state's recusal conditions or when litigants file a motion to disqualify a judge.[198] In the latter scenario, the challenged judge determines whether to accept or deny the motion.[199] Either way, judges end up evaluating their own impartiality. The problem with this system is that judges are typically inclined to determine that they are not biased and are fully capable of overseeing the litigation in an impartial manner.[200] This method could be problematic, and studies on judicial bias suggest that these self-determinations may not be accurate since judges often rule in favor of their campaign contributors.[201] Further, litigants can be hesitant to file a motion to disqualify a judge, fearing that the judge will take offense and disadvantage them throughout the rest of the proceedings.[202] Thus, current recusal procedures are weak shields against the threat campaign contributions pose to judicial impartiality.

Commentators have suggested numerous revisions to the current recusal standards in an effort to alleviate the concerns raised by campaign contributions.[203] In particular, states could create rules that consider the dollar amount or percentage of total contributions a donor makes to a judicial campaign, the time the donation was made, and the motivations surrounding the donor's contributions in determining when a judge should recuse himself or herself.[204] While such rules may provide some benefit in combating contributor threats to judicial impartiality, they do not address the underlying issue that judges evaluate themselves in recusal proceedings.

Of course, a possible solution to this issue would be to have other judges review recusal proceedings, but this procedure is not without its own problems. For one, appellate judges do not typically overrule recusal denials because judges do not like "investigating and ruling on the integrity of fellow judges and [often] do not look favorably on litigants who

198. Stott, *supra* note 190, at 500.

199. *Id.*

200. *See* Tobin A. Sparling, *Keeping Up Appearances: The Constitutionality of the Model Code of Judicial Conduct's Prohibition of Extrajudicial Speech Creating the Appearance of Bias*, 19 GEO. J. LEGAL ETHICS 441, 480 (2006).

201. *See supra* note 74.

202. Sparling, *supra* note 200, at 480; Stott, *supra* note 190, at 500.

203. *See supra* note 190 and accompanying text.

204. Belmas & Shepard, *supra* note 190, at 734–35 (arguing that recusal procedures should consider the relative amount a donor contributed to a judge's campaign, "the issues they favor in their support, and the timing of the donation"). The authors reject a bright line specifying what amount of money creates a conflict. *Id.* at 734. Instead, they advocate for a reasonableness standard where judges must recuse themselves when "a reasonable person would believe that the total amount spent [by the donor], the proportion of that amount in the election, and the effect of the contribution on the election's outcome would require [the judge's] recusal." *Id.*

question the integrity of the court."[205] These sentiments likely would be shared by lower-court judges reviewing the denied recusal motions of their peers. And with the dockets of many jurisdictions overflowing with cases, other judges may simply defer to the judgment of their peers for the sake of efficiency.[206]

Finally, states could impose automatic judicial disqualifications under certain circumstances when a party who donated to a judge's campaign appears before that judge in court. States could consider the dollar amount contributed by an individual or organization, as well as the proportion of that donation in relation to the judge's total campaign expenditures, and place a defined limit on one or both.[207] Such procedures would eliminate the issue of having judges evaluate their own impartiality and would not require third party judges to intervene either. One criticism of automatic recusals offered by Justice Roberts in *Williams-Yulee* is that some jurisdictions could run into problems if certain donors contribute to numerous judges' campaigns, and a situation could arise where a court could not try a party because every available judge would have to recuse themselves.[208] However, such situations are unlikely to occur often, and jurisdictions could create measures to override automatic recusals in such circumstances—perhaps by selecting the judge who benefited the least from that individual or group's contribution.

D. The Best Way to Preserve Judicial Impartiality and Independence Is to Advocate for Lifetime Judicial Appointment, but Politics Gets in the Way

Even assuming that it is permissible to censor judicial speech in some circumstances, as the Court did in *Williams-Yulee*, no amount of speech abridgement will solve the underlying issues of judicial bias created by judicial election. As Justice Scalia pointed out in his dissent, the Florida canon addresses one small area where the appearance and reality of judicial impartiality could be compromised.[209] Even if conduct rules forbid judges from making any statements during their elections, they would still be subject to pressure from public scrutiny of their decisions.[210] No restriction on judicial campaign speech can mitigate this basic fact of judicial elections. Similarly, state-created recusal procedures, while arguably a better approach to preserving judicial integrity

205. Stott, *supra* note 190, at 501.

206. *See id.* at 501–02.

207. These procedures are similar to those offered by Belmas & Shepard, *supra* note 190, and ABA Model Code of Judicial Conduct A(4), *supra* note 69. The key to these procedures working is that they must be automatic, not discretionary.

208. *See* Williams-Yulee v. Fla. Bar, 135 S. Ct 1656, 1671–72 (2015).

209. *See id.* at 1682 (Scalia, J., dissenting).

210. *See* Republican Party of Minn. v. White, 536 U.S. 765, 789 (2002) (O'Connor, J., concurring) (describing the effect of public pressure on elected judges).

than restricting campaign speech,[211] fail to eliminate public pressure on judicial decision-making. Recusals can ease the burden placed on judges when confronted with campaign contributors in their courtrooms, but the underlying pressure of public approval still looms in the background of any decision made by an elected judge.[212]

Having concluded that speech should not be abridged in any election and that recusal procedures cannot fully preserve judicial impartiality and independence, the best option to preserve judicial impartiality and independence is to advocate for the end of judicial elections and the adoption of lifetime judicial appointments. The integrity of elections in this country must be preserved, but the existence of judicial elections need not be. By adopting appointment systems like that of the federal government's, state governments can free their judiciaries from the pressures of the public and financial supporters and ensure the impartiality and independence of their judiciaries without compromising the interest of free speech in elections.[213]

The problem with advocating for states to model the federal system of judicial appointment is that, in the current political climate, widespread and sweeping reform in this direction appears to be virtually impossible. For one, neither the Supreme Court nor Congress can compel states to end judicial elections. Further, judicial elections remain popular amongst voters[214] despite the fact that voters acknowledge that campaign contributions influence judicial decision-making.[215] Recently, activists have aimed their reform efforts at implementing merit selection,[216] and voters have met even this movement with considerable resistance.[217] In fact, much of the legislative action in 2015 amongst states that already employ merit selection has been aimed at either substantially reforming merit selection or abolishing it altogether.[218]

What, then, can concerned parties do to preserve both judicial independence and impartiality? Implementing automatic recusal rules is the second-best option for maintaining judicial impartiality after state adoption of the federal system, but implementing such measures would not be

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211. *See* Belmas & Shepard, *supra* note 190, at 714.

212. *See White*, 536 U.S. at 789; Uelmen, *supra* note 157, at 1113.

213. *See* THE FEDERALIST NO. 78, at 437 (Alexander Hamilton) (Penguin Books ed., 1987) (arguing that federal judges should be appointed for life "during good behavior" to keep them completely free of influence from the people and the other branches of government).

214. Press Release, Harris Interactive, Most Americans Want State Judges to Be Elected (Oct. 20, 2008), http://media.theharrispoll.com/documents/Harris-Interactive-Poll-Research-Electing-judges-2008-10.pdf.

215. Sample et al., *supra* note 4, at 56.

216. For a brief discussion of merit selection, see *supra* note 146.

217. *See* Sample et al., *supra* note 4, at 57.

218. Bill Raftery, *Review of 2015 Efforts to Change, Alter, or End Merit Selection/Commission Based Judicial Appointment Systems*, GAVEL TO GAVEL (Aug. 13, 2015), http://gaveltogavel.us/2015/08/13/review-of-2015-efforts-to-change-alter-or-end-merit-selectioncommission-based-judicial-appointment-systems/.

without its own problems. In particular, state courts may be resistant to legislative action requiring judicial recusal in certain circumstances as a violation of separation of powers, and courts could even strike down recusal measures implemented by state legislatures.[219] Thus, it will likely fall upon state courts to implement additional recusal standards, and most states have been slow to implement more stringent recusal rules post-*Caperton*.[220] And, as mentioned above, judicial recusal does nothing to solve the fundamental problems judicial elections pose to judicial independence. So long as there are judicial elections, true judicial independence cannot be achieved. However, since solving some problems is better than solving none, maintaining judicial impartiality by way of automatic recusal standards would be a step in the right direction.

CONCLUSION

The *Williams-Yulee* decision is an attempt by the Court to cure some of the ills of judicial elections, and those ills undoubtedly need to be remedied. However, the Court created an even bigger problem by abridging judicial candidates' freedom of speech. While the Court may wish to help states in their efforts to preserve judicial impartiality, once a state has opted to hold judicial elections, it must suffer the full consequences of that decision regardless of the problems those elections create. Those states have "voluntarily taken on the risks [of] judicial bias,"[221] and the only way to eliminate those risks is for that state to get rid of judicial elections.

The better way to preserve judicial impartiality and independence is to advocate for states to model the federal system of judicial selection. However, this solution is infeasible in the current political climate, so the Court, the ABA, and the public should instead encourage states to implement automatic recusal rules in particular situations. Automatic recusal procedures cannot completely remedy the threats posed to judicial independence by contested elections, but in a world of political second-bests, such solutions will have to do for the time being.

Michael Linton Wright[*]

219. Martin H. Belsky, *Electing our Judges and Judicial Independence: The Supreme Court's "Triple Whammy,"* 2 AKRON J. CONST. L. & POL'Y 147, 160 (2011).

220. *See, e.g.*, ABA, COMPARISON, *supra* note 69, at 3–16.

221. Republican Party of Minn. v. White, 536 U.S. 765, 792 (2002) (O'Connor, J., concurring).

* J.D. Candidate 2017. I would like to thank the *Denver Law Review* Board for all of their hard work on this Comment. I could not have made this writing publishable without their help. I would also like to thank my family and Louise Pietruszewski for supporting me throughout the write-on and publication process.