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ARTICLES

COMMENT

BORROWING BALANCE, HOW TO KEEP THE SPECIAL-NEEDS EXCEPTION TRULY SPECIAL: WHY A COMPREHENSIVE APPROACH TO EVIDENCE ADMISSIBILITY IS NEEDED IN RESPONSE TO THE EXPANSION OF SUSPICIONLESS INTRUSIONS

DRU BRENNER-BECK*

I. INTRODUCTION

Rejecting the false dichotomy between our security and our ideals, President Obama, in his first inaugural address, harkened back to our Founders' creation of a "charter to assure the rule of law and the rights of

* Lieutenant Colonel (Retired), U.S. Army Judge Advocate General's Corps. Formerly served as Deputy Legal Counsel, U.S. Army's Office of the Inspector General and Chief, Military and Civil Law, U.S. Army Europe. After retirement, Ms. Brenner-Beck served as a law clerk to the Honorable Carlos F. Lucero, U.S. Court of Appeals for the Tenth Circuit, and as a legal consultant on international law matters. She is also the President of the National Institute of Military Justice. The views expressed in this article are those of the author and not of NIMJ. The author would like to thank Professors Geoffrey Corn, William Banks, and Rachel VanLandingham for their support and suggestions on this Article.

man."[1] In his speech, President Obama recognized that the protection of security and rights are not mutually exclusive. Instead, they are necessary predicates for the other.[2] The process of reconciling national security—the need to protect both the nation itself and the safety of its citizens—with the protection of civil liberties, remains a consistent challenge for Western governments, which are under increasing pressure as a result of the rise of domestic and international terrorism since the 1960s. But it is the rule of law itself that provides the best tool to achieve this balance and preserve both liberty and security.

Addressing similar challenges, the post-World War II American military justice system was designed to balance the rights of accused soldiers and the need to maintain good order and discipline within the armed forces.[3] As it developed over the past seventy-four years, the Uniform Code of Military Justice (UCMJ), and the justice system it fostered, increased protections for the rights of individuals within the strictures of maintaining discipline—developments not seen until decades later in significant Supreme Court civil-rights cases.[4] Although Groucho Marx famously quipped, "Military justice is to justice what military music is to music,"[5] the reality is that the effort to strike an effective balance

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1. President Barack Obama, Inaugural Address (Jan. 20, 2009).

2. *See id.*

3. *See* U.S. ARMY JUDGE ADVOCATE GENERAL'S SCH., THE BACKGROUND OF THE UNIFORM CODE OF MILITARY JUSTICE 12–13 (1959).

4. Defense counsel F. Lee Bailey has said that if accused of a crime, "he would rather be tried in a military court than in any other system of justice because of the protections afforded the military accused." *Military Justice 101 - Part 5: Right to Remain Silent (Article 31 Rights)*, ABOUT.COM U.S. MIL., http://usmilitary.about.com/od/justicelawlegislation/l/aa31rights.htm (last visited Aug. 9, 2014). For example, in Article 31 of the UCMJ, the military required an accused to be warned of the right against self-incrimination sixteen years before the Supreme Court would recognize a less encompassing right in *Miranda v. Arizona*. *Compare* Miranda v. Arizona, 384 U.S. 436, 469, 472 (1966) ("Therefore, the right to have counsel present at that interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights."), *with* UCMJ art. 31(b) (2012) (requiring that servicemembers be warned of their right against self-incrimination). Article 38 of the UCMJ also guarantees an accused the right to defense counsel at no cost, while the Supreme Court only recognized such a right for defendants who can show they are unable to afford counsel. *Compare* Gideon v. Wainwright, 372 U.S. 335, 344 (1963), *abrogated in part by* Scott v. Illinois, 440 U.S. 367 (1979) ("[A]ny [criminal defendant] haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."), *with* UCMJ art. 38(b)(1) ("The accused has the right to be represented in his defense before a general or special court-martial or at an investigation . . . .").

5. *Quotation Details*, QUOTATIONS PAGE, http://www.quotationspage.com/quote/848.html (last visited Oct. 6, 2014).

between individual liberties, the interests of justice, and the complex needs of the unique military society has resulted in a highly credible and effective system for the investigation and adjudication of criminal offenses. Military law, therefore, provides a potentially useful source for broader civilian criminal justice system as the civilian counterpart struggles to strike a similar balance between protecting the security interests of society while preserving fundamental liberties.

Innovations found in the UCMJ—which was enacted by Congress and implemented by the Executive to achieve this balance in the military—may in some instances be logically extended to civilian society by providing tools for federal courts to use in reconciling civil liberties and national security. The UCMJ can be a focus and mechanism for judicial scrutiny of executive actions taken when faced with the increasing threats posed by international terrorism. One such innovation is especially compelling in this regard: Military Rule of Evidence 313 (Rule 313).[6] This rule of evidence was adopted to facilitate the legitimate use of suspicionless searches to protect the safety and security of military units while simultaneously exposing the improper use of such searches as subterfuge to avoid the normal individualized suspicion requirements of the Fourth Amendment.

Accordingly, this Article proposes using Rule 313 as the basis of an analogous Federal Rule of Evidence designed to identify when special-needs searches are impermissibly being used to subvert the protections of the Fourth Amendment. While others have touched on the importance of extending existing Fourth Amendment doctrines to the realm of counterterrorism-related suspicionless searches, and even analogizing Rule 313 as a template to better manage the inevitable expansion of such searches,[7] this Article provides a comprehensive foundation for such an extension. Indeed, it is the direct correlation between the jurisprudential foundations of the special-needs exception and the limitations imposed on its invocation by the courts that are necessary to justify intrusions into zones of individual privacy that demonstrates the wisdom of a rule of evidence-based mechanism to enforce those limitations. It is also essential,

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6. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 313 (2012).

7. While other authors have examined Rule 313 for applicability in the civilian context, the premise of this Article will suggest that the military rule should be available to challenge all searches, not only searches based on individualized suspicion or those in the context of terrorism. The following authors have contributed substantially to the discussion over the usefulness of such a federal rule of evidence. Geoffrey S. Corn, *Terrorism, Tips, and the Touchstone of Reasonableness: Seeking a Balance Between Threat Response and Privacy Dilution*, 118 PENN ST. L. REV. 129, 162 (2013); Sharon Finegan, *Closing the Inventory Loophole: Developing a New Standard for Civilian Inventory Searches from the Military Rules of Evidence*, 20 GEO. MASON L. REV. 207, 235–36 (2012).

however, to recognize the almost inevitable expansion of government use of this doctrine in the realm of counterterrorism operations, and the associated risk to individual liberty that will result. Part II of this Article provides the context necessary to understand the value of a Rule 313-based approach to regulating the use of evidence derived from suspicionless searches. Part III offers an in-depth review of the jurisprudential foundation for such searches. Part IV provides an overview of the dangers to liberty inherent in the increasing use of such searches with the contemporary threat of domestic terrorism. Part V analyzes how creating a federal version (and ideally state versions) of Rule 313 will provide a more effective mechanism to balance the interests of security and liberty than the existing ad hoc approach. Placing the burden on the government to justify invocation of the suspicionless-search authority whenever objective evidence creates a reasonable basis to conclude that the use of this tool was a subterfuge to avoid the normal individualized suspicion requirements under the Fourth Amendment, makes two important contributions. First, such a rule contributes to the achievement of a long-term, constitutionally supportable balance between national security and liberty; and second, it recognizes that the personal autonomy and liberty protected by the Fourth Amendment are both an individual and societal good.[8]

II. CONTEXTUAL BACKGROUND

As international and domestic terrorism have become recognized realities after World War II, United States and Western European legal systems have struggled to balance protection of civil liberties with governments' legitimate efforts to protect the safety of their citizens. Increased threats to the safety of the nation and its citizens have led to increasing government security actions that impact freedom of speech, religion, and assembly, as well as the freedom from unreasonable search and seizure. These challenges are not unique to the United States with its constitutional protections of fundamental rights and commitment to civil liberties. Western European nations also struggle with achieving an effective protective balance through appropriate laws. One early example of this struggle resulted from the rise of international hijacking in the late 1960s and early 1970s.[9] This threat led to the imposition of security screening at U.S. and international airports.[10] After the attacks of September

8. Alexander A. Reinert, *Revisiting "Special Needs" Theory via Airport Searches*, 106 NW. U. L. REV. 1513, 1531–32 (2012).

9. *See* COMM. ON COMMERCIAL AVIATION SEC. ET AL., AIRLINE PASSENGER SECURITY SCREENING: NEW TECHNOLOGIES AND IMPLEMENTATION ISSUES 6, 9 (1996).

10. *Id.* at 6.

11, 2001, new security measures were implemented in response to public pressure calling for effective actions to prevent future terrorist attacks.[11] After the 2004 Madrid train bombings and the two London attacks in July 2005, the European Union and its member governments passed laws granting increased powers to the police in an attempt to battle terrorist attacks.[12]

Not surprisingly, citizens have challenged the impacts that these new security measures have had on their protected civil rights, usually through the courts.[13] As a result, the courts have become the arbiter of the balance drawn between security and civil liberties, a role both familiar to them and simultaneously one that is at the periphery of their institutional competence. Facing these challenges after the 9/11 attacks, U.S. courts have fallen back on familiar constitutional doctrines such as the special-needs exception to the Fourth Amendment, which at its core, balances the government interest in security against the privacy interest of the citizenry.[14]

Yet, recognizing their own institutional limitations in the face of the increasing terrorism threats, U.S. courts have remained hesitant to second-guess security decisions made by government experts, or delve into the subjective mindset of individual government agents. However, as the shock of the September 11th attacks began to wane, courts became increasingly more willing to examine government programs and security methods, particularly when government actions infringed on other constitutional freedoms, such as those protected by the First Amendment, or when motivated by racial or religious profiling.[15] Similar conflicts arose in Britain as stringent government security measures impacted individual liberties, specifically freedom of speech, assembly, and press following the July 2005 London bombings.[16] Despite several government inquiries recognizing significant racial disparities in the implementation of these laws, courts in the UK did not restrict the government's security activities, and it was only after the European Court of Human Rights held these laws violated fundamental rights that Parliament curtailed the previous unfettered security

11. *After 9/11: Global Effects on the 'War on Terror,'* BBC NEWS MAG., http://www.bbc.co.uk/news/world-14844727 (last updated Sept. 9, 2011, 17:00).

12. *See, e.g.*, *Fight Against Terrorism*, EUROPA, http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_terrorism/index_en.htm (last visited Aug. 10, 2014); *Fight Against Terrorism: Prevention, Preparedness, and Response*, EUROPA, http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_terrorism/l33219_en.htm (last updated Jan. 1, 2005).

13. *See* discussion *infra* Part IV.

14. *See* discussion *infra* Part IV.

15. *See* discussion *infra* Part IV.

16. *See* discussion *infra* Part IV.

powers exercised by the police.[17] Even after these changes, security laws in Britain remain robust. Despite some cases limiting government security actions, U.S. courts, recognizing the limits of their institutional competence, remained hesitant to substitute their judgment for that of the Executive in determining necessary security measures; and Congress has provided little guidance to the courts to assist them in balancing security needs against individual liberties.[18]

Ironically, Congress and the President, through the UCMJ, have provided such guidance to the military justice system in Rule 313, a provision specifically designed to balance the needs of security and military discipline against individual liberties.[19] This rule uses a system of shifting presumptions[20] to maintain the ability to conduct administrative inspections, "ensur[ing] the security, military fitness, or good order and discipline" in the military is confined to its proper role and does not become a subterfuge for government searches that would otherwise violate the Fourth Amendment or infringe other constitutional protections.[21] By focusing on objective evidence, Rule 313's use of shifting presumptions provides a meaningful judicial mechanism to test and, if appropriate, limit government security actions, while remaining well within the institutional and historical competencies of the Judicial Branch. Adopting a similar rule in the Federal Rules of Evidence would provide federal courts with a principled tool to examine government security actions, achieve the appropriate balance between security and liberty, and potentially provide a useful model for implementation of similar protective laws at the state level. Strengthening principled judicial oversight of executive security actions through such an evidentiary rule would reinforce the protections inherent in the Constitution's separation-of-powers principles, contribute to achieving long-term balance between security and liberty, and illustrate the central role of the rule of law in protecting the rights of society in our democratic system of government.

17. *See* discussion *infra* Part IV.

18. *See* discussion *infra* Part IV.

19. *See* MCM, *supra* note 6, MIL. R. EVID. 313.

20. A rebuttable presumption is defined as "[a] conclusion made as to the existence or nonexistence of a fact that must be drawn from other evidence that is admitted and proven to be true." *Presumption*, FREE DICTIONARY, http://legal-dictionary.thefreedictionary.com/presumption (last visited Aug. 9, 2014).

21. *See* MCM, *supra* note 6, MIL. R. EVID. 313.

A. Terry *and* Camara—*The Game Changers*

Contemporaneously with the rise of international terrorism and aircraft hijacking in the 1960s and early 1970s the Supreme Court decided *Terry v. Ohio*[22] and *Camara v. Municipal Court.*[23] Although having nothing to do with terrorism or national security, these two cases, seen as game changers in Fourth Amendment jurisprudence, set the foundation for the future recognition of a special-needs exception to the Fourth Amendment, which is the basis for a majority of the Fourth Amendment reasonableness determinations supporting national security searches.[24] Prior to these two cases, absent exigent circumstances, searches and seizures generally required both probable cause and a warrant to be considered reasonable under the Fourth Amendment.[25]

In *Camara*, the Supreme Court clarified that the warrant and probable-cause requirements of the Fourth Amendment were not obviated in the context of administrative housing inspections conducted to ensure compliance with health, safety, and housing code requirements.[26] Requiring both a warrant[27] and probable cause, the Court nevertheless calibrated the probable cause inquiry to one relevant to the context of the search, recognizing that the Fourth Amendment "test of 'probable cause' . . . can take into account the nature of the search that is being sought."[28] Challengingly, the program in *Camara* relied on a suspicionless, periodic area inspection, or what in the traditional criminal context would have been a complete lack of probable cause. Although requiring a warrant, the *Camara* Court recognized that "the unique character of the[] inspection programs" might require "some other accommodation between public need

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22. Terry v. Ohio, 392 U.S. 1 (1968).

23. Camara v. Mun. Court, 387 U.S. 523 (1967).

24. Reinert, *supra* note 8, at 1520–22.

25. *Id.*

26. *Camara*, 387 U.S. at 527–29. In *Camara*, the Court overruled *Frank v. Maryland*, 359 U.S. 360 (1959), which had allowed warrantless housing inspections. *Camera*, 387 U.S. at 527–28.

27. The warrant requirement served to limit the "discretion of the official in the field" in important ways. *Id.* at 532. The question for the *Camara* court was "whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Id.* at 523. The Court concluded that the warrant requirement assured neutral review of whether enforcement of the regulatory scheme required inspection of the premises, whether the inspector was acting under lawful authority, and in determining the lawful limits of the inspection; the Court further noted that "broad statutory safeguards [were] no substitute for individualized review." *Id.* at 532–33.

28. *Id.* at 538 (quoting *Frank*, 359 U.S. at 383 (Douglas, J., dissenting)) ("Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken.").

and individual rights," ultimately crafting probable cause as such an accommodation.[29] According to the Court, reasonableness "in determining whether there is probable cause to issue a warrant . . . must be weighed in terms of the[] reasonable goals of code enforcement."[30]

Recognizing that the standards would vary with the program being enforced,[31] the Court explained that even with a complete lack of particularized suspicion, probable cause would "exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."[32] The Court further explained that such calibration, while differing from the traditional probable cause in the criminal context, was still reasonable under the Fourth Amendment.[33] The phrase "suitably restricted search warrant" buttressed the inherent cabining of government discretion reflected in the Court's reference to the "reasonable legislative or administrative standards" necessary for a finding of probable cause.[34] This calibration, requiring a nexus between the administrative inspection and search program and the scope of the search, served to limit government discretion. Thus, in *Camara*, the Court introduced "reasonableness balancing" as its test under the Fourth Amendment, which attempts to balance the need to search against the invasion that the search entails[35]—a concept seen one year later in *Terry*.

In *Terry*, the Court tested a police officer's "stop and frisk" against the Fourth Amendment's general reasonableness requirement.[36] In its evaluation, the *Terry* Court did three novel things. First, *Terry* recognized that a warrant and probable cause were not the irreducible minimum

29. *Id.* at 534–35.

30. *Id.* at 535; *see also* Griffin v. Wisconsin, 483 U.S. 868, 877 n.4 (1987) ("In the administrative search context, we formally require that administrative warrants be supported by 'probable cause,' because in that context we use that term as referring not to a quantum of evidence, but merely to a requirement of reasonableness.").

31. *Camara*, 387 U.S. at 538. To conduct this balancing, the Court looked to three criteria. First, the "long history of judicial and public acceptance" of the inspection at issue; next, "the public interest demands that all dangerous conditions be prevented or abated" because it was unlikely any other technique would achieve acceptable results; and lastly, "because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy." *Id.* at 537.

32. *Id.* at 538.

33. *Id.* at 539 ("If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.").

34. *Id.* at 538–39.

35. *Id.* at 536–37 ("Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.").

36. Terry v. Ohio, 392 U.S. 1, 12 (1968).

requirements of reasonableness under the Fourth Amendment, allowing a limited warrantless search based on reasonable and articulable suspicion—a standard less than probable cause.[37] Second, it incorporated the concept of "reasonableness balancing" from *Camara*[38] to weigh the government's asserted interest in the search against the individual's constitutionally protected interest.[39] Finally, in order to be reasonable, *Terry* required a nexus between the scope of the search and its underlying justification, i.e., the articulated government need.[40]

In reaching its decision in *Terry*, the Court relied on *Camara* to refine and articulate these three concepts.[41] After *Camara* and *Terry*, searches based on a lesser degree of suspicion—or on no suspicion at all—could, in certain circumstances, be reasonable under the Fourth Amendment. Thus, *Camara* and *Terry* became the two cases courts would turn to as they faced the challenges posed by the rise of hijacking and terrorism in the late 1960s and early 1970s.

B. Air Piracy and the Early Security Searches

During the mid-1960s and early 1970s, hijacking became an increasingly common occurrence, with over fifty hijackings occurring in 1969 alone.[42] The dramatic rise in numbers and the media coverage of these dramatic events caused increased public concern about air safety. In response, the U.S. government began to place U.S. Marshals on some

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37. *Id.* at 20–21.

38. Professor Reinert uses three categories to discuss approaches taken in cases dealing with airport-security screenings: (1) reasonableness balancing, (2) consent, and (3) special needs. Reinert, *supra* note 8, at 1515. Few courts relied solely on consent, but extrapolations from *Terry*'s and *Camara*'s reasonableness balancing quickly became the dominant trend. *Id.* at 1524.

39. *Terry*, 392 U.S. at 20–21 ("[I]t is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'" (alterations in original) (quoting *Camara*, 387 U.S. at 534–37)).

40. In *Terry*, the Court limited the scope of the search to "an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Id.* at 29.

41. *Id.* at 20–21 (citing *Camara*, 387 U.S. at 534–37). Although *Terry* is frequently cited for its balancing test, the test was first articulated in *Camara*. *See Camara*, 387 U.S. at 536–37.

42. *Hijacking: 1969 Year in Review*, UNITED PRESS INT'L, http://www.upi.com/Audio/Year_in_Review/Events-of-1969/Hijacking/12303189849225-11/ (last visited June 26, 2014); *see also* United States v. Epperson; 454 F.2d 769, 771 (4th Cir. 1972) ("Up to June 1970, there occurred 80 instances of air piracy of passenger aircraft."); United States v. Lopez, 328 F. Supp. 1077, 1082–84 (E.D.N.Y. 1971) (describing the federal government's response to pervasive hijacking).

commercial flights in 1971,[43] and in the following year, the Federal Aviation Administration's Anti-Hijacking Program mandated airline screenings of passengers by "behavioral profile, magnetometer [screening], identification check, [or] physical search."[44] Predictably, these government-mandated screenings faced Fourth Amendment challenges.[45]

While the details of the initial Anti-Hijacking Program were shrouded in secrecy, courts were nevertheless forced to evaluate their constitutionality.[46] The initial security procedures in 1972 and 1973 used behavioral profiles to identify passengers who would be subject to additional screening through identity checks, the screening of the passenger and her baggage through a magnetometer, and if a magnetometer was unavailable, a search of the passenger and her baggage.[47] As the program expanded and magnetometers became increasingly available, magnetometer screening of all passengers became increasingly common, and finally became required.[48] As these screenings expanded, so too did legal cases evaluating their reasonableness under the Fourth Amendment.

In response to these challenges to the Anti-Hijacking Program, courts universally concluded that the exigencies of time and the danger involved dispensed with the warrant requirement for airport-security searches under

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43. Annie Wu, *The History of Airport Security*, SAVVY TRAVELER, http://savvytraveler.publicradio.org/show/features/2000/20000915/security.shtml (last visited July 26, 2014).

44. *See* COMM. ON COMMERCIAL AVIATION SEC., *supra* note 9, at 6; *see also* United States v. Davis, 482 F.2d 893, 897 *passim* (9th Cir. 1973) (describing the federal government's response to the problem of hijacked airplanes), *overruled en banc by* United States v. Aukai, 497 F.3d 955 (9th Cir. 2007).

45. In addition to Fourth Amendment issues, courts routinely evaluated equal protection arguments, consent issues, and protection of the constitutional right to travel in these cases. *See, e.g.*, *Lopez*, 328 F. Supp. at 1101, 1092–93. To the extent that the screening profiles used indicators that "do not discriminate against any group on the basis of religion, origin, political views, or race . . . they violate none of the traditional equal protection standards." *Id.* at 1086–87. To the extent that the profile was altered to include any of these categories, courts were quick to police these differences. *Id.* at 1101–02.

46. Because the swift nature required of the anti-hijacking security procedures that conflicted with the warrant requirement, these systems required a thorough analysis under the Fourth Amendment. *See id.* at 1092. Differing from today's universal screening requirements, magnetometer screenings were initially not available at all airports or required of all passengers. *Id.* at 1082. "The [Anti-Hijacking Program P]rogram [was] designed to speed passengers who are unlikely to present danger and to isolate, with the least possible discomfort[] or delay, those presenting a substantial probability of danger." *Id.* at 1083. *Lopez* presents the best overview of the initial Anti-Hijacking Program security elements. *Id.* As the air security situation deteriorated, the Federal Aviation Administration increased security requirements mandating either magnetometer or physical search of all passengers and their luggage to ensure the absence of weapons or explosives, and the stationing of armed government agents to respond to emergencies at airports. *See Davis*, 482 F.2d at 900–02, 904.

47. *Davis*, 482 F.2d at 900–02, 904.

48. *Id.* at 906 n.32.

both *Terry* and *Camara*.[49] But it was the legality of the searches themselves that posed more conceptual difficulties. Courts struggled to justify the initial magnetometer screens under existing Fourth Amendment doctrine as they were often used when no individualized suspicion existed, or at best when the behavioral profile flagged an individual for heightened scrutiny. Facing these conceptual difficulties, courts often looked to a combination of the behavioral profile, suspicious passenger behavior, positive unexplained magnetometer readings, or a combination of circumstances to justify the magnetometer screens, frisks, or hand searches of the passenger and the passenger's baggage.[50]

For those cases where suspicious passenger behavior provided reasonable and articulable suspicion under *Terry*, courts were able to uphold the searches as reasonable under a routine application of *Terry*.[51] As magnetometer use became increasingly more common, courts, relying on *Terry* as authority, balanced the minimal intrusion of a magnetometer screen against the substantial dangers posed by air piracy to find the magnetometer screen as per se reasonable under the Fourth Amendment, even though no particularized suspicion existed to justify them.[52] In this

49. *E.g.*, *Lopez*, 328 F. Supp. at 1092.

50. Blanket airport-security searches were not supported by any particular suspicion at their inception. However, courts did accept the behavioral profile of the Anti-Hijacking Program to provide the required reasonable, articulable individualized suspicion under *Terry* for the subsequent use of the magnetometer, a request for identification, or both. *Lopez*, 328 F. Supp. at 1098. Often the profile identification would lead to an interview with airline personnel or a U.S. Marshal, which would produce suspicious behavior to justify a magnetometer screen, which would in turn produce a positive result, which could then justify a *Terry* frisk or search of baggage. *Id.* at 1083. The Court's concern over the Orwellian implications of blanket electronic surveillance is exemplified in *Lopez*; nevertheless, courts allowed the use of the profile when combined with other indicators giving rise to reasonable suspicion, however slight, given the substantial danger of air piracy. *Id.* at 1100 (allowing 100% magnetometer screen when coupled with a behavioral profile to trigger additional inquiry). However, if applicable, courts in particular cases did rely on the *Terry* stop-and-frisk authorization if supported by the facts. *See id.* at 1098; *see also* United States v. Ruiz-Estrella, 481 F.2d 723, 730 (2d Cir. 1973) (holding that failure to produce reasonable articulable facts failed to support *Terry* search at an airport); United States v. Bell, 464 F.2d 667, 675 (2d Cir. 1972) (upholding *Terry* search supported by specific articulable facts); United States v. Lindsey, 451 F.2d 701, 704 (3d Cir. 1971) (finding an appropriate *Terry* stop at an airport).

51. *See, e.g.*, *Lindsey*, 451 F.2d at 704 (upholding a normal *Terry* pat-down after observing nervous demeanor and bulges in jacket).

52. United States v. Slocum, 464 F.2d 1180, 1182 (3d Cir. 1972); *see also* United States v. Albarado, 495 F.2d 799, 806, 810 (2d Cir. 1974) (finding magnetometer search reasonable); *Bell*, 464 F.2d at 675 (allowing *Terry* search of passenger who was a "selectee" under the hijacker profile used at the time, had no identification, admitted being on bail for attempted murder and narcotics charges, and activated the magnetometer). *But see* United States v. Allen, 349 F. Supp. 749, 752 (N.D. Cal. 1972) (holding that potential denial of boarding based on hijacker profile and inadequate explanation of ticket and identification in another person's name did not support warrantless search of baggage).

conceptual shift, courts dispensed with the discussion of the reasonable suspicion necessary to justify the magnetometer screens at their inception, a discussion required under a strict application of *Terry*. Instead, courts directly balanced the privacy intrusion of the magnetometer screen against the governmental interest in searching to determine the reasonableness of the search,[53] thus using the suspicion-based standard from *Terry* to justify a suspicionless search.[54] In some cases, courts further reduced the degree of suspicion required under *Terry* in the context of airport-security searches, creating a "*Terry*-lite" rule, or expanding the scope of the search allowed under *Terry* to automatically include all baggage because of the danger inherent in the air piracy context.[55]

This shift occurred in several steps. First, the exigencies of screening for weapons and explosives at an airport were analogized to that of the street-side frisk for weapons in *Terry* in both scope and purpose, thus excusing the warrant requirement.[56] Next, both *Camara* and *Terry* were used to support a general reasonableness-balancing test, one where the government interest in searching was balanced "against the invasion of privacy involved,"[57] a test now undertaken with no prerequisite of probable cause or reasonable suspicion. The government interest in searching was

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53. United States v. Epperson, 454 F.2d 769, 771–72 (4th Cir. 1972) ("The danger is so well known, the governmental interest so overwhelming, and the invasion to privacy so minimal, that the warrant requirement is excused by exigent national circumstances. . . . Such a search is more than reasonable; it is a compelling necessity to protect air commerce and the lives of passengers."); *see also* United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974) ("The reasonableness of a warrantless search depends, as many of the airport search opinions have stated, on balancing the need for a search against the offensiveness of the intrusion.").

54. *See supra* note 36 and accompanying text. Although courts grappling with the airport-security cases routinely did so from a *Terry* standpoint, the court in *Davis* explicitly found its solution in *Camara*'s administrative search provisions. *Davis*, 482 F.2d at 909–10.

55. *See* United States v. Fern, 484 F.2d 666, 667, 669 (7th Cir. 1973) (finding reasonable suspicion to justify search under *Terry* when passenger met profile and acted nervous, even without magnetometer); United States v. Legato, 480 F.2d 408, 410, 414 (5th Cir. 1973) (upholding search in the parking structure of the airport); United States v. Moreno, 475 F.2d 44, 50 (5th Cir. 1973) (rejecting view that airport-security personnel must always restrict themselves to a pat-down search when there is a proper basis for an air piracy investigation).

56. *Epperson*, 454 F.2d at 771.

57. *Albarado*, 495 F.2d at 804–05 ("[W]e note our guideline for decision lies in the language—through [sic] not the specific holding—of *Terry v. Ohio* . . . [in] that the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures, since an airport search as a practical matter could not be subjected to the warrant procedure. The ultimate standard of the [F]ourth [A]mendment on which we must base our opinion, therefore, is one of reasonableness. . . . [T]he reasonableness of a search depends upon the facts and circumstances and the total atmosphere of each case. . . . Our inquiry here must be directed to the basic issue whether in the totality of circumstances such a search is reasonable." (internal quotation marks omitted)); *see Slocum*, 464 F.2d at 1182; *Epperson*, 454 F.2d at 771.

then conceptualized as "the search for the sole purpose of discovering weapons and preventing air piracy, and not for the purpose of discovering weapons and pre-criminal events,"[58] a very thinly sliced differentiation from "general law enforcement." The Fifth Circuit described the air piracy situation as "an exceptional and exigent situation under the Fourth Amendment."[59] Finally, like *Terry*, the primary purpose of the airport searches was viewed as protecting the safety of the officer and those around her, with the scope of the search limited to the government's purpose.[60]

Rather than rely on *Terry*—with its inherent difficulties with individualized suspicion in blanket airport-security screening—some courts concluded that *Camara*'s administrative-search exception was a more appropriate approach.[61] Under this approach, searches "conducted as part of a general regulatory scheme in furtherance of an administrative purpose" can be reasonable under the Fourth Amendment even absent "a showing of probable cause directed to a particular place or person to be searched."[62] Under *Camara*, the reasonableness of a search is evaluated "by balancing the need to search against the invasion which the search entails."[63] For the Ninth Circuit in *Davis*, the inquiry was clear:

> As we have seen, screening searches of airline passengers are conducted as part of a general regulatory scheme in

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58. *Epperson*, 454 F.2d at 771. This language is reminiscent of the parsing of probable cause in *Camara*, and will be seen in the special-needs jurisprudence and its warning against general law enforcement purpose; this Article will go on to describe the similarity as outlined in Rule 313(b). *See* discussion *infra* Part V. Rule 313 allows inspections for weapons or contraband as long as the primary purpose of the inspection is to determine and ensure military fitness. *See* MCM, *supra* note 6, MIL. R. EVID. 313(b).

59. *Moreno*, 475 F.2d at 48.

60. *See Epperson*, 454 F.2d at 771–72 (citing Terry v. Ohio, 392 U.S. 1, 30 (1968)).

61. *See* United States v. Davis, 482 F.2d 893, 908 (9th Cir. 1973), *overruled en banc by* United States v. Aukai, 497 F.3d 955 (9th Cir. 2007). The Ninth Circuit explicitly relied on *United States v. Biswell*, *Wyman v. James*, and *Camara* in coming to its conclusion. *See id.* at 908 & n.40. Even the short passage of time from *Lopez* in 1971 to *Davis* in 1973 resulted in dramatic changes to the Anti-Hijacking Program. *See id.* By 1973, when the Ninth Circuit evaluated the screening procedures in *Davis*, all passengers were required to pass through magnetometers as part of the security screening procedures mandated by the government, thus lacking the individualized suspicion required under *Terry*. *See id.* For the Ninth Circuit, reliance on *Terry* also suffered from scope problems as *Terry* justified only a quick pat-down to ensure that the person did not have a weapon immediately available to use against the officer. *Id.* at 907.

62. *Id.* at 908.

63. *Id.* at 910 (quoting Camara v. Mun. Court, 387 U.S. 523, 536–37 (1967)). In its balancing of the government need, the court concluded:

> The need to prevent airline hijacking is unquestionably grave and urgent. The potential damage to person and property from such acts is enormous. . . .
>
> A pre-boarding screen of all passengers and carry-on articles sufficient in scope to detect the presence of weapons or explosives is reasonably necessary to meet the need.

Id. (footnote omitted).

> furtherance of an administrative purpose, namely, to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings. The essential purpose of the scheme is not to detect weapons or explosives or to apprehend those who carry them, but to deter persons carrying such material from seeking to board at all.[64]

Thus, *Camara* provided a valuable approach for the airport-security cases: It avoided the problem of the lack of traditional, individualized probable cause or reasonable suspicion inherent in cases relying upon *Terry* to justify airport-security searches, yet used the same reasonableness-balancing test. Sufficient regulations existed in the Anti-Hijacking Program to allow the courts to evaluate its regulatory and administrative standards as justification for the need for both the search and its scope.[65] Outlining the permissible scope of such a search, the Ninth Circuit chose to borrow from *Terry* to narrow the scope, explaining that "an administrative screening search must be as limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it."[66] Finally, under this administrative-search exception, a warrant was not required if "the burden of obtaining a warrant [was] likely to frustrate the governmental purpose behind the search."[67] Again, with the exigencies of time and danger of the airport-security screening, no warrant was required.[68]

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64. *Id.* at 908. The Ninth Circuit initially predicated its conclusion on passengers' ability to avoid the search by electing not to board the aircraft. *Id.* at 910–11. However, by tying this caveat to the limitation of permissible scope authorized by *Terry*, the court also recognized the caveat as protecting the passengers' constitutional right to travel. *Id.* at 912. The Ninth Circuit later overruled this caveat in *United States v. Aukai*, recognizing that the administrative-search exception did not rely on consent. United States v. Aukai, 497 F.3d. 955, 959 (9th Cir. 2007) (en banc). *But see* Ferguson v. City of Charleston, 532 U.S. 67, 90–91 (2001) (Kennedy, J., concurring) (discussing the concept of consent as relevant to the reasonableness of the intrusion under the special-needs exception).

65. *See generally Davis*, 482 F.2d at 897–904 (providing an excellent discussion of the evolution of the Anti-Hijacking Program in the U.S.).

66. *Id.* at 910 & n.49 ("The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." (quoting Terry v. Ohio, 392 U.S. 1, 19 (1968))); *see also* United States v. Hartwell, 436 F.3d 174, 181 (3d Cir. 2006) (adopting an administrative-search exception to uphold magnetometer and other airport-security searches).

67. *Camara*, 387 U.S. at 533 ("In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.").

68. *Id.*; *see also* Downing v. Kunzig, 454 F.2d 1230, 1232–33 (6th Cir. 1972) (upholding limited searches of briefcases and packages for weapons or explosives in federal courthouse where special circumstances of danger and balancing of competing interests were clearly on the side of upholding a limited search).

A common issue threaded throughout the early airport-security cases was that of consent. First were contentions by the government that airport searches were justified by implied consent either because the Anti-Hijacking Program regulations required passengers identified under the air carrier's security program to consent to a search or be denied boarding, or alternatively because prominent notices informed passengers that they and their baggage were subject to search.[69] The government argued that these facts led to the conclusion that passengers had impliedly consented to search by purchasing an airline ticket and attempting to board an aircraft.[70] Courts, however, applying the high standard required to waive a constitutional right, rejected that theory,[71] finding that posted notices or acquiescence to authority were insufficient to waive passengers' Fourth Amendment rights.[72] In addition to holding the government to its burden of showing that any consent was freely and voluntarily given, courts did not permit the government to condition the exercise of the constitutionally protected right to travel on the relinquishment of Fourth Amendment rights[73]—an early application of the unconstitutional conditions doctrine.

Secondly, courts evaluated what became the "right to leave" argument. The Anti-Hijacking Program regulations, while not mandating a search, did

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69. *See Davis*, 482 F.2d at 913–15 (analyzing the role of "voluntariness" necessary to find that passengers impliedly consented to preboarding searches); United States v. Lopez, 328 F. Supp. 1077, 1092–93 (E.D.N.Y. 1971).

70. *Id.*; *see Davis*, 482 F.2d at 913–15; *Lopez*, 328 F. Supp. at 1092–93.

71. United States v. Albarado, 495 F.2d 799, 806–07 (2d Cir. 1974) ("While a search which would otherwise be unlawful may through the consent of the person searched become lawful, such consent entailing as it does the waiver of a constitutional right, must be freely and voluntarily given; it must not be directly or indirectly the result of coercion. To make one choose between flying to one's destination and exercising one's constitutional right appears to us, as to the Eighth Circuit, in many situations a form of coercion, however subtle." (citations omitted)).

72. *See, e.g.*, United States v. Edwards, 498 F.2d 496, 501 (2d Cir. 1974) (holding consent goes to reasonableness, not necessarily waiver); *Albarado*, 495 F.2d at 806–07; United States v. Kroll, 481 F.2d 884, 886 (8th Cir. 1973); *Davis*, 482 F.2d at 913–14; United States v. Ruiz-Estrella, 481 F.2d 723, 727–28 (2d Cir. 1973); United States v. Meulener, 351 F. Supp. 1284, 1287–88 (C.D. Cal. 1972); *Lopez*, 328 F. Supp. at 1092–93. *But see, e.g.*, United States v. Doran, 482 F.2d 929, 932 (9th Cir. 1973) (finding signs and public address announcements that all passengers were subject to search supports inference of consent, akin to individuals participating in a closely regulated business); United States v. Skipwith, 482 F.2d 1272, 1277, 1281 (5th Cir. 1973) ("[The right to leave] greatly damages the prophylactic purpose of the search procedure. Such an option would constitute a one-way street for the benefit of a party planning airplane mischief, since there is no guarantee that if he were allowed to leave he might not return and be more successful. Of greater importance, the very fact that a safe exit is available if apprehension is threatened, would, by diminishing the risk, encourage attempts."); United States v. Edwards, 359 F. Supp. 764, 768 (E.D.N.Y. 1973), *aff'd*, 498 F.2d 496 (2d Cir. 1974) (finding no requirement for explicit warning of right not to consent so long as the passenger did not board the aircraft).

73. *See Albarado*, 495 F.2d at 806–07; *Davis*, 482 F.2d at 913–14; *Meulener*, 351 F. Supp. at 1288; *Lopez*, 328 F. Supp. at 1092–93.

require that the airline deny boarding to anyone refusing to consent to a search after meeting the profile or activating the magnetometer.[74] Several courts considered whether passengers' actual knowledge that they could choose to leave and not board the aircraft, and therefore avoid a search, was relevant to the assessment of either the validity of any consent gained, or the reasonableness of the scope of the search.[75] Other than the Ninth Circuit, few courts followed this theory, which initially considered that a passenger's consent was relevant to the permissible scope of the search.[76]

However, the Ninth Circuit disavowed this theory in 2007, clarifying that administrative searches, upon which their analysis was based, were not dependent on consent.[77] Instead, all that was required in an otherwise reasonable airport search conducted pursuant to statutory authority was a "passenger's election to attempt entry into [a] secured area."[78] Nevertheless,

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74. *Davis*, 482 F.2d at 911 n.51.

75. *See, e.g.*, *Meulener*, 351 F. Supp. at 1289–91. For these courts, the purpose of the search was to preclude weapons and explosives from being taken on-board the aircraft. *Id.* at 1288–89. Therefore, to be truly voluntary, any consent gained had to be based on the passenger's actual knowledge of the right to choose to not board the aircraft and avoid the search. *Id.* at 1289–90. Additionally, if a passenger chose not to board, a search was no longer reasonably related to the purpose of the search. *Id.*; *see also Davis*, 482 F.2d at 910–912 (discussing consent under circumstances of airport-security check). *Contra* United States v. Cyzewski, 484 F.2d 509, 513 n.4. (5th Cir. 1973); *Skipwith*, 482 F.2d at 1277 (rejecting right-to-leave argument).

76. *Davis*, 482 F.2d at 910–12 (discussing consent in the context of purposes of airline-security search). *But see* United States v. Aukai, 497 F.3d. 955, 960–61 (9th Cir. 2007) (en banc) (overruling *Davis*'s conclusion that consent to search may be revoked and search cannot be forced at that point after 9/11). The *Aukai* court further held that "where an airport screening search is otherwise reasonable and conducted pursuant to statutory authority, all that is required is the passenger's election to attempt entry into the secured area of an airport." *Aukai*, 497 F.3d at 961 (footnote omitted) (citation omitted) (citing United States v. Biswell, 406 U.S. 311, 315 (1972)).

77. In *Aukai*, the Ninth Circuit returned back to the basis of the decision in *Davis*—the administrative-search inspection. *Aukai*, 497 F.3d at 960–61. *Davis* held that the passenger could revoke his consent to search at any time because the government's need for the search had been satisfied by the deterrence established by the airport-security search program, and continuing the search when the passenger decided not to board the aircraft would go beyond the necessary nexus between the government need justifying the search and the scope of the search. *Davis*, 482 F.2d at 910–13. However, in *Aukai*, relying on *Biswell*, an administrative-inspection case, the focus was on the government's need, not on consent, just as the administrative inspection of a licensed firearms dealer was the justification of the inspection, not the consent of the firearms dealer. *Aukai*, 497 F.3d at 960–61. The Ninth Circuit returned the focus of the reasonableness of the airport-security administrative inspection to a person's initial decision to subject herself to the security regime, similar to the initial decision to enter into a closely regulated industry like a federal firearms dealer or federally licensed alcoholic beverage dealers. *See id.*; *see also Biswell*, 406 U.S. at 315–16 (discussing federal firearms dealers); Colonnade Catering Corp. v. United States, 397 U.S. 72, 73–74 (1970) (discussing federally licensed alcoholic beverage dealers). Thus, as no consent was required in *Camara* for the homeowner to submit to administrative housing inspections, the decision to submit to airport-security inspections was made at the point of entry into the security screening line. *See Aukai*, 497 F.3d at 960–61.

78. *Aukai*, 497 F.3d at 961.

the public's knowledge and acceptance that searches were an integral part of the flying experience was, and continues to be, relevant to *Camara*'s reasonableness balancing by affecting the perception of the "invasion [that] the search entails."[79] Even if not seen as requirements in and of themselves—because they affect the objective and subjective invasion of privacy—consent, notice, or the opportunity to avoid the search continued to be relevant considerations in the general reasonableness-balancing test.

As discussed above, a key difference between these approaches, all reasonable under the Fourth Amendment, is that the *Terry* stop-and-frisk approach requires at its inception some degree of individualized suspicion based on reasonable and articulable facts, while the *Camara* approach accepts that no particularized suspicion exists and relies upon other safeguards to control government behavior. As it developed in the early airport-screening cases, the reasonableness-balancing approach, while originally premised on *Terry* in many cases, became unmoored from *Terry*'s requirement of individualized suspicion, perhaps reflecting (sometimes explicitly) the incorporation of *Camara*'s reasonableness balancing with its calibration of probable cause to the administrative and legislative standards authorizing the search. Both approaches relied on the required nexus between the government purpose authorizing the search and the scope of the search to restrict the government official's discretion. These early airport-screening cases took place against the backdrop of the escalation of air piracy with its extreme danger to lives and property—with at least one circuit court of appeals describing airport-security searches as "an exceptional and exigent situation under the Fourth Amendment."[80]

Moving forward, the Supreme Court would use *Terry*, *Camara*, and the experiences of the lower federal courts in the early airport-security cases as it developed the Fourth Amendment's special-needs exception. These earlier airport-screening cases were the quintessential special-needs cases, occurring a decade before that term appeared. Ironically, a general reasonableness-balancing test was used in these early cases to extend *Terry* searches where no individualized suspicion existed, an extension of *Terry* initially rejected by the Supreme Court in *Brown v. Texas* and *Delaware v. Prouse*.[81] Nonetheless, in more narrow contexts "in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable," the Supreme Court would come

79. Camara v. Mun. Court, 387 U.S. 523, 537 (1967).

80. United States v. Moreno, 475 F.2d 44, 48 (5th Cir. 1973); *see also* United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974).

81. Brown v. Texas, 443 U.S. 47, 51–52 (1979); Delaware v. Prouse, 440 U.S. 648, 662–63 (1979).

to accept that suspicionless searches could indeed be reasonable under the Fourth Amendment.[82]

III. SPECIAL NEEDS—BEYOND THE NORMAL NEED FOR LAW ENFORCEMENT

Although the Supreme Court had recognized a limited exception to the warrant and probable-cause requirements in *Terry*, it did so sparingly. Rejecting a similar argument in its companion case, *Sibron v. New York*, the Court reiterated that only a reasonable, articulable suspicion that a person is armed and poses a threat to a police officer or others justifies a *Terry* stop and frisk.[83] Even faced with the Court's cautionary language in *Terry* and *Sibron*, the lower courts dealing with the significant air security threat discussed above attempted to articulate when such security searches were reasonable under the Fourth Amendment, grappling with *Terry* as authority for blanket suspicionless airport searches.[84] In many cases, these courts extended *Terry* beyond its original limited circumstances. Faced with the same air piracy threat, other courts, relying on *Camara* and later administrative-inspection cases,[85] attempted to articulate when warrants were not required, and how government discretion could be limited with their absence. Under both approaches, reasonableness under the Fourth Amendment for these hard cases became a balance between "the need to search [or seize] against the invasion which the search [or seizure] entails."[86]

The doctrinal developments compelled by the early airport-security cases became the genesis for the Supreme Court's special-needs jurisprudence, as it too was forced to grapple with situations where significant government needs for searches outside of the traditional criminal-law context became more critical.[87] Although decided nearly a

82. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985).

83. Sibron v. New York, 392 U.S. 40, 64–66 (1968).

84. *See* discussion *supra* Part II.B.

85. *See* New York v. Burger, 482 U.S. 691 (1987) (concerning an automobile junkyard); O'Connor v. Ortega, 480 U.S. 709 (1987) (evaluating a government office); Donovan v. Dewey, 452 U.S. 594 (1981) (dealing with underground and surface mines); Michigan v. Tyler, 436 U.S. 499 (1978) (relating to an arson investigation).

86. Terry v. Ohio, 392 U.S. 1, 20–21 (1968) (alterations in original) (quoting Camara v. Mun. Court, 387 U.S. 523, 534–35 (1967)).

87. In *National Treasury Employees Union v. Von Raab*, the Supreme Court quoted Judge Friendly's opinion in *United States v. Edwards*:

> When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the

decade after many of the airport-security cases, the Supreme Court in 1985 followed a familiar path blazed by those cases when it decided *New Jersey v. T.L.O.*, a case involving a school administrator's search of a student's purse.[88] Recognizing the special needs in the case—both the unique relationship between students and school officials, and the school's need to maintain discipline and protect the educational environment—the Court dispensed with the traditional warrant and probable-cause requirement as being inconsistent with those needs.[89] After balancing the need to search against the intrusion the search entailed under *Camara*, the Court, using *Terry* as both authority and a benchmark, concluded that reasonable suspicion was the appropriate standard to satisfy the Fourth Amendment's reasonableness standard in that case.[90] *Terry* also served as a benchmark for the appropriate scope of such a search.[91]

Agreeing that there were limited exceptions to the probable-cause requirement, the Court in *Ferguson* cited Justice Blackmun's concurrence in *T.L.O.* in which reasonableness could be determined by "a careful balancing of governmental and private interests," ultimately "conclud[ing] that such a test should only be applied 'in those special circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'"[92] Thus, *Terry* and *Camara* provided the basis for the Court—as they did for the lower federal courts dealing with the airport-security cases—to dispense with the

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passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.

Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 675 n.3 (1989) (quoting United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974)).

88. *See* New Jersey v. T.L.O., 469 U.S. 325, 325 (1985).

89. *Id.* at 340.

90. *Id.* at 337–42 (quoting *Camara*, 387 U.S. at 536–37).

91. *Id.* at 341–42 ("Determining the reasonableness of any search involves a twofold inquiry: first, one must consider whether the . . . action was justified at its inception; second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place." (citation omitted) (internal quotation marks omitted)).

92. Ferguson v. City of Charleston, 532 U.S. 67, 74 n.7, 75 (2001) (quoting *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in judgment)). In *Ferguson*, the Supreme Court traced the history of the special-needs exception by focusing on Justice Blackmun's concurrence in *T.L.O.* as the origin of the term, and explained that the "Court subsequently adopted the 'special needs' terminology in *O'Connor v. Ortega* . . . and *Griffin v. Wisconsin*, . . . concluding that, in limited circumstances, a search unsupported by either warrant or probable cause can be constitutional when 'special needs' other than the normal need for law enforcement provide sufficient justification." *Id.* In 1987, the Court recognized such special needs in the context of work-related searches of an employee's desks and offices in *O'Connor*, and in the search of a probationer's home in *Griffin*, weighing the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements. *See* O'Connor v. Ortega, 480 U.S. 709, 709–10 (1987); Griffin v. Wisconsin, 483 U.S. 868, 870–72 (1987).

warrant requirement if the "burden of obtaining a warrant [was] likely to frustrate the governmental purpose behind the search,"[93] and to endorse "balancing the need to search against the invasion which the search entails" as the ultimate test of reasonableness under the Fourth Amendment where these special needs existed.[94]

While *T.L.O.* involved "some quantum of individualized suspicion,"[95] the Court was soon called upon to address whether its special-needs doctrine extended to situations where no particularized suspicion existed—a question reserved in *T.L.O.*[96] Two cases would test this proposition in 1989, and both addressed drug-testing programs established or mandated by the government.

Prior to these cases, only in 1976's *United States v. Martinez-Fuerte* had the Court sanctioned a brief, investigatory suspicionless stop near the border.[97] Deciding in that case that the government's need to control the flow of illegal aliens into the country outweighed the limited intrusion on Fourth Amendment interests in the brief stop and questioning at an established highway border checkpoint, the Court analogized the brief checkpoint stop to *Camara*'s use of an "area warrant" to inspect for housing violations.[98] Because "[t]he Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of

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93. *T.L.O.*, 469 U.S. at 340.

94. *Id.* at 337.

95. *Id.* at 342 n.8.

96. *Id.* (reserving the issue of the reasonableness of the search if there is no individualized suspicion). In *T.L.O.*, there was reasonable suspicion that evidence of smoking would be found in T.L.O.'s purse. *Id.* at 329. In *Griffin*, the Court upheld warrantless searches of a probationer's house based on "reasonable grounds" under a regulatory program and the special need of the probation system. *Griffin*, 483 U.S. at 875–76. Reasonable grounds, however, still required an articulation of particularized suspicion. *See id.* at 878 (discussing the reasonableness requirement as less than probable cause). In *O'Connor*, the Court allowed a government employer to conduct warrantless searches of an employee's desks and offices without probable cause, deviating from the traditional standard because of the substantial government interests in the efficient and proper operation of the workplace. *O'Connor*, 480 U.S. at 725 ("[S]pecial needs, beyond the normal need for law enforcement, make the . . . probable-cause requirement impracticable." (quoting *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in judgment))). *O'Connor* also involved individualized suspicion. *Id.* at 726. In later special-needs cases, the Court would cite both *Griffin* and *O'Connor* as authority for the development of this exception, and its exploration of what it meant to have a need apart from the normal need for law enforcement. Both cases, while discussing *T.L.O.*, also went back to *Camara*.

97. United States v. Martinez-Fuerte, 428 U.S. 543, 545, 560–61 (1976) ("The defendants note correctly that to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure. But the Fourth Amendment imposes no irreducible requirement of such suspicion. This is clear from *Camara v. Municipal Court*." (footnote omitted) (citation omitted)).

98. *Id.* at 561–62 (internal quotation marks omitted).

individuals,"[99] two major factors leading to approval of *Martinez-Fuerte*'s routine highway checkpoint were that they were less likely than roving checkpoints to lead to fear or concern from motorists and, by being set up by higher level administrators, were less subject to the discretion of officials in the field.[100] Although not discussed in terms of a government special need, and instead using *Camara* and administrative inspections as authority, *Martinez-Fuerte* would serve in future special-needs and traffic-checkpoint jurisprudence as authority for suspicionless searches. Nevertheless, in other contexts in 1979, the Court in *Delaware v. Prouse* and *Brown v. Texas* rejected two attempts to expand *Terry* to allow seizures of vehicles or persons, absent reasonable, articulable suspicion.[101] Only in the administrative-inspection context had the Court allowed what could be termed suspicionless administrative searches, and then only when the discretion of officials in the field was constrained by an administrative warrant or by a specific statutory or regulatory scheme.[102] It was against this backdrop that the Court considered *Skinner v. Railway Labor*

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99. *Id.* at 554.

100. *Id.* at 558–59; *see also* United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975) (discussing roving patrols). After a series of cases in the '70s that challenged searches and seizures conducted as part of the Border Patrol's traffic-checking operations, the Supreme Court maintained the requirement for individualized suspicion in all cases except *Martinez-Fuerte*, which provides an excellent discussion of the prior cases and their distinctions. Because of these concerns expressed in *Martinez-Fuerte*, the Court did not approve suspicionless searches or seizures at roving checkpoints in *Brignoni-Ponce*. *Brignoni-Ponce*, 422 U.S. at 884. The Court determined that these fixed checkpoints were constitutionally reasonable because:

> [t]he location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources . . . [who] will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops.

Martinez-Fuerte, 428 U.S. at 559. Additionally, the "visible manifestations of the field officers' authority at a checkpoint provide substantially the same assurances" as the warrant serves in *Camara*. *Id.* at 565. Finally, the Court characterized the stop as a brief stop during which all that is required are answers to one or two questions and possible production of a document showing the right to be in the U.S.—with neither the vehicles nor occupants being subject to a search, and the visual inspection of the vehicle limited to what can be seen without a search. *Id.* at 558.

101. *See* Delaware v. Prouse, 440 U.S. 648, 663 (1979); Brown v. Texas, 443 U.S. 47, 48–49, 52–53 (1979). Law enforcement also pushed the boundaries of *Terry*, seeking to expand either the scope of *Terry* or its basis. In *Prouse* and *Brown*, the Court rejected attempts to expand *Terry* to allow suspicionless vehicle stops and seizures without reasonable and articulable suspicion.

102. *See, e.g.*, Donovan v. Dewey, 452 U.S. 594, 599–600 (1981); Michigan v. Tyler, 436 U.S. at 506 n.5, 506–07 (1978); United States v. Biswell, 406 U.S. 311, 316 (1972); Camara v. Mun. Court, 387 U.S. 523, 538–39 (1967).

Executives' Association and *National Treasury Employees Union v. Von Raab*.[103]

Decided on the same day in 1989, both *Skinner* and *Von Raab* involved what would be considered "blanket" drug-testing programs—in *Skinner*, for railway employees involved in accidents or other incidents, and in *Von Raab*, for U.S. Customs Service employees whose duties involved drug interdiction, carrying firearms, or handling classified information.[104] As in the airport-screening cases, the government regulations mandating the breath, urine, and blood tests at issue in *Skinner* made them cognizable under the Fourth Amendment. And as in those early cases, which far predated the special-needs jurisprudence, "the permissibility of a particular practice '[was] judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'"[105]

While acknowledging that the Fourth Amendment normally requires both a warrant and probable cause in criminal cases, the *Skinner* Court explicitly harkened back to *T.L.O.*, adopting Justice Blackmun's special-needs language: "[W]hen 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable,'" the Court will "balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context."[106] This contextual reasonableness balancing required an examination of both government and individual interests.[107] Complicating the reasonableness balancing in *Skinner*, however, was the lack of individualized suspicion. Acknowledging the difficulty, the Court stated:

> When the balance of interests precludes insistence on a showing of probable cause, we have usually required "some quantum of individualized suspicion" before concluding that a search is reasonable. We made it clear, however, that a showing of

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103. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989).

104. *Skinner*, 489 U.S. at 606; *Von Raab*, 489 U.S. at 660–61.

105. *Skinner*, 489 U.S. at 619 (quoting *Prouse*, 440 U.S. at 654).

106. *Id.* (citing Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).

107. Even after recognizing the special need in *Skinner*, which the Court acknowledged was "[t]he [g]overnment's interest in regulating the conduct of railroad employees to ensure . . . the safety of the traveling public and of the employees themselves," the Court exhaustively examined the nature of the employment relationship of the affected employees, the pervasive regulation of the industry, its history of alcohol and drug abuse, the long history of regulatory concern, as well as the detailed nature of the regulations in question, which provided minimal discretion for the official in the field in order to assess the intrusiveness of the search on the employees' privacy interests. *Id.* at 620–21.

> individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable. In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion. We believe this is true of the intrusions in question here.[108]

In *Skinner*, the Court concluded as it had in *Martinez-Fuerte* that the government's interest outweighed the intrusion on the individual's privacy interest, even accounting for the lack of individualized suspicion.[109] However, the Court's choice of wording at least implied that suspicionless searches were limited to situations where the government's interest is important and the privacy intrusion minimal.[110] This distinction is similar to that made by the Court between the roving and fixed highway checkpoints in *Brignoni-Ponce*[111] and *Martinez-Fuerte*,[112] respectively. In *Martinez-Fuerte*, the Court upheld the fixed checkpoints as reasonable because they were less intrusive—they engendered less fear and concern in the motorists and involved far less discretion in officials in the field than the roving checkpoints disapproved of in *Brignoni-Ponce*.[113]

Building on this basis in *Von Raab*, the Court described *Skinner* as "reaffirm[ing] the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance."[114] In

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108. *Id.* at 624 (citations omitted).

109. *Id.* In *Skinner*, the Court concluded that the detailed regulations provided guidance both as to the circumstances justifying the tests and the permissible limits of their intrusiveness, thereby limiting discretion that was similar to the protection provided by a warrant. *Id.* at 622. The Court relied on the administrative-inspection cases such as *Camara* and *Burger*, substituting detailed guidance for the oversight provided by a magistrate. *Id.* The Court further discounted the employees' privacy interests as they were subject, in addition to the normal restrictions of the employment relationship, to restrictions inherent in working in a pervasively regulated industry—one which had a long history of regulation to ensure safety, a goal dependent on their "health and fitness." *Id.* at 627.

110. In making this determination in *Skinner*, the Court examined the employees' privacy interests, concluding that the intrusion caused by the search was minimal. *Id.* at 624. Similarly, the Court evaluated the privacy intrusion of the brief traffic stop in *Martinez-Fuerte* and held it as minimal as well. United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976); *see also* Dunaway v. New York, 442 U.S. 200, 212 (1979) (explaining that *Brignoni-Ponce* refused to extend *Terry* in such a way, and that anything beyond the brief stop for limited questions must be supported by probable cause).

111. United States v. Brignoni-Ponce, 422 U.S. 873, 881–83 (1975).

112. *Martinez-Fuerte*, 428 U.S. at 563–64.

113. *Id.* at 555–59 (explaining the *Brignoni-Ponce* holding).

114. Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665 (1989) (relying on *T.L.O.* and *Martinez-Fuerte*).

the context of special needs, the reasonableness-balancing test now was articulated as follows: "[W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the [g]overnment's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."[115]

Von Raab, similar to *Skinner*, involved a workplace drug-testing program, but in a government workplace, and one in which the articulated special need was the government's need to have its frontline drug interdiction personnel be "physically fit, and have unimpeachable integrity and judgment."[116] Key to the Court's contextual balancing was its evaluation of the diminished expectation of privacy held by the U.S. Customs Service employees, as government employees generally, but specifically as those engaged in sensitive duties or required to carry firearms, who "reasonably should expect effective inquiry into their fitness and probity."[117] Equally reassuring to the Court was that the program's procedures minimized the potential intrusion on privacy interests, with the scope and dates of testing being determined in advance, and that those in covered positions knew that they were subject to drug testing when they applied for the positions.[118]

In *Skinner* and *Von Raab*, the Court did four things. First, the Court re-emphasized the distinction between criminal cases, which ordinarily required a warrant and probable cause, and special-needs cases, which do not.[119] Second, the Court explicitly adopted the special-needs language from Justice Blackmun's concurrence in *T.L.O.* to describe this exception to the normal warrant and probable-cause requirements of the Fourth Amendment.[120] Third, it endorsed the approach taken by the lower courts in which the need for a warrant or particularized suspicion would be

115. *Id.* at 665–66.

116. *Id.* at 670.

117. *Id.* at 672.

118. *Id.* at 672 n.2 (analogizing to *Martinez-Fuerte* in that advance notification eliminates being subject to an "unsettling show of authority," similar to a motorist not being taken by surprise).

119. In *Skinner*, however, the Court held that absent a persuasive showing that the testing program was a pretext to enable law enforcement authorities to gather evidence of penal-law violations, it would "leave for another day the question whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the . . . program." Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 621 n.5 (1989).

120. *Skinner*, 489 U.S. at 619 (citing New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment)).

determined in the particular context after balancing the government's interests against the individual's privacy interests.[121] Fourth, and perhaps most significantly, the Court determined that "a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable."[122]

Interestingly, although the Court never directly reviewed an airport-security case, in *Von Raab*, it indicated its knowledge and approval of the approach taken by the lower courts in *Skinner and Von Raab*.

> Where . . . the possible harm against which the [g]overnment seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the [g]overnment's goal.
>
> The point is well illustrated also by the [f]ederal [g]overnment's practice of requiring the search of all passengers seeking to board commercial airliners, as well as the search of their carry-on luggage, without any basis for suspecting any particular passenger of an untoward motive. Applying our precedents dealing with administrative searches, the lower courts that have considered the question have consistently concluded that such searches are reasonable under the Fourth Amendment. As Judge Friendly explained in a leading case upholding such searches:
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> > When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.[123]

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121. *Id.* at 619; *Von Raab*, 489 U.S. at 667 ("Our cases teach, however, that the probable-cause standard is peculiarly related to criminal investigations." (quoting Colorado v. Bertine, 479 U.S. 367, 371 (1987) (internal quotation marks omitted))).

122. *Skinner*, 489 U.S. at 624 (citing United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976)).

123. *Von Raab*, 489 U.S. at 674–75, 675 n.3 (footnote omitted) (citations omitted) (upholding air piracy precautions adopted in response to observable national and international hijacking crises, but holding that the government's ability to conduct them is not predicated on a demonstration of danger as to a particular airport or airline).

> It is sufficient that the [g]overnment have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context.
>
> Nor would we think, in view of the obvious deterrent purpose of these searches, that the validity of the [g]overnment's airport screening program necessarily turns on whether significant numbers of putative air pirates are actually discovered by the searches conducted under the program.

Coming full circle, the Court thus endorsed contextual reasonableness balancing even when individualized suspicion was lacking, and this balancing would determine not only reasonableness under the Fourth Amendment but also "whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."[124]

Von Raab proved an impetus for government search programs claiming a need apart from law enforcement. In *Michigan v. Sitz*, decided the year after *Von Raab*, the Court narrowly approved a police sobriety checkpoint, holding that the government's interest in preventing the scourge of drunk driving outweighed the minimal intrusion of the fixed checkpoint, which it likened to the immigration roadblocks in *Martinez-Fuerte*.[125] Although it had struck down a random, suspicionless traffic stop in *Delaware v. Prouse* ten years prior,[126] the Court upheld *Sitz*'s fixed sobriety checkpoint, reflecting perhaps a more nuanced understanding of the various governmental interests at stake and a recognition of the expansion of governmental search and inspection programs in that time frame.[127] Key to its determination of reasonableness was the fixed predetermined nature of the checkpoints and the requirement to stop every car.[128] The elimination of police discretion led to the Court's conclusion that the subjective intrusion was minimal.[129] Interestingly, the Court explained in *Sitz* that *Von Raab* was premised upon the balancing approach undertaken in both *Martinez-Fuerte* and *Brown v. Texas*, two earlier cases that balanced the government interest in the seizure against the intrusion the seizure entailed.[130]

In *Sitz*, although describing the danger posed by drunk driving, the Court did not use the special-needs language of *Von Raab*, instead relying on *Martinez-Fuerte*'s balancing test, justified under *Camara*, to uphold

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Id. at 675 n.3.

124. *Id.* at 665–66.

125. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451–52 (1990).

126. Delaware v. Prouse, 440 U.S. 648, 661 (1979).

127. *See Sitz*, 496 U.S. at 447–48.

128. *Id.* at 453.

129. *Id.* at 452–53.

130. *Id.* at 450; *see also* Brown v. Texas, 443 U.S. 47, 50–51 (1979) (holding that the constitutionality of seizures that amount to less than traditional arrest involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the "severity of the interference with individual liberty"). In its discussion of *Brown*, the Court did not examine its reliance on the requirements of *Terry* in first requiring that police have articulable suspicion to seize the defendant. *Sitz*, 496 U.S. at 453–54. The Court further attempted to distinguish *Prouse*, a case involving random traffic stops to check driver and vehicle licensing, as involving random stops with no empirical evidence of their effectiveness as to the stated goal of promoting roadway safety. *Id.* at 454.

Sitz's fixed sobriety checkpoints.[131] But as pointed out by the *Sitz* dissent, use of the *Brown/Terry* balancing test had been premised upon the intrusion first being determined as minimal or "substantially less intrusive than a typical arrest."[132] Only after such a determination was the requirement of probable cause for a seizure excused and subsequent use of the balancing test to determine reasonableness under the Fourth Amendment allowed.[133] Thus, in *Sitz*, the Court adhered to preexisting precedent under *Terry* and *Camara*, preferring to stay out of the special-needs arena,[134] but at the same time, expanding that preexisting precedent to situations lacking particularized suspicion beyond the border context. Nevertheless, in its examination of the magnitude of drunken driving as a measure of the government's interest in the search, the Court did in fact evaluate a need apart from that of general law enforcement.[135]

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131. In *Sitz*, the Court directly analogized the traffic checkpoint to that in *Martinez-Fuerte* and referred to the balancing in that case. *Sitz*, 496 U.S. at 450. In *Martinez-Fuerte*, the Fourth Amendment balancing was based on *Brignoni-Ponce*, which itself was premised on *Terry*. United States v. Martinez-Fuerte, 428 U.S. 543, 555–56 (1976). Thus the balancing in *Sitz*, premised on both *Martinez-Fuerte* and *Brown*, arose from *Terry*.

132. *Sitz*, 496 U.S. at 457 (Brennan, J., dissenting) (emphasis omitted) (citation omitted) (quoting Dunaway v. New York, 442 U.S. 200, 209 (1979)) (internal quotation marks omitted). *Dunaway* reined in attempts to expand *Terry* to justify the use of the balancing test more generally in replacement of the warrant and probable-cause requirement of the Fourth Amendment. *Dunaway*, 442 U.S. at 210–12. The dissent was concerned that by conflating the two inquiries, the majority was creating the impression that "the Court generally engages in a balancing test in order to determine the constitutionality of all seizures, or at least those dealing with police stops of motorist on public highways." *Sitz*, 496 U.S. at 456–57 (Brennan, J., dissenting) (internal quotation marks omitted). Thus, the dissent wrote to clarify the distinct predicate inquiry required to reach the balancing test—an intrusion substantially less intrusive than a typical arrest. While not disagreeing that the balancing test was appropriate, the dissent was concerned that the majority was conflating the first requirement—that the intrusion was substantially less intrusive than a typical arrest—with the second—the actual balancing of the privacy intrusion against the governmental interest. *Id.* at 457.

133. While the dissent concurred that the seizure in *Sitz* was minimal such that the *Brown* balancing test was appropriate, it castigated the majority for concluding, without explanation, that the balance weighed in the government's favor, taking issue with the majority's conclusion that no requirement of individualized suspicion was required. For Justice Brennan, no searching inquiry had examined the context of the sobriety program and significant differences existed between it and the program upheld in *Martinez-Fuerte*. *Id.* at 457–58.

134. *See id.* at 444–45 (majority opinion). It is ironic that *Sitz* is seen as a seminal special-needs case when the Court did not use either the language from its special-needs jurisprudence. This does, however, reflect that the special-needs exception is more nuanced, and in fact reflects three separate strands of authority and language: (1) those conceptualized as special needs, (2) those involving highway checkpoints that draw on the *Martinez-Fuerte* line of cases, and (3) cases supported as permissible administrative inspections. However, all three strands borrow language and precedent from the others.

135. *Id.* at 451–52; *see also* City of Indianapolis v. Edmond, 531 U.S. 32, 39, 41 (2000) ("This checkpoint program was clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways, and there was an obvious connection between the

Thus, after *Sitz*, two routes to the reasonableness-balancing test existed, although they were often intertwined both conceptually and with the line of precedent supporting the Court's conclusion. The first, under the *Terry*, *Brown*, and *Martinez-Fuerte* line of cases, required a predicate of an intrusion substantially less than a typical arrest, and a purpose separate from general law enforcement; the second required a special need beyond the normal need for law enforcement.[136] Both could, in the appropriate circumstance, be reasonable even without particularized suspicion, although the Court at least implied that the appropriate circumstance would be where privacy interests were minimal.[137] In fact, a third avenue, that of administrative inspections arising directly from *Camara*, also served as the basis to use a more general, contextualized reasonableness-balancing test under the Fourth Amendment—cases that also served needs apart from criminal law enforcement.[138]

Moving forward, the Court was faced with two favorites: suspicionless drug testing and schoolchildren. In *Vernonia School District 47J v. Acton*, the Court upheld random, suspicionless drug testing of interscholastic athletes at an Oregon high school.[139] Drawing from *O'Connor*, the Court found special needs in the relationship of the school district "as guardian and tutor" of the students.[140] In its balancing of interests, the Court further diminished the students' already limited privacy interests by analogizing students who voluntarily participated in extracurricular sports to "adults who choose to participate in a 'closely regulated industry,'" such that both "expect intrusions upon normal rights and privileges, including privacy."[141] Thus, the subtle inference of implied consent was again present in the balancing of interests.[142] In the face of the compelling government need to

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imperative of highway safety and the law enforcement practice at issue. . . . We suggested in *Prouse* that we would not credit the 'general interest in crime control' as justification for a regime of suspicionless stops. Consistent with this suggestion, each of the checkpoint programs that we have approved was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety." (citation omitted)).

136. *See Sitz*, 496 U.S. at 450–51.

137. *See* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 624 (1989); *Sitz*, 496 U.S. at 451 ("Detention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard." (citing United States v. Martinez-Fuerte, 428 U.S. 543, 567 (1976))).

138. *See, e.g.*, Ferguson v. City of Charleston, 532 U.S. 67, 84 (2001).

139. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 649–50, 664–65 (1995).

140. *Id.* at 665.

141. *Id.* at 657 (citing *Skinner*, 489 U.S. at 627).

142. *See Ferguson*, 532 U.S. at 90–91 (Kennedy, J., concurring) ("An essential, distinguishing feature of the special needs cases is that the person searched has consented, though the usual voluntariness analysis is altered because adverse consequences (e.g., dismissal from employment or disqualification from playing on a high school sports team) will follow from

address a pressing drug problem at the high school, the Court held the program to be reasonable and thus constitutional.[143]

Although the Court had examined seizures "substantially less intrusive than a typical arrest" in its traffic checkpoint cases, it had not fully articulated what governmental needs would qualify as "special needs[] beyond the normal need for law enforcement" sufficient to excuse compliance with the Fourth Amendment's warrant, probable cause, and individualized suspicion requirements.[144] In *Chandler v. Miller*[145] and *Ferguson v. City of Charleston*,[146] the Court examined both the nature of the special need and its required distinction from the normal need for law enforcement. Additionally, in *Indianapolis v. Edmond*, a case contesting drug interdiction highway checkpoints, the Court would further explain the purpose-based limitations for suspicionless government highway checkpoints, again bringing both lines of cases into rough alignment.[147]

In *Chandler v. Miller*, the Court struck down as unreasonable Georgia's suspicionless drug testing of candidates for designated state offices.[148] Although the Court determined Georgia's testing method to be relatively noninvasive, it held that Georgia had failed to establish a need that was substantial—or in the Court's words, "important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion."[149] For the Court, Georgia had failed to establish in the record a "concrete danger demanding departure from the Fourth Amendment's main rule."[150] Georgia's desire to convey its commitment to the struggle against

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refusal. The person searched has given consent, as defined to take into account that the consent was not voluntary in the full sense of the word. The consent, and the circumstances in which it was given, bear upon the reasonableness of the whole special needs program." (emphasis omitted) (citations omitted)).

143. *Vernonia Sch. Dist. 47J*, 515 U.S. at 664–65; *see also* Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 825 (2002) (upholding drug testing of all high school students participating in any extracurricular activities based on special needs).

144. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 457 (1990) (Brennan, J., dissenting) (emphasis omitted) (citation omitted); *Skinner*, 489 U.S. at 619.

145. Chandler v. Miller, 520 U.S. 305, 311 (1997).

146. *Ferguson*, 532 U.S. at 74.

147. City of Indianapolis v. Edmond, 531 U.S. 32, 47 (2000).

148. *Chandler*, 520 U.S. at 322–23.

149. *Id.* at 318.

150. *Id.* at 318–19. Georgia required that within thirty days of qualifying for nomination or election, a candidate provide a sample at the candidate's personal physician's office for submission to a certifying laboratory. *Id.* at 309. For the Court, the lack of a documented drug problem in the record, the ability of the candidate to determine the timing of the drug test and therefore control the results, and the lack of any concrete danger posed by drug use by these individuals highlighted the differences between this program and the one upheld in *Von Raab*. *Id.* at 321–22. The testing regime was not effective to identify drug use by candidates, nor did it serve

drugs, while laudatory, was symbolic and was not the type of special need that was sufficient to overcome the protections of the Fourth Amendment.[151] Significantly for the purposes of special-needs situations in terrorism cases, the Court in *Chandler* reiterated that blanket suspicionless searches remained permissible

> where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as "reasonable"—for example, searches now routine at airports and at entrances to courts and other official buildings. But where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.[152]

In *Ferguson v. City of Charleston*, the Court explored not only the need asserted by the government but also the question of pretext it had reserved in *Skinner*.[153] *Ferguson* involved a state hospital's drug-testing program of pregnant patients as part of a coordinated program with law enforcement to force those patients into treatment for substance abuse and sometimes prosecute them.[154] After restating its special-needs balancing test,[155] the Court emphasized that the invasion of privacy in this case was far more substantial than its prior special-needs cases, as most patients did not expect their diagnostic test results to be shared with nonmedical personnel without their consent.[156] Rather than "accept[ing] the [government's] invocation of a special need," the Court focused on the nature of the special need asserted by the government, as it had done in *Chandler*, conducting a close review of the scheme at issue.[157] In so doing,

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as a deterrent. *Id.* ("But Georgia asserts no evidence of a drug problem among [its] elected officials, those officials typically do not perform high-risk, safety-sensitive tasks, and the required certification immediately aids no interdiction effort. The need revealed, in short, is symbolic, not 'special,' as that term draws meaning from our case law.").

151. *Id.* at 322.

152. *Id.* at 323 (citation omitted); *see also* Ferguson v. City of Charlestown, 532 U.S. 67, 78 (2001) ("[W]e employed a balancing test that weighed the intrusion on the individual's interest in privacy against the 'special needs' that supported the program.").

153. *Ferguson*, 532 U.S. at 79 & n.15.

154. *Id.* at 72–73.

155. *Id.* at 78.

156. *Id.* The Court discussed the fact that in the prior special-needs cases, there were no misunderstandings about the use of the test results. Test procedures were clearly spelled out in the materials that were provided to the tested individuals. Additionally, there were protections against the dissemination of the test results to third parties. Finally, in none of those cases did the circumstances involve the kind of expectation of privacy seen when a typical patient undergoes a diagnostic test in a hospital where the test results will not be shared with nonmedical personnel without the patient's consent. *Id.*

157. *Id.* at 81 (internal quotation marks omitted).

the Court considered "all the available evidence in order to determine the [program's] relevant primary purpose."[158]

Finding irrelevant the government's claim of a beneficent ultimate purpose, the Court instead evaluated the record evidence as clearly establishing the involvement of law enforcement in the development, implementation, and administration of the policy, and its continuing focus on the arrest and prosecution of drug-abusing mothers, as well as the policy incorporating the police's operational guidelines to include "chain of custody, the range of possible criminal charges, and the logistics of police notification and arrests."[159] The involvement of law enforcement at every stage of the administrative program in *Ferguson*,[160] together with the program designed to generate evidence for use in criminal proceedings, rendered the government's purpose "indistinguishable from the general interest in crime control," and in effect answered the question reserved in *Skinner*.[161] Recognizing that although the ultimate objective may have been to get the women into treatment for drug abuse, the primary purpose of the program was "to generate evidence *for law enforcement purposes*."[162] For the Court, this distinction was key since every law enforcement purpose ultimately serves some societal goal, and allowing the government purpose to be drawn at such a high level would eviscerate the protections of the Fourth Amendment.[163]

Thus, the primary purpose of the government's asserted special-need program would become the focus of the balancing test in future special-needs cases. The majority signaled its unwillingness for the special-needs jurisprudence to become a Trojan horse that would undermine the protections of the Fourth Amendment, particularly in criminal cases.

The *Ferguson* decision relied in part on *Indianapolis v. Edmond*, a case decided the year prior in 2000.[164] *Edmond*, like *Sitz*, involved a suspicionless highway checkpoint program, but in *Edmond*, the program was designed to detect and interdict illegal drugs[165] rather than enhance

158. *Id.*

159. *Id.* at 82–84.

160. *Id.* at 83 n.20, 84 ("[A]t its core, [the policy was] predicated on the use of law enforcement. The extensive involvement of law enforcement and the threat of prosecution were . . . essential to the program's success.").

161. *Id.* at 81 (citing City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000)).

162. *Id.* at 82–83, 85–86 ("The stark and unique fact that characterizes this case is that Policy M–7 was designed to obtain evidence of criminal conduct by the tested patients that would be turned over to the police and that could be admissible in subsequent criminal prosecutions.").

163. *Id.* at 84.

164. City of Indianapolis v. Edmond, 531 U.S. 32 (2000).

165. The checkpoint program in *Edmond* involved the brief checkpoint stop of a predetermined number of vehicles. *Id.* at 35. Police would ask motorists for their license and

highway safety through the detection of drunk drivers as validated in *Sitz*. Although the *Edmond* Court evaluated the three types of circumstances in which the Court had previously recognized that the ordinary rule requiring particularized suspicion may not apply—special needs, administrative inspections, and road checkpoints[166]—in *Edmond* it focused on its previous highway checkpoint cases. While the *Martinez-Fuerte* Court focused on the unique context of the immigration highway checkpoints near the border, in *Sitz*, the Court saw the checkpoint program as "clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways, and the[] . . . obvious connection between the imperative of highway safety and the law enforcement practice at issue."[167] Finally, the Court discussed its suggestion in *Prouse* that a stationary checkpoint with limited discretion to check licensing and registration might be a constitutional means of serving "the [s]tate's interest in roadway safety."[168] According to the Court, each of these checkpoint programs "was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety."[169] In *Edmond*, it was uncontested that the primary purpose of the checkpoint was interdicting illegal narcotics,[170] and for the Court this was indistinguishable from a general interest in law enforcement.[171]

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registration, and observe for signs of impairment. *Id.* Additionally, the police would walk a drug dog around the vehicle's exterior and only search a vehicle with consent or upon the appropriate quantum of individualized suspicion. *Id.*

166. *See id.* at 37–38. These three categories were: (1) certain regimes of suspicionless searches where the program was designed to serve special needs beyond the normal needs of law enforcement; (2) searches for certain administrative purposes without particularized suspicion of misconduct, provided those searches were appropriately limited; and (3) brief suspicionless seizures of motorists at checkpoints designed either to intercept illegal aliens or to remove drunken drivers from the road. *Id.* In its discussion of the first category, the Court cited *Vernonia* for its analysis of random drug testing of student–athletes; *Von Raab*, analyzing drug tests for United States Customs Service employees seeking transfer or promotion to certain positions; and *Skinner*, which analyzed drug and alcohol tests for railway employees involved in train accidents or found to be in violation of particular safety regulations. *Id.* at 37. For the second category, the court looked to *Burger* for its analysis of warrantless administrative inspection of premises of closely regulated business; *Tyler*, for its analysis of the administrative inspection of fire-damaged premises to determine the fire's cause; and *Camara*, for the analysis of the administrative inspection to ensure compliance with the city's housing code. *Id.* Finally, for the third category, the court examined *Martinez-Fuerte* for the suspicionless seizures of motorists at a fixed Border Patrol checkpoint designed to intercept illegal aliens; *Sitz*, for the sobriety checkpoint aimed at removing drunk drivers from the road; and *Prouse*'s suggestion concerning similar fixed roadblocks to verify driver's licenses and vehicle registrations. *Id.* at 37–39.

167. *Id.* at 39.

168. *Id.* at 39–40.

169. *Id.* at 41.

170. *Id.*

171. *Id.*

Again, the Court recognized the difference between the immediate purpose and the ultimate purpose of the various programs in *Martinez-Fuerte*, *Sitz*, and *Edmond*. Acknowledging that "[s]ecuring the border and apprehending drunk drivers" were law enforcement activities and were goals in pursuit of which arrest and criminal prosecutions were employed, the Court nevertheless rejected analyzing purpose at this high level of generality such that suspicionless checkpoints could be used for "any conceivable law enforcement purpose."[172] Instead, the Court, as it did in *Chambers* and *Ferguson*, closely reviewed the program, evaluated the "nature of the public interests that such a regime is designed principally to serve," and determined the primary purpose of the program.[173] Rejecting claims that *Whren v. United States* and *Bond v. United States* precluded inquiry into the purpose of the program,[174] the Court explained that while the subjective motivations of individual officers were "irrelevant to the Fourth Amendment validity" of an objectively relevant traffic stop justified by probable cause, *Whren* and *Bond* had expressly distinguished cases involving searches conducted in the absence of probable cause.[175]

Thus, the Court underscored that the inquiry into "programmatic purposes" was "relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion."[176] It also highlighted that both administrative-inspection searches and special-needs cases "have often required an inquiry into purpose at the programmatic level,"[177] and that a similar inquiry was appropriate to determine the government purpose for this suspicionless search as well.[178] Additionally, while programmatic purpose was relevant to programs of seizures without probable cause in *Edmond*, the Court in *Ashcroft v. al-Kidd* stated in dicta that "[i]t was not the absence of probable cause that triggered the invalidating-purpose inquiry in *Edmond*. . . . Purpose was relevant in *Edmond* because 'programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken *pursuant to a general scheme without individualized suspicion*.'"[179]

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172. *Id.* at 42.

173. *Id.* at 43–44.

174. *See* Bond v. United States, 529 U.S. 334, 338 (2000); Whren v. United States, 517 U.S. 806, 813 (1996).

175. *Edmond*, 531 U.S. at 45.

176. *Id.* at 45–46.

177. *See id.* at 46.

178. *Id.*; *see also* Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080–81 (2011) (recognizing two limited exceptions to the general rule that Fourth Amendment reasonableness is predominantly an objective inquiry under *Whren* and *Bond*—special-needs and administrative-search cases "where 'actual motivations' do matter").

179. *al-Kidd*, 131 S. Ct. at 2081 (quoting *Edmond*, 531 U.S. at 45–46).

Although dicta, the Court recognized that "special-needs and administrative-inspection cases" require a purpose inquiry that involves both subjective and objective components.[180]

In *Edmond*, the Court was undaunted by the challenges inherent in such inquiries, instead recognizing that they remained a routine means for courts in constitutional analysis to "sift[] abusive governmental conduct from that which is lawful."[181] In its final analysis in *Edmond*, the Court "decline[d] to approve a [suspicionless] program whose primary purpose is ultimately indistinguishable from the general interest in crime control."[182] Thus, after *Edmond* and *Ferguson*, the primary purpose of the asserted government program was not only relevant, but it was also *the* element that would be weighed against the privacy intrusion to determine ultimate reasonableness. The Court indicated that it was not reticent about inquiring into the "nature of the public interests that such a regime [was] designed principally to serve," and that it would not approve a lower Fourth Amendment standard for a purpose indistinguishable from general law enforcement.[183] Ever cautious, the Court also noted an exception for emergencies that would allow an appropriately tailored checkpoint to thwart an imminent terrorist attack, and cautioned that the opinion did not affect "the validity of border searches or searches at places like airports and government buildings, where the need for such measures to ensure public safety can be particularly acute."[184]

Further clarifying the contextual nature of the inquiry into governmental purpose, the Court in *Illinois v. Lidster* approved a highway checkpoint that was set up to seek information from the motoring public about a fatal hit-and-run accident that had occurred at that location a week prior.[185] Although the checkpoint was broadly designed to serve a law enforcement purpose, the Court declined to implement an *Edmond* litmus

180. *Id.*

181. *Edmond*, 531 U.S. at 46–47.

182. *Id.* at 44.

183. *Id.* at 43.

184. *Id.* at 44, 47–48 ("Of course, there are circumstances that may justify a law enforcement checkpoint where the primary purpose would otherwise, but for some emergency, relate to ordinary crime control. For example, as the [c]ourt of [a]ppeals noted, the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route. The exigencies created by these scenarios are far removed from the circumstances under which authorities might simply stop cars as a matter of course to see if there just happens to be a felon leaving the jurisdiction. While we do not limit the purposes that may justify a checkpoint program to any rigid set of categories, we decline to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control." (citation omitted)).

185. Illinois v. Lidster, 540 U.S. 419, 427 (2004).

test equating anything with a law enforcement purpose with *Edmond*'s prohibition against searches based on a general interest in crime control.[186] After closely evaluating the government's purpose in this case, the Court saw a distinction in the fact that the police were not seeking evidence of the vehicle occupants' wrongdoing, but instead seeking their help as members of the public to solve a fatal accident.[187] After balancing this governmental interest against the minimal privacy intrusion of the brief checkpoint stop, the Court held the intrusion reasonable.[188]

The role of consent had been a contentious issue in the early special-needs and administrative-inspection cases, with the stringent tests required by the Supreme Court to waive a constitutional right confounding the early courts evaluating airlines-security searches.[189] While consent had little applicability in the cases concerning highway checkpoints, it was a component of the special-needs cases after *T.L.O.* In both *Skinner* and *Von Raab*, the expectation of privacy of the railroad workers and government employees was diminished because of their participation in a pervasively regulated industry[190] or their application for certain positions.[191] Although not seen as a waiver of a constitutional right or as consent per se, the circumstances of the employment relationship and the special safety and security needs asserted by the government were relevant to the overall reasonableness of the search.[192] In *Vernonia* and *Earls*, the schoolchildren were similarly seen to have diminished privacy interests not only due to the special relationship of the school district as guardian and tutor but also because the voluntary participation of the schoolchildren in sports or extracurricular activities in general further diminished their reasonable expectation of privacy.[193] Of particular significance for the Court in *Ferguson*, the privacy interest of maternity patients in not having their medical tests shared with third parties without consent was significantly

186. *Id.*
187. *Id.*
188. *Id.* at 428.
189. *See* United States v. Albarado, 495 F.2d 799, 806–07 (2d Cir. 1974); United States v. Davis, 482 F.2d 893, 913–14 (9th Cir. 1973); United States v. Lopez, 328 F. Supp. 1077, 1092–93 (E.D.N.Y. 1971); *see also* United States v. Meulener, 351 F. Supp. 1284, 1288 (C.D. Cal. 1972).
190. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 627 (1989).
191. Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 672 & n.2 (1989) ("Only employees who have been tentatively accepted for promotion or transfer to one of the three categories of covered positions are tested, and applicants know at the outset that a drug test is a requirement of those positions.").
192. *Id.* at 672.
193. *See* discussion *supra* notes 139–43.

different than the privacy interests in *Chandler*, *Vernonia*, *Skinner*, and *Von Raab*.[194] As Justice Kennedy explained in his concurrence:

> An essential, distinguishing feature of the special needs cases is that the person searched has consented, though the usual voluntariness analysis is altered because adverse consequences (e.g., dismissal from employment or disqualification from playing on a high school sports team) will follow from refusal. The person searched has given consent, as defined to take into account that the consent was not voluntary in the full sense of the word.[195]

Thus, the Supreme Court wrestled with the same problems with consent in the early airline-security cases because the requirements for a knowing waiver of a constitutional right were rarely met, leaving the issues of consent to bear on the overall reasonableness of the search instead.

IV. THE "NEW" TERRORIST THREAT & POST 9/11

Beginning in the 1960s or earlier, the U.S. and Western Europe experienced extensive domestic and international terrorist movements and attacks.[196] Groups such as the Red Army Faction, ETA, PKK, the Irish Republican Army in Europe and numerous others were augmented by international groups such as the Palestinian Liberation Organization (PLO), Hezbollah, Hamas, and the Abu Nidal Organization.[197] The terrorist threats that emerged after the attacks of 9/11 were not new, but the string of deadly high-profile terrorist attacks that quickly followed[198]—including the 2004 Madrid train bombings and the July 2005 London bombings—focused the world's attention on the radical Islamist terrorist threat and its perceived ability to strike worldwide.[199]

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194. Ferguson v. City of Charleston, 532 U.S. 67, 77–78 (2001).

195. *Id.* at 90–91 (Kennedy, J., concurring) (emphasis omitted) (citing *Skinner*, 489 U.S. at 615).

196. *See* John Moore, *The Evolution of Islamic Terrorism: An Overview*, FRONTLINE http://www.pbs.org/wgbh/pages/frontline/shows/target/etc/modern.html (last visited Oct. 6, 2014).

197. *See* OFFICE OF COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM (2007). ETA is an acronym for Euskadi Ta Askatasuna, "Basque Homeland and Liberty," an armed separatist and nationalist movement in Spain, while the PKK is the Kurdistan Workers' Party, a Kurdish organization that fought Turkey to establish an autonomous Kurdish state in Turkey. *See ETA Admits Killings and Bombings*, BBC NEWS (Sept. 22, 2000, 11:30 GMT), http://news.bbc.co.uk/2/hi/europe/937193.stm; *Profile: The PKK*, BBC NEWS, http://www.bbc.com/news/world-europe-20971100 (last updated Mar. 21, 2013, 9:30 ET).

198. Subsequent attacks included the October 2002 Bali bombings, the attacks on the Madrid train system in March 2004, the London bombings in July 2005, and the Mumbai attacks in November 2008. *See After 9/11: Global Effects on the 'War on Terror'*, BBC NEWS MAG., http://www.bbc.co.uk/news/world-14844727 (last updated Sept. 9, 2011, 17:00).

199. *See id.*

In response, nations implemented new security measures or updated existing statutory authorities within the limits of their respective legal systems in order to protect against future attacks. In the U.S., suspicionless blanket searches on subways or other mass transportation systems, or at public demonstrations, were implemented under the special-needs exception to the Fourth Amendment;[200] in contrast, Britain updated its antiterror legislation to authorize similar suspicionless searches in declared security zones—zones that quickly became ubiquitous.[201] Many of these security measures affected civil liberties and were soon challenged in the courts. In the U.S., the special-needs exception became the primary theory under which the Executive Branch sought to sustain new security search regimes; and in Britain, § 44 of the Terrorism Act of 2000 was used to justify hundreds of similar searches. Initial deference to security needs in the aftermath of the 9/11 attacks in the U.S. and the July 2005 attacks in Britain diminished as judicial and public scrutiny of these security initiatives disclosed racial and religious discrimination and negative effects on free speech and a free press.

A. American Cases

In the aftermath of 9/11, government entities, concerned with possible future domestic terrorist attacks—particularly in light of the attacks on Madrid's railways in 2004, Moscow's 2004 and 2010 subway attacks, and the London attacks in July 2005, among other high-profile terrorist attacks around the world—instituted new suspicionless-search programs in an effort to prevent similar attacks in the U.S.[202]

1. U.S. Cases Implicating First Amendment Liberties

From October 2001 to March 2004, the New York City Police Department (NYPD) instituted a policy requiring bag searches as a condition of attending certain demonstrations and applied the practice in

200. *See, e.g.*, Stauber v. City of New York, Nos. 03 Civ. 9162(RWS), 03 Civ. 9163(RWS), 03 Civ. 9164(RWS), 2004 WL 1593870, at *11 (S.D.N.Y. July 16, 2004). In the aftermath of the 9/11 attacks, the New York Police Department (NYPD) implemented a policy requiring the consent to search the possessions of members of the public wishing to attend certain demonstrations. *Id.*

201. *See generally* Terrorism Act, 2000, c. 11, § 44 (U.K.) (authorizing suspicionless searches in certain contexts in efforts to prevent terrorism).

202. *See generally Implementing 9/11 Commission Recommendations: Progress Report 2011*, U.S. DEP'T HOMELAND SEC. (2011), http://www.dhs.gov/xlibrary/assets/implementing-9-11-commission-report-progress-2011.pdf (discussing the Department of Homeland Security's heightened security recommendations)..

approximately ten public demonstrations during that period.[203] In challenging this practice in the case of *Stauber v. City of New York*,[204] the plaintiffs claimed that *Wilkinson v. Forst* was controlling.[205] In *Wilkinson*, the Second Circuit concluded that the police practice of setting up checkpoints to search automobiles and conduct suspicionless searches of individuals and their possessions at a series of KKK and anti-KKK demonstrations, regardless of whether those in attendance were suspected of carrying weapons, violated the Fourth Amendment.[206] In making this determination, the court "balanc[ed] . . . the need for the particular search against the invasion of personal rights that the search entails," and in so doing, considered "the scope of the particular intrusion, the manner in which it [was] conducted, the justification for initiating it, and the place in which it [was] conducted."[207]

The plaintiffs in *Stauber* argued that *Wilkinson* controlled the court's evaluation of the contested bag search policy, and prohibited "blanket bag searches as a condition for entry to demonstrations."[208] In response, the city argued that the contested practice was closer to the magnetometer searches authorized by *United States v. Edwards* than *Wilkinson*, which involved pat-down searches.[209] The district court, however, rejected the city's position and determined that *Edwards* was distinguishable because the bag search in *Edwards* occurred only after a magnetometer alarm, in effect providing additional indicia of individualized suspicion in the context of an airport search.[210] The *Stauber* court also evaluated the factors, enunciated by the Supreme Court in *Bell v. Wolfish*,[211] and concluded that a bag search is not minimally intrusive as it involves a greater expectation of privacy

203. *Stauber*, 2004 WL 1593870, at *11.

204. *Id.* at *1. The plaintiffs sought a preliminary injunction challenging the NYPD's practice of "unreasonably impeding access to demonstration sites," unreasonably depriving access to demonstration sites by using metal "pens" where demonstrators were required to assemble, unreasonably searching the "possessions of persons as a condition of attaining access to certain demonstrations (the 'bag search policy')," and unreasonably using "horses forcibly to disperse peacefully assembled demonstrators." *Id.*

205. *Id.* at *29.

206. Wilkinson v. Forst, 832 F.2d 1330, 1335, 1341–42 (2d Cir. 1987).

207. *Id.* at 1336.

208. *Stauber*, 2004 WL 1593870, at *30.

209. *Id. Edwards* was one of the early airport-security cases authorizing a bag search after the airport magnetometer was activated. United States v. Edwards, 498 F.2d 496, 497–98 (2d Cir. 1974). Additionally, the Second Circuit in *Wilkinson* allowed the use of blanket magnetometer searches of rally attendees based on the demonstrated likelihood of violence at KKK rallies, and past experience that the search policy had inhibited KKK members from carrying weapons. *Wilkinson*, 832 F.2d at 1338, 1340–41.

210. *Stauber*, 2004 WL 1593870, at *30.

211. Bell v. Wolfish, 441 U.S. 520 (1979).

than a magnetometer search;[212] that the location of this search posed a danger of discouraging protected constitutional expression because of potential stigma attached to the decision to search;[213] and finally, that the NYPD had given no notice of its intent to perform bag searches at particular demonstrations, placing potential demonstrators in the position of choosing between submitting to the search or forgoing attendance at the demonstration.[214]

More importantly, the court held that the NYPD had failed to provide specific information on the nature of the threats faced by the officials or how the bag search policy would address those kinds of threats, and rejected the city's general invocation of the terrorist threat as justification for the blanket search policy.[215] Feeding into the court's determination, although not explicitly addressed, was the fact that no written policy controlled the decision of whether bags would be searched, and the decision to search bags was often left to the police officers on-site.[216] This unbridled discretion further weighed against the legitimacy of the city's policy under these circumstances. The court, however, was careful to preserve the city's ability to respond when "such a need is legitimately presented in another context,"[217] and held that the city was not required "to seek prior approval if in the judgment of the NYPD the threat to public safety meets the standards laid out in *Wilkinson* and *Edwards*."[218] In making this determination, the court cited to a special-needs case, *Chandler v. Miller*, for the proposition that "where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable,'" providing as an example "searches now routine at airports and at entrances to courts and other official buildings."[219] Thus, even though the court rejected the city's position in *Stauber*—perhaps because of the lack of evidence of a substantial and real threat or because of the unbridled discretion of the NYPD in implementing the policy—it did recognize that a special need might justify such a policy in appropriate circumstances.[220]

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212. *Stauber*, 2004 WL 1593870, at *30.
213. *Id.* at *31.
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.* at *32.
218. *Id.*
219. *Id.* (quoting Chandler v. Miller, 520 U.S. 305, 323 (1997)).
220. *See id.* at *33 (enjoining bag searches at particular demonstrations but allowing such searches where both the probability of a threat to public safety and a determination that blanket searches could reduce the threat are shown; exempting magnetometer searches as a lesser intrusive means; and distinguishing the injunction against bag searches at public demonstrations from other

Also in 2004, in *American-Arab Anti-Discrimination Committee v. Massachusetts Bay Transportation Authority*, another district court upheld the Massachusetts Bay Transportation Authority's (MBTA) policy of requiring all persons within a territorial zone surrounding the Fleet Center—the location of the Democratic National Convention that year—to submit to a search of all hand-carried bags, briefcases, and other items carried by passengers on the MBTA's trains and buses.[221] In the face of a Fourth Amendment challenge, the MBTA claimed the searches were justified as an administrative search similar to security searches conducted at airports and entrances to courthouses and military installations.[222]

In upholding the search practice, the court recognized the substantial governmental and public interests in the administrative-search regime after evaluating the evidence presented on the threat. In doing so, the court recognized that in addition to air transportation, other mass transportation systems had become targets of terrorism, noting the recent attacks in Madrid on March 11, 2004, which resulted in over 200 dead, and another on a subway in Moscow on February 6, 2004, with over forty dead.[223] Thus, in light of the timing of the Madrid bombings—likely planned to impact the Spanish democratic elections—and recent warnings by the Department of Homeland Security of a heightened threat designed to impact the U.S. democratic process, the court determined the threat to be real.[224] Although the court recognized that assessment of either the likelihood or imminence of any particular threat would be difficult, it analogized the situation to that of airport security, where the lack of threat information as to a particular flight or airport did not "vitiate either the authority or the wisdom of conducting security screenings generally for *all* flights."[225]

The second part of the test—whether the searches were reasonable under the Fourth Amendment—required a determination of "whether the privacy intrusion is reasonable in its scope and effect, given the nature and dimension of the public interest to be served."[226] Acknowledging that the intrusion was "not insignificant," the court nevertheless found the MBTA's policy to be reasonable.[227] In making this determination, the court found

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threats to public safety akin to the Madrid 2004 bombings, since the order addresses only the NYPD's prior policy of bag searches at public demonstrations).

221. Am.-Arab Anti-Discrimination Comm. v. Mass. Bay Transp. Auth., No. 04-11652-GAO, 2004 WL 1682859, at *1 (D. Mass. July 28, 2004).

222. *Id.*

223. *Id.* at *2–4.

224. *Id.*

225. *Id.* at *2.

226. *Id.* at *3.

227. *Id.*

several factors to be important. First, the fact that the MBTA gave notice of the prospective searches both reduced the subjective anxiety (and mitigated any stigma) of MBTA riders, and provided an opportunity for persons who did not want to submit to a search to avoid travel on the MBTA during the applicable time.[228] Second, the search plan was limited in scope and duration, affecting only those subway, rail, and bus lines that would actually pass through the Secret Service security zone, and was limited to the four days of the Convention.[229] Finally, the plan provided little discretion to the police, with the written plan prescribing the inspection method and defining prohibited objects.[230] The plan also subjected police to supervision and required recordkeeping so that the conduct of the inspections could be reviewed afterward.[231]

Thus, in the face of a real threat, a limited-search inspection program with notice to the public and minimal discretion for the implementing officers was held to be reasonable under the Fourth Amendment.[232] The court reached this conclusion only after reviewing the contextual reasonableness balancing required under the Supreme Court's administrative-inspection jurisprudence, even without using the special-needs doctrine to justify the reasonableness of the search program.[233] The MBTA has subsequently established a permanent security inspection program that requires the swabbing of the exterior of random passengers' bags to detect explosives residue.[234]

The impact on other protected constitutional rights, particularly First Amendment free speech, assembly, and press rights would continue to affect the determination of reasonableness under the Fourth Amendment. In *Bourgeois v. Peters*, the Eleventh Circuit evaluated a Georgia city's implementation of a magnetometer search requirement for participants in an

228. *Id.*
229. *Id.*
230. *Id.* at *4.
231. *Id.* at *3–4.
232. *Id.*
233. *Id.* at *3.
234. *MBTA Security Inspections*, MASS. BAY TRANSP. AUTH., http://www.mbta.com/transitpolice/default.asp?id=19050 (last visited June 26, 2014) ("The MBTA has been conducting random security inspections regularly since October 2006. Passengers are selected on a random basis through the use of a computer generated sequence of numbers. These inspections involve the brushing, with a swab, of the exterior of a carry-on. This swab is then placed in explosive trace detection equipment. The entire process should take approximately 10-20 seconds if no positive reading occurs. There are notices posted at the entrance to the station that the inspection is in progress. A passenger may choose not to be inspected but then is prohibited from riding on the MBTA. Through a cooperative partnership with the Transportation Security Administration (TSA), TSA personnel assist us at some of the inspection sites. Their authority to assist is derived from 49 U.S.C. § 114(d).").

annual protest against the School of the Americas at Fort Benning, a protest that had been ongoing for thirteen years.[235] While acknowledging the impact of 9/11, absent "some reason to believe that international terrorists would target or infiltrate this protest," the court rejected both the occurrence of the 9/11 attacks or sporadic elevated Homeland Security threat advisory levels as justifications for the search of the protestors.[236] Tellingly, the court also rejected the city's assertion of a special need separate from law enforcement—in this case, "to keep the protestors and others safe by detecting weapons and contraband."[237] Concluding that the interests in public safety and law enforcement were inextricably intertwined, the court rejected the city's attempt to cast its interest in ferreting out weapons and contraband as separate from its general interest in law enforcement.[238]

In essence, the court found unpersuasive the city's attempt to premise its interests on the public policy motivating the law in question rather than the law itself, concluding that such a holding would eviscerate the protections of the Fourth Amendment.[239] Similar to the Supreme Court's determination in *Ferguson*, the Eleventh Circuit in this case refused to premise its evaluation of the governmental interest pursuant to the Fourth Amendment balancing test at a high level of generality. Rejecting the city's final argument that the magnetometer searches were reasonable under the Fourth Amendment,[240] the Eleventh Circuit instead went back to the general rule "that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specially established and well-delineated exceptions."[241] It concluded that no such exception applied to the facts of this case, and that most of the recognized exceptions to the individualized suspicion requirement applied where a person had a diminished expectation of privacy—a fact not present in this case.[242] Enhancing the city's difficulty was the fact that police had successfully controlled the prior peaceful protests with no magnetometer searches for the last twelve years,[243] and the burden of these searches on protected First Amendment activity also militated against a conclusion of reasonableness

235. Bourgeois v. Peters, 387 F.3d 1303, 1307 (11th Cir. 2004).
236. *Id.* at 1311–12.
237. *Id.* at 1312.
238. *Id.* at 1312–13.
239. *Id.* at 1313.
240. *Id.* at 1316.
241. *Id.* at 1313 (internal quotation marks omitted) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 454–55 (1971)).
242. *Id.* at 1314–15.
243. *Id.* at 1314 n.9.

under the Fourth Amendment.[244] Thus, no evidence was presented in *Bourgeois* of a specific, real threat that the city sought to address through its suspicionless-search program; as such, it was held to be not reasonable under the Fourth Amendment.[245]

2. *Other U.S. Cases*

Concerns over continuing terrorist attacks after 9/11 motivated new suspicionless-search programs designed to detect and deter future terrorist attacks, particularly those affecting mass transportation. Although not directly impacting First Amendment concerns, these cases did, in some instances, implicate the constitutifonal right to interstate travel, akin to the challenges to the early airport-security cases.[246]

Following the July 2005 London bombings, New York City implemented a random subway search program, in which it conducted random but preplanned searches of containers carried into the New York City subways.[247] The purpose of the searches was to detect explosive devices being carried onto the subways, as they had been in the earlier

244. *Id.* at 1318.

245. *See id.* at 1322–23, 1325.

246. Wilkinson v. Forst, 832 F.2d 1330, 1339 (2d Cir. 1987) (explaining that suspicionless searches at courthouses likewise impact the constitutional right to attend public trials). The common factor between the airport and courtroom-security search cases is "the perceived danger of violence, based on the recent history at such locations, if firearms were brought into them." *Id.*

247. Timothy Williams & Sewell Chen, *In New Security Move, New York Police to Search Commuters' Bags*, N.Y. TIMES, (July 21, 2005), http://www.nytimes.com/2005/07/21/nyregion/21cnd-security.html. Numerous other cities have followed New York's lead in the establishment of random bag inspections. *See MBTA Security Inspections*, *supra* note 234; *Metro Transit Police to Step Up System Security*, WASH. METROPOLITAN AREA TRANSIT AUTH. (Dec. 16, 2010), http://www.wmata.com/about_metr o/news/PressReleaseDetail.cfm?ReleaseID=4776; *see also* Gayle Anderson, *Sheriff's Units Increase Random Checkpoint Screenings at Metro Rail Stations*, SOURCE (Nov. 16, 2011), http://thesource.metro.net/2011/11/16/sheriffs-units-increase-random-checkpoint-screenings-at-metro-rail-stations/; Eric Fidler, *Metro Bag Searches Aren't Always Optional*, GREATER GREATER WASH. (June 13, 2013), http://greatergreaterwashington.org/pos t/19170/metro-bag-searches-arent-always-optional/; Mimi Hall, *Amtrak Security Is Visibly on Track*, USA TODAY, July 10, 2008, 11:37 PM, http://usatoday30.usatoday.com/travel/news/2008-07-10-amtrakinside_n.htm; Gene Healy, *New Homeland Security Schemes Prove We're Just Stuck on Stupid*, S.F. EXAMINER, Dec. 22, 2010, http://www.sfexaminer.com/sanfrancisco/new-homeland-security-schemes-prove-were-just-stuck-on-stupid/Content?oid=2166667; Mike Morris, *Metro Says It Won't Do Random Bag Checks*, HOUS. CHRON., http://www.chron.com/news/houston-texas/article/Metro-says-it-won-t-do-random-bag-checks-3514008.php (last updated Apr. 26, 2012, 9:54 PM); Ted Oberg, *Metro Faces Public Backlash Over Counter-Terror Initiative*, ABC 13 EYEWITNESS NEWS (Apr. 27, 2012, 3:36:08 AM PDT), http://abc13.com/archive/8637693/; Robert Thomson, *Metro's Bag Searches Will Treat Everyone Like Terrorists*, WASH. POST (Dec. 18, 2010, 7:39 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/18/AR2 010121802562.html.

London bombings.[248] This "container inspection program" established checkpoints at which police would search the bags of passengers as they entered the station.[249] At each designated location, supervisors would establish the frequency of passengers subject to the search, depending on the passenger volume and available police resources.[250] Passengers selected for search could decline but would not be permitted to enter the subway system with an uninspected item.[251] Refusing the search would not constitute probable cause to arrest or reasonable suspicion for a forcible stop, although attempts to enter the subway system after declining a search could result in arrest.[252]

In *MacWade v. Kelly*, the Second Circuit upheld this program under the special-needs exception to the Fourth Amendment, holding that the exception applied even though passengers retained an undiminished expectation of privacy in their belongings.[253] In its evaluation, the court agreed, as a threshold matter, that the government had established that the program served as its immediate purpose a special need distinct from its general interest in law enforcement—in this case preventing, through deterrence and detection, a terrorist attack on the New York subways.[254] To reach this conclusion, the court used expert testimony concerning terrorist operations and the likely efficacy of a seemingly random checkpoint system to disrupt terrorist planning and coordination.[255] After recognizing the government's special need, the court then balanced the weight and immediacy of the government's interest, the nature of the privacy interest affected by the search, the character of the intrusion, and the efficacy of the search in advancing the government's interest to determine the overall reasonableness of the search under the Fourth Amendment.[256] Based on past thwarted attacks on the New York subways, its continued viability as a terrorist target, and the attacks on mass transportation systems in Madrid, Moscow, and London, the court concluded that "the risk to public safety

248. MacWade v. Kelly, No. 05CIV6921RMBFM, 2005 WL 3338573, at *5 (S.D.N.Y. Dec. 7, 2005), *aff'd*, 460 F.3d 260 (2d Cir. 2006).

249. *Id.* at *5–6.

250. *Id.*

251. *Id.* at *6.

252. *Id.* at *6 n.14 (noting that passengers were subject to arrest if they attempted to re-enter the subway from another entrance after refusing to subject their items to search).

253. *MacWade*, 460 F.3d at 263.

254. *Id.* at 271 ("Where, as here, a search program is designed and implemented to seek out concealed explosives in order to safeguard a means of mass transportation from terrorist attack, it serves a special need.").

255. *Id.* at 266–67.

256. *Id.* at 268–69 (citing Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 830–837 (2002)).

[was] substantial and real,"[257] and then turned its attention to the remaining factors identified by the Supreme Court in *Earls*.[258] In reaching its conclusion after balancing the remaining criteria, the court conceded that the privacy interests of subway passengers in their belongings remained undiminished and not insignificant, but ultimately determined that those interests were outweighed.[259]

In its evaluation, the court also spent considerable effort clarifying that the NYPD had significantly limited the nature and character of the intrusion by providing passengers notice and allowing them to decline the search if they left the subway, searching only containers likely to contain explosives, inspecting containers visually unless it was necessary to manipulate their contents, limiting most searches to only a few seconds, and ensuring the searches occurred in the open with little stigma or fear associated with searches conducted in a more hidden location.[260] Significant to the conclusion that the program was narrowly tailored to its purpose was the fact that the officers "exercise no discretion in selecting whom to search, but rather employ a formula that ensures they do not arbitrarily exercise their authority."[261] By evaluating the program "at the level of its design," the court determined that the program was reasonably effective in deterring terrorist operations, giving significant weight to the executive's decision among various methods to achieve the program's goals of deterring and detecting terrorist attacks.[262] The limitations (or the narrow tailoring) of the program recognized by the court were significant to its conclusion of reasonableness under the Fourth Amendment, particularly in light of the "'enormous dangers to life and property from terrorists' bombing the subway."[263]

Also in 2006, in *Cassidy v. Chertoff*, the Second Circuit reviewed a challenge to a Lake Champlain ferry company's random searches of "persons, cargo, vehicles, or carry-on baggage" conducted pursuant to

257. *Id.* at 272. In evaluating the gravity of the government's interest, i.e., whether it was substantial and real (as required under *Chambers*), the court here traced the development of the special-needs doctrine back to its 1970s-era case *Edwards*, in which it discussed the dire nature of the risk of aircraft hijacking. *Id.* at 271–72. Explaining that *Edwards*'s rationale was "lodged . . . within the broad rubric of reasonableness," the court stated that its reasoning became known as the special-needs exception in *New Jersey v. T.L.O.* *Id.* at 268.

258. *Earls*, 536 U.S. at 838 (upholding drug testing of all high school students participating in any extracurricular activities as a special need).

259. *MacWade*, 460 F.3d at 273.

260. *Id.*

261. *Id.*

262. *Id.* at 273–75.

263. *Id.* at 271–72 (quoting United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974)).

federal law and Coast Guard regulations.[264] The law and implementing regulations were passed after 9/11 to enhance maritime security and required the private ferry company to implement random searches.[265] Once again, the court upheld the searches as reasonable under the special-needs exception to the Fourth Amendment after conducting the contextual reasonableness-balancing test it had applied in *MacWade*.[266] Recognizing an undiminished privacy interest in the passengers' carry-on baggage, and assuming such an interest in the cars' trunks, the court determined, as it had in *MacWade*, that the balancing required under the special-needs exception ultimately supported the reasonableness of these searches.[267]

The court evaluated the character and degree of the governmental intrusion and looked to various factors to determine if the intrusion was substantial or minimal. Among these factors were "the duration of the search or stop, the manner in which government agents determine [whom] to search, the notice given to individuals that they are subject to search and the opportunity to avoid the search by exiting the premises, as well as the methods employed in the search."[268] Because the searches consisted primarily of cursory visual inspections of vehicles and their trunks and brief examinations of the contents of the luggage, the court concluded the intrusion was minimal.[269] As is evident, the limited nature of the intrusion in time and degree as well as the lack of discretion given to the government agents weighed heavily in favor of the conclusion that the intrusion was minimal.

Finally, in evaluating the nature of the government's need, the court gave substantial deference to the Coast Guard's finding that large ferries

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264. Cassidy v. Chertoff, 471 F.3d 67, 72 (2d Cir. 2006).

265. *See id.* at 74 (citing Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 614 (1989)). Because federal laws and regulations required the private ferry company to implement the searches at issue, and because of the government's significant involvement in the search policy, the parties conceded that the search was within the ambit of the Fourth Amendment. *Id.*

266. *Id.* at 75 ("In applying the special needs doctrine, courts must assess the constitutionality of the challenged conduct by weighing 'the government conduct—in light of the special need and against the privacy interest advanced'—through the examination of three factors: (1) the nature of the privacy interest involved; (2) the character and degree of the governmental intrusion; and (3) the nature and immediacy of the government's needs, and the efficacy of its policy in addressing those needs." (citing Palmieri v. Lynch, 392 F.3d 73, 81 (2d Cir. 2004))). This three-part test is taken from *Earls*. Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 830–34 (2002).

267. *Cassidy*, 471 F.3d at 87.

268. *Id.* at 78–79 (citations omitted). In its evaluation, the court considered that there was no evidence suggesting that the police had "unbridled discretion" to carry out the searches in an arbitrary or discriminatory manner, nor was there any allegation of unlawful or discriminatory activity during the searches. *Id.* at 79. Moreover, the court again rejected the claim that the government was limited to the least intrusive means to accomplish its special need. *Id.* at 80.

269. *Id.* at 81.

were at "high risk" of a terrorist attack.[270] Concluding that there was a special need distinct from the general interest in law enforcement in preventing terrorist attacks on large vessels engaged in mass transportation that the Coast Guard had determined to be at a heightened risk of attack, the court again looked to *Edwards*'s description of the increased risk of air hijacking together with its endorsement by the Supreme Court's decision in *Von Raab*.[271] Finally, the court once again rejected any requirement that the least intrusive means be employed to achieve the government's special need, instead recognizing that the choice among reasonable alternatives remains with democratically accountable governmental officials with special knowledge and understanding of the risks.[272] Having determined "that the central purpose of random security screening on high-risk maritime vessels is to deter[] a transportation security incident,"[273] the court concluded that the random security searches at issue were a reasonable means of deterring the prohibited conduct.[274]

The court once again refused to second-guess executive decisions on how to accomplish these security goals, particularly in light of the fact that the government had chosen a minimally intrusive method designed to deter terrorist attacks.[275] Significant to the court's holding was that the intrusion was minimal, and little discretion had been left to the employees conducting the search, limiting the possibility of discriminatory application.[276]

Courts have also applied the special-needs exception in the absence of a direct terrorist justification, and in some cases, the parallel legal reasoning between the special-needs exception and traffic checkpoint cases remains operative as well.[277] Regardless, the fundamental test is consistent across

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270. *Id.* at 84.
271. *See id.* at 83–84.
272. *Id.* at 85.
273. *Id.* (alteration in original) (internal quotation marks omitted).
274. *Id.* at 87.
275. *See id.* at 84.
276. *See id.* at 79.
277. *See, e.g.*, Johnston v. Tampa Sports Auth., 530 F.3d 1320, 1329 (11th Cir. 2008) (per curiam) (affirming NFL-mandated search at the entry to a stadium on the basis of consent rather than the special-needs exception because the conditions of entry and consequences of nonconsent were established solely by a nongovernmental entity); United States v. Amerson, 483 F.3d 73, 81–82 (2d Cir. 2007) (recognizing special need in government collection of DNA from probationers); Palmieri v. Lynch, 392 F.3d 73, 85–86 (2d Cir. 2004) (holding that the special-needs exception applied to trespass by a government agent who was conducting an administrative inspection of property on wetlands); United States v. Green, 293 F.3d 855, 860 (5th Cir. 2002) (holding that the checkpoint at the entrance to a military base was valid under the Fourth Amendment because the purpose of ensuring traffic safety and security was distinct from the general interest in law enforcement, and because officers on the ground had no discretion as to whom to search or the search's scope); *see also* Lynch v. City of New York, 589 F.3d 94, 97 (2d Cir. 2009) (evaluating NYPD policy mandating breathalyzer tests after any police shooting resulting in injury or death

these cases. First, certain regimes of suspicionless searches are reasonable under the Fourth Amendment where the program was designed to serve special needs beyond the normal need for law enforcement, and the program's primary purpose is not a general interest in crime control.[278] Similarly, suspicionless highway checkpoint cases are permissible only if they are not designed to serve the general interest in law enforcement.[279] This requires reviewing courts to conduct inquiries into the "purpose at the programmatic level."[280] Although the subjective intent of officers is irrelevant for normal Fourth Amendment probable-cause analysis, it remains valid for the assessment of programmatic purpose under the special-needs doctrine, or in other cases involving "Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion."[281]

Finally, if a court determines that the primary purpose of the program is not the general interest in law enforcement, the court must conduct a reasonableness-balancing test, weighing the special need against the privacy interests advanced.[282] To do so, a court balances "(1) the nature of the privacy interest involved; (2) the character and degree of the governmental intrusion; and (3) the nature and immediacy of the government's needs, and the efficacy of its policy in addressing those needs."[283] Thus, although seemingly limited to programmatic purpose, subjective issues such as subterfuge are relevant either to the direct evaluation of programmatic purpose or in the analysis of the character and degree of the governmental intrusion. When evaluating the character and degree of government intrusion, courts have routinely analyzed the amount of official discretion, notice, and the ability of the citizen to decline the search, in addition to the

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under the special-needs exception). In *Lynch*, although there were multiple governmental purposes in the policy, the primary purpose was not that of general law enforcement. *Lynch*, 589 F.3d at 102. Once a special need was recognized, then the reasonableness-balancing test was conducted. *Id.* at 103–04. As discussed earlier in this Article, the Supreme Court's analysis of special-needs cases is often inextricably intertwined with highway-checkpoint cases, sharing both legal tests and supporting Supreme Court precedent.

278. *Lynch*, 589 F.3d at 102–03.

279. *See, e.g.*, City of Indianapolis v. Edmond, 531 U.S. 32, 47 (2000); *see also* Illinois v. Lidster, 540 U.S. 419, 426 (2004).

280. *Lynch*, 589 F.3d at 100 (quoting *Edmond*, 531 U.S. at 46).

281. Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080–81 (2011) (emphasis omitted) (describing the holding of *Edmond* and the categories of special-needs and administrative-search cases where "actual motivations do matter" (internal quotation marks omitted)); *see also Lynch*, 589 F.3d at 100.

282. *Lynch*, 589 F.3d at 100.

283. *Id.* (quoting United States v. Amerson, 483 F.3d 73, 83–84 (2d Cir. 2007)).

specific nature of the intrusion, while recognizing that unbridled discretion may lead to government abuse of suspicionless searches.[284]

Because actual motivations do matter for courts evaluating suspicionless-search regimes, consideration of the government's primary programmatic purpose, as well as how the government implements its program, is highly relevant to a determination of reasonableness under the Fourth Amendment. Nevertheless, as the case law indicates, courts remain resistant to examining motivations of individual police officers. This is where a rule of evidence akin to Rule 313, focusing on both the purpose of the search and its implementation, may prove valuable by allowing courts a means to capture objectively these inherently subjective elements.

B. British Approach to Suspicionless Terrorism Searches: How Complete Discretion Leads to Racial Disparities and Adverse Effects on Fundamental Rights and Is Incompatible with the Rule of Law

Examination of Britain's implementation of a similar antiterrorist suspicionless-search regime is highly instructive in illustrating the evils that unbridled police discretion involve, including racial, ethnic, and religious discrimination, as well as interference with free speech, press, and assembly rights. Many of these evils are mirrored in recent U.S. cases, particularly in challenges to the NYPD's controversial stop-and-frisk program.[285]

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284. *See, e.g.*, MacWade v. Kelly, 460 F.3d 260, 275 (2d Cir. 2006) (holding that notice and opportunity to decline a search are beneficial aspects of a suspicionless-search program because those factors minimize intrusiveness).

285. *See* Thomas Kaplan, *Cuomo Seeks Cut in Frisk Arrests*, N.Y. TIMES, June 3, 2012, http://www.nytimes.com/2012/06/04/nyregion/cuomo-seeks-cut-in-stop-and-frisk-arrests.html; *see also* Russ Buettner & William Glaberson, *Courts Putting Stop-and-Frisk Policy on Trial*, N.Y. TIMES, July 10, 2012, http://www.nytimes.com/2012/07/11/nyregion/courts-putting-stop-and-frisk-policy-on-trial.html. A New York court, in analyzing the data from 4.4 million stops conducted by the NYPD from January 2004 to June 2012, found that 83% of the stops involved African-American or Hispanic persons—with those two groups accounting for a little over half of the population—and concluded that these numbers indicated racial discrimination. *See* Editorial, *Racial Discrimination in Stop-and-Frisk*, N.Y. TIMES, Aug. 12, 2013, http://www.nytimes.com/2013/08/13/opinion/racial-discrimination-in-stop-and-frisk.html ("The evidence clearly showed that the police carried out more stops on [B]lack and Hispanic residents even when other relevant factors were controlled for, and officers were more likely to use force against minority residents even though stops of minorities were less likely to result in weapons seizures than stops of whites."); *see also* Floyd v. City of New York, 959 F. Supp. 2d 540, 558–59 (S.D.N.Y. 2013), *superseded per curiam in part sub nom.* Ligon v. City of New York, 736 F.3d 118 (2d Cir. 2013), *vacated per curiam in part*, 743 F.3d 362 (2d Cir. 2014); *see also* Ligon v. City of New York, 925 F. Supp. 2d 478, 484–85 (S.D.N.Y. 2013). The evidence further supported claims that the NYPD regularly performed stop-and-frisks in the absence of reasonable suspicion and routinely stopped persons based, at least in part, on race or ethnicity. *See Floyd*, 959 F. Supp. 2d at 559–61; *see also* Sherry F. Colb, *A Federal Court Holds New York Stop-and-Frisk Policy Unconstitutional in* Floyd v. City of New York, JUSTIA (Aug. 21, 2013), http://verdict.justia.com/2013/08/21/a-federal-

However, the prevalence of stop-and-frisk programs in the United Kingdom, a country that shares similar liberty values as the U.S., raises the specter that these common evils are inherent in, and arise directly from, unbridled governmental discretion.

The UK's approach is captured in § 44 of the Terrorism Act of 2000 (the Act), which authorizes police to stop and search persons and vehicles at random where it would be expedient to prevent acts of terrorism.[286] This section arose from an earlier counterterrorism provision to combat IRA bombings in London in the 1990s. This law provides for a two-step process. First, if a senior police officer believes it "*expedient* for the prevention of acts of terrorism," the officer may authorize use of the § 44 authority within certain specified geographic areas for up to twenty-eight days.[287] Second, the Secretary of State must then confirm the authorization within forty-eight hours.[288] Renewals of the authority must comply with the same procedures, and the existence and contents of such authorizations are not available to the public.[289] If authorized, police are not required to have reasonable suspicion prior to exercising the authority to search individuals and vehicles.[290] Although the power may only be exercised for the purpose of searching for items that could be used in connection with terrorism, a police officer is not required to have grounds for suspecting the presence of such

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court-holds-new-york-stop-and-frisk-policy-unconstitutional-in-floyd-v-city-of-new-york (explaining two baselines that can potentially serve as an appropriate race-neutral standard to measure racial disparities in police stops: (1) the proportion of African-American and Hispanic criminal suspects in the relevant area, or (2) the population demographics and crime rates in the relevant area). Although the cases were stayed for other reasons, the data produced indicate that unfettered police discretion can result in racial discrimination. The ultimate result should provide additional insights into the need for an articulation of reasonable suspicion, and is relevant to an evaluation of potential problems in search protocols based on special needs. Dispensing with the requirement for reasonable suspicion, either de facto (as in this case) or de jure (as in the British § 44 searches discussed below) leads to inevitable governmental misuse, impacting equal protection, free speech, and free assembly rights.

286. Terrorism Act, 2000, c. 11, §§ 43–44 (U.K.). The UK police have the authority to stop and search individuals under a variety of legislation, each with its own prerequisites. *Id.* This analysis will involve only the power under §§ 43 and 44 of the 2000 Terrorism Act, which prior to the 2010 European Court of Human Rights opinion in *Gillan v. United Kingdom*, did not require any predicate reasonable belief on the part of the police in order to conduct a search. Gillan v. United Kingdom, 2010-I Eur. Ct. H.R. 223, 225. *See generally* JOHN IP, SUSPICIONLESS SEARCHES AND THE PREVENTION OF TERRORISM *in* COUNTER-TERRORISM AND BEYOND: THE CULTURE OF LAW AND JUSTICE AFTER 9/11 88 (Andrew Lynch et al. eds., 2010) (providing an excellent discussion of both the *MacWade* case and the facts and authorities underlying *Gillan v. United Kingdom*).

287. *Gillan*, 2010-I Eur. Ct. H.R. at 225 (emphasis added).

288. *Id.*

289. Terrorism Act, 2000, c. 11, § 46(7) (U.K.).

290. *Gillan*, 2010-I Eur. Ct. H.R. at 227.

items.[291] While supposedly limited to twenty-eight days, successive § 44 authorizations covering the entirety of London had been ongoing from the Act's inception in February 2001 until 2010, when the European Court of Human Rights (ECHR) held in *Gillan v. United Kingdom* that the program violated the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).[292]

In 2003, a graduate student named Kevin Gillan traveled to London to protest an arms fair in East London, and was stopped and searched near the protest site by two policemen, while Pennie Quinton, a freelance journalist, was also stopped and searched when she went to the arms fair to film the protest.[293] Both searches were conducted under the authority of § 44. Gillan's search took approximately twenty minutes, while Quinton's lasted from five to thirty minutes.[294] Both Gillan and Quinton contested the searches in lower courts and, when unsuccessful, pursued an appeal to the House of Lords.[295] On appeal, the House of Lords rejected their claim that a proper construction of the Act permitted the § 44 authorization to be made only if the authorizing senior police official "had reasonable grounds for considering that the powers were necessary and suitable . . . for the prevention of terrorism," concluding that the word "expedient" in the Act was distinct from "necessary."[296] The House of Lords also rejected their contentions that the continuous, rolling § 44 authorizations for London in effect since the Act's inception were ultra vires, and that their authorization had become a routine bureaucratic inference without the informed consideration required by §§ 43 and 44.[297] Finally, the House of Lords also

291. The "constable" may detain the person or vehicle for as long as necessary to conduct the search and may only require the removal of headgear, footwear, outer coat or jacket, or gloves, and must provide a written statement that the search occurred under the authority of § 44 if requested. Terrorism Act, 2000, c. 11, §§ 44–45 (U.K.). Failure to comply with the search or interfering with the search is a criminal offense. *See* Terrorism Act, 2000, c. 11, §§ 45, 47 (U.K.). The police were required to comply with Code A of the Police and Criminal Evidence Act 1984 (PACE), issued by Secretary of State, together with general guidance on the conduct of searches; however, PACE did not alter § 44's lack of reasonable suspicion. *See Gillan*, 2010-I Eur. Ct. H.R. at 244.

292. *Gillan*, 2010-I Eur. Ct. H.R. at 265; *see* R v. Comm'r of Police for the Metropolis, [2006] UKHL 12, [2006] A.C. (H.L.) 307, 23 (appeal taken from Eng. & Wales) (showing how English courts once allowed suspicionless searches without any boundaries).

293. *Comm'r of Police for the Metropolis*, [2006] A.C. at 1–2.

294. *Id.*

295. *Gillan*, 2010-I Eur. Ct. H.R. at 231–34.

296. *Id.* at 234–35.

297. *Id.* at 236.

rejected claims that § 44 searches violated Gillan's and Quinton's rights under Articles 5, 8, 10, and 11 of the Convention.[298]

Gillan and Quinton then brought a complaint to the ECHR, alleging that the § 44 searches subjected them to a deprivation of liberty under Article 5, § 1 of the Convention; was an interference with their right to respect for their private lives under Article 8; and a violation of their rights to freedom of expression under Article 10, and freedom of assembly under Article 11.[299] The court rejected the UK's contention that the brevity of the detention and the nature of the stop and search did not necessarily amount to a deprivation of liberty under Article 5.[300] Instead, finding the element of coercion and complete deprivation of the freedom of movement as "indicative of a deprivation of liberty within the meaning of Article 5 § 1," the court nevertheless did not finally determine the issue because it held that the § 44 stop and search did amount to an interference with Gillan's and Quinton's Article 8 right to respect for their private lives.[301]

Central to its decision concerning interference with Article 8 rights was the interference with the physical and psychological integrity and personal autonomy of a person. For the court, "use of the coercive powers conferred by the legislation to require an individual to submit to a detailed search of his person, his clothing and his personal belongings amounts to a clear interference with the right to respect for private life."[302] Addressing the exception allowing such interference when it was "in accordance with law" under Article 8, paragraph 2, the court explained that to be "in accordance with the law," the measure must "have some basis in domestic law" and be "compatible with the rule of law."[303] To meet these requirements, domestic law

> must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. . . . [I]t would be contrary to the rule of law, one

298. *See id.* at 236–37; IP, *supra* note 286, at 94 ("The House of Lords held that the stop-and-search, given its brief duration, was not a deprivation of liberty for the purposes of Article 5 of the European Convention. Further, even if it were a deprivation of liberty, the exception under Article 5(1)(b)—lawful detention in order to secure the fulfillment of an obligation prescribed by law—would apply. A claim based on Article 8 (respect for private and family life) was rejected on the basis that the right would not be infringed by the relatively superficial search involved in a § 44 stop-and-search, and that even if it were, it was a justified and proportionate counter-terrorism measure. Further claims based on Articles 10 (free expression) and 11 (free assembly) were also dismissed on the basis that they would not be infringed by the proper exercise of the § 44 power." (footnotes omitted)).

299. *Gillan*, 2010-I Eur. Ct. H.R. at 231.

300. *See id.* at 254–55.

301. *Id.*

302. *Id.* at 257.

303. *Id.* at 262.

> of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.[304]

The court recognized that § 44 had a basis in domestic law, but concluded that the powers conferred were "neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. They [were] not, therefore, 'in accordance with the law.'"[305]

The factors leading to the court's conclusion on this matter were as follows: the lack of any limitations on the statutory authority for the search authorization, with the words "expedient for the prevention of acts of terrorism" to be so broad as to make judicial challenge of its use difficult; the failure of the geographical and temporal limits in the Act as a "real check" on the issuing of authorization as shown by the continuous renewal of London's authorization since the powers were first granted; the limited protections provided by the Independent Reviewer's annual reports; the breadth of discretion conferred on the individual police officer, with no requirement of any suspicion, authorizing stop and searches on hunches or intuition; and the limitations on any meaningful judicial review given the broad nature of the statutory language requiring no suspicion at all to initiate a search.[306]

Of particular concern to the court was the "statistical and other evidence showing the extent to which resort is had by police officers to the powers of stop and search under section [§] of the Act," and the "clear risk of arbitrariness" shown by the disproportionate use of the powers against Black or Asian persons in the available statistics, a risk recognized by the House of Lords.[307] Fundamentally, it was "the absence of any obligation on the part of the officer to show reasonable suspicion," rendering any legal challenge to its exercise futile, that led to the court's conclusion that the powers were "neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse," and were therefore not in accordance with law and a violation of Article 8 of the Convention.[308] Similar to its disposition of the allegation of violations of Article 5 rights, the court also

304. *Id.*
305. *Id.* at 265.
306. *Id.* at 263–65.
307. *Id.* at 264–65.
308. *Id.* at 265.

declined to examine the allegations of Article 10 and 11 violations, given its conclusion that Gillan's and Quinton's Article 8 rights had been violated.[309]

Significant to both the House of Lords and the ECHR were concerns that § 44 authority was being abused in a variety of ways. Specific concerns arose over the terrorist search authority being used as a convenient subterfuge for general criminal law enforcement investigations rather than being limited strictly to terrorist investigations; being used deliberately to balance racially disproportionate statistics; being used in a racially disproportionate manner; being used to intimidate journalist and peaceful protestors; and being used ubiquitously rather than as a narrow emergency power. Provisions of the Act required the government to provide annual reports on the efficacy of the Act to Parliament, in addition to annual reports required by the Criminal Justice Act of 1991, which required the Secretary of State to publish information on the criminal justice system with reference to avoiding racial discrimination.[310] The data in these reports show an exponential increase in the use of the § 44 search authority overall, with a significantly disproportionate impact on racial minorities. Total searches rose from 33,177 searches in 2004–2005, to 44,543 in 2005–2006, 37,000 in 2006–2007, 117,278 in 2007–2008, to over 200,000 in 2008–2009, and falling back to just over 100,000 in 2009–2010.[311]

As an illustrative example of the racial disparities, of the increase in searches between 2003–2004 and 2004–2005, searches of Asian people increased by 84%, and searches of Black people increased by 51%, with searches of White people increasing only 24% in the same period.[312] The annual reports of the Independent Reviewer required under the Act highlighted increasing controversy over the operation of § 44 search powers, noting that the entire City of London was subject to continuous rolling authorizations. In the six years of these reports analyzed by the ECHR, the Independent Reviewer became increasingly concerned with the escalating use of the power by police with inadequate training on its scope and limitations, resulting in negative impacts on communities and citizen comfort with the practice. Complaints of police targeting journalists and unpopular protestors,[313] other misuses of the search authority—including

309. *Id.* at 266.
310. *Id.* at 246, 248.
311. *Id.* at 248.
312. *Id.*
313. *Id.* at 230–31. *See generally Independent Reviews on the Terrorism Act 2000 and the Terrorism Act 2006*, HOME OFF., http://tna.europarchive.org/20100419081706/http:/security.homeoffice.gov.uk/news-publications/publication-search/legislation/terrorism-act-2000/independent-review-responses/ (last visited July 28, 2014) (reporting annually the impact of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006).

stops of nonminorities solely to produce a racial balance in § 44 statistics—and disproportionate uses of the authority impacting racial and ethnic minorities, joined with evidence of dramatic increases in such searches, "show that [§] 44 [was] being used as an instrument to aid non-terrorism policing on some occasions."[314] These concerns led the Independent Reviewer to call for limits on the application of this exceptional power.[315]

In response to the ECHR's opinion, in July 2010 the Home Secretary suspended the use of § 44 to support suspicionless searches and initiated a review process to evaluate possible government responses.[316] In its report, the UK government evaluated possible abuses of power and sought remedies to bring the statutory authority into compliance with the UK's obligations under the Convention; it also outlined perceptions of racial profiling in the use of § 44's search powers and raised questions concerning both its necessity—since few such searches led to convictions for terrorism offenses—and the targeting of journalist and photographers using these powers.[317] Its recommendations included retaining the § 44 suspicionless-search authority but severely limiting its use to situations where there was reasonable suspicion that an act of terrorism will take place and that the stop-and-search powers are necessary to prevent such an act.[318] Limiting the authorization process, both geographically and temporally, to situations necessary to prevent specific suspected acts of terrorism was one of the main recommendations of the Independent Reviewer's report, and included

314. *See Gillan*, 2010-I Eur. Ct. H.R. at 247.

315. *See* LORD CARLILE OF BERRIEW, Q.C., REPORT ON THE OPERATION IN 2006 OF THE TERRORISM ACT 2000 32 (2007), *available at* http://tna.europarchive.org/20100419081706/http://security.homeoffice.gov.uk/news-publications/publication-search/legislation/terrorism-act-2000/independent-review-responses/lord-carlile-report-07?view=Binary.

316. *See generally* Terrorism Act 2000 (Remedial) Order 2011, S.I. 2011/631, art. 2 (U.K.), http://www.legislation.gov.uk/uksi/2011/631/pdfs/uksi_20110631_en.pdf (suspending the previously authorized suspicionless searches); DAVID ANDERSON, Q.C., REPORT ON THE OPERATION IN 2010 OF THE TERRORISM ACT 2000 AND OF PART 1 OF THE TERRORISM ACT 2006 65–66 (2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243552/9780108510885.pdf [hereinafter REPORT ON THE OPERATION IN 2010] (discussing the findings of the government-initiated review of the antiterrorism legislation).

317. SEC'Y OF STATE FOR THE HOME DEP'T, REVIEW OF COUNTER-TERRORISM AND SECURITY POWERS: REVIEW FINDINGS AND RECOMMENDATIONS 15–16, 21 (2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97972/review-findings-and-rec.pdf [hereinafter REVIEW FINDINGS AND RECOMMENDATIONS]; SEC'Y OF STATE FOR THE HOME DEP'T, REVIEW OF COUNTER-TERRORISM AND SECURITY POWERS: SUMMARY OF RESPONSES TO THE CONSULTATION 1–2 (2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97969/sum-responses-to-cons.pdf [hereinafter SUMMARY OF RESPONSES TO THE CONSULTATION].

318. REVIEW FINDINGS AND RECOMMENDATIONS, *supra* note 317, at 18–19.

substantial statutory guidance on the exercise of discretion by the police.[319] In January 2011, the Home Secretary recommended a moratorium on the use of § 44 searches of individuals, forcing reliance on § 43's reasonable-suspicion requirement. As a result, § 44 was repealed and replaced by § 60 of the 2012 Protections of Freedom Act.[320] Under § 60, searches in "authorisation zones" require reasonable suspicion that an act of terrorism will take place.[321] As a consequence of these reforms, the number of terrorism searches conducted during 2010–2011 was 9,652, falling from 102,504 in 2009–2010.[322]

C. *Common Problems*

The three lines of U.S. cases that support searches in the absence of particularized suspicion, as well as the British experience with § 44 searches, show that a core concern is unbridled discretion of the government agents performing the search. While subjective intent on the part of these agents is irrelevant when probable cause is required to justify a search, a key concern in the special-needs, vehicle-checkpoint, and administrative-inspections cases is the concern that these searches, because of the very lack of any particularized suspicion, are particularly susceptible

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319. *Id.*; *see also* Nick Dent, *Section 44: Repeal or Reform? A Home Secretary's Dilemma*, U. ESSEX, http://projects.essex.ac.uk/ehrr/V8N1/Dent.pdf (last visited June 26, 2013).

320. *Section 44 Terrorism Act: The Protection of Freedoms Act*, LIBERTY, https://www.liberty-human-rights.org.uk/human-rights/justice-and-fair-trials/stop-and-search/section-44-terrorism-act (last visited Oct. 6, 2014).

321. *Protection of Freedoms Bill: Explanatory Notes*, PARLIAMENT.UK (Feb. 11, 2011), http://www.publications.parliament.uk/pa/cm201011/cmbills/146/en/11146en.htm; *Protection of Freedoms Bill, Fact Sheet—Part 4: Counter-Terrorism Powers*, HOME OFF. (Oct. 2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/98407/fact-sheet-part4.pdf; Max Rowlands, *Statewatch Analysis UK: Review of Counter-Terrorism Powers Fails to Deliver Definitive Change*, STATEWATCH 4, http://www.statewatch.org/analyses/no-135-uk-ct-powers.pdf (last visited July 28, 2014).

322. *See 91% Decrease in Terrorism Stop-and-Search Powers*, BBC, http://www.bbc.co.uk/news/uk-15290176 (last updated Oct. 13, 2011, 14:27); *Police Use of Terrorism Stop and Search Powers Drops 90 Per Cent*, TELEGRAPH, Oct. 13, 2011, 11:26 AM BST, http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/8824203/Police-use-of-terrorism-stop-and-search-powers-drops-90-per-cent.html; *see also* Teodora Beleaga, *Terror Stop and Police Statistics*, GUARDIAN, Apr. 19, 2012, 12:17 PM EDT, http://www.theguardian.com/news/datablog/2010/jun/10/stop-and-search-terror-police-statistics; *Rules on Stop and Search Changed*, BBC NEWS U.K., http://www.bbc.co.uk/news/10555430 (last updated July 8, 2010, 20:22). *But see* Pat Strickland, *Stop and Search*, HOUSE OF COMMONS LIBR. 8 (Jan. 23, 2014), www.parliament.uk/briefing-papers/SN03878.pdf (discussing searches under § 47A, which was adopted as an interim change after the ECHR's decision in *Gillan & Quinton*). From 2010 to 2011, the number of searches was 11,792, down from a peak of 210,000 in 2008–2009, with the decrease coinciding with the replacement of § 44 with § 47A. Strickland, *supra* note 322, at 8. The grounds for the use of § 47A did not authorize its use during the Royal Wedding in April 2011. *See* REPORT ON THE OPERATION IN 2010, *supra* note 316, at 7.

to misuse, subterfuge, or pretext by the government. This weakness potentially eviscerates the protections of the Fourth Amendment. Because of this, courts should be particularly concerned at ferreting out instances or programs designed to achieve illegitimate ends or that involve means prohibited by the Constitution, such as profiling based on race, ethnicity, or religion. Identification of programmatic purpose at the appropriate level can prove difficult. Evaluation of an individual police officer's subjective intent is similarly difficult to discern but remains a core judicial task. It is in the evaluation of both the programmatic intent and the implementation of special-needs search programs that a rule similar to Rule 313 could prove valuable.

Rule 313, which uses the mechanism of shifting presumptions that shift the burden of persuasion to the government to disprove subterfuge at a high evidentiary level—that of clear and convincing evidence—can prove a valuable tool in the evaluation of special-needs searches. Even under the special-needs exception in the U.S., unbridled discretion is constitutionally suspect. By restoring the principled cabining of police discretion by courts through the use of objective evidentiary tests, the evils of unchecked police discretion can be curtailed. The creation of an analog Federal Rule of Evidence would serve multiple purposes. First, it would provide a means for defense counsel to attack suspected subterfuge searches, legitimizing the inquiry and providing a rule under which a motion to exclude can be made and discovery can be sought. Second, because of its high evidentiary burden, it would provide incentives to the police to ensure that special-needs searches can be justified both at their inception, and in implementation when challenged in court. Finally, enactment of a federal rule of evidence akin to Rule 313 that restricts police discretion would also contribute to the achievement of a long-term constitutionally supportable balance between national security and liberty, and recognizes that the personal autonomy and liberty protected by the Fourth Amendment is both an individual and societal good.[323]

V. PROPOSAL

In an attempt to balance the legitimate needs of military commanders to inspect their soldiers to ensure readiness and good order and discipline with respect for soldiers' constitutional rights, the President promulgated Rule 313.[324] This rule explicitly authorizes the conduct of inspections by

323. Reinert, *supra* note 8, at 1521.

324. *See* MCM, *supra* note 6, MIL. R. EVID. 313.

Rule 313. Inspections and inventories in the armed forces.

military leaders "to determine and ensure the security, military fitness, and good order and discipline" of the "unit, organization, installation, vessel, aircraft, or vehicle."[325] Codifying the long-standing authority to conduct

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(a) *General rule.* Evidence obtained from inspections and inventories in the armed forces conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) *Inspections.* An "inspection" is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle. An inspection may include but is not limited to an examination to determine and to ensure that any or all of the following requirements are met: that the command is properly equipped, functioning properly, maintaining proper standards of readiness, sea or airworthiness, sanitation and cleanliness, and that personnel are present, fit, and ready for duty. An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband. An order to produce body fluids, such as urine, is permissible in accordance with this rule. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule. If a purpose of an examination is to locate weapons or contraband, and if: (1) the examination was directed immediately following a report of a specific offense in the unit, organization, installation, vessel, aircraft, or vehicle and was not previously scheduled; (2) specific individuals are selected for examination; or (3) persons examined are subjected to substantially different intrusions during the same examination, the prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of this rule. Inspections shall be conducted in a reasonable fashion and shall comply with Mil. R. Evid. 312, if applicable. Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected. Unlawful weapons, contraband, or other evidence of crime located during an inspection may be seized.

(c) *Inventories.* Unlawful weapons, contraband, or other evidence of crime discovered in the process of an inventory, the primary purpose of which is administrative in nature, may be seized. Inventories shall be conducted in a reasonable fashion and shall comply with Mil. R. Evid. 312, if applicable. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inventory within the meaning of this rule.

Id.

325. MCM, *supra* note 6, MIL. R. EVID. 313 analysis, at A22-21 to -26. Although Rule 313 included an explicit authorization for inspections, the drafters recognized that it merely codified the longstanding law of military inspections. *Id.*

> [A]n inspection is conducted for the primary function of ensuring mission readiness, and is a function of the inherent duties and responsibilities of those in the military chain of command. Because inspections are intended to discover, correct, and deter conditions detrimental to military efficiency and safety, they must be considered as a condition precedent to the existence of any effective armed force and inherent in the very concept of a military unit. . . .
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> . . .
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> An effective armed force without inspections is impossible—a fact amply illustrated by the unfettered right to inspect vested in commanders throughout the armed forces of the world.

inspections of military units and personnel,[326] Rule 313 also recognizes that commanders will have secondary motives beyond those authorized by the rule. Rule 313(b) specifically authorizes inspections for contraband, with its inherent possibility of prosecution.[327] Although commanders may have a secondary motive to prosecute those in possession of contraband, for an inspection to be legitimate under Rule 313, its primary purpose must be administrative—to ensure the fitness of the military unit.[328] The inquiry into the commander's primary purpose in conducting an inspection is analogous to the Supreme Court's inquiry in *Ferguson* into the "primary" purpose of the special-needs program, or as explained in *Edmond*: "[P]rogrammatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion."[329]

Despite the long history of the military inspection and its necessity and constitutional validity, the drafters of Rule 313 recognized three circumstances where inspections for contraband objectively raise a strong likelihood of subterfuge: (1) when the examination was directed immediately following a report of a specific offense in the unit and was not previously scheduled; (2) when specific individuals were selected for examination; and (3) when inspected persons are subject to substantially different intrusions during the same examination.[330] In these three circumstances, Rule 313 shifts the burden to the prosecution to prove by clear and convincing evidence that the primary "purpose of the examination was to determine and ensure security, military fitness, and good order and discipline, and not for the primary purpose of prosecution."[331] This language was added to Rule 313 "to provide objective criteria by which to measure a subjective standard, i.e., the commander's purpose."[332] Rather than make the existence of the circumstances conclusive, however, the drafters chose instead to employ a burden-shifting rule that "provide[s]

Id. at A22-21.

326. *See* United States v. Middleton, 10 M.J. 123, 127–28 (C.M.A. 1981) (sustaining the authority of commanders to conduct unit inspections).

327. MCM, *supra* note 6, MIL. R. EVID. 313(b).

328. *See* MCM, *supra* note 6, MIL. R. EVID. 313 analysis, at A22-21.

329. *See* Ferguson v. City of Charleston, 532 U.S. 67, 81 (2001); City of Indianapolis v. Edmond, 531 U.S. 32, 45–46 (2000).

330. MCM, *supra* note 6, MIL. R. EVID. 313(b); *see also* MCM, *supra* note 6, MIL. R. EVID. 313(b) analysis, at A22-25 ("'Specific individuals' means persons named or identified on the basis of individual characteristics, rather than by duty assignment or membership in a subdivision of the unit, organization, installation, vessel, aircraft, or vehicle such as a platoon or squad, or on a random basis.").

331. MCM, *supra* note 6, MIL. R. EVID. 313(b) analysis, at A22-25.

332. United States v. Jackson, 48 M.J. 292, 298 (C.A.A.F. 1998) (emphasis omitted) (internal quotation marks omitted).

concrete and realistic guidance for commanders to use in the exercise of their inspection power, and for judicial authorities to apply in reviewing the exercise of that power."[333]

The implementation of this rule has been controversial. Military courts-martial judges are often required to evaluate and parse evidence of the commander's intent in ordering the inspection. The triggering of the rule is often clear-cut,[334] but the evaluation of whether the government has met its burden to show by clear and convincing evidence that a proper purpose motivated the inspection is often difficult and dependent on the military judge's determination of the credibility of the ordering and implementing official's testimony.[335]

But despite the difficulty of evaluating the subjective motivations of the persons involved in a military inspection, the existence of Rule 313

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333. MCM, *supra* note 6, MIL. R. EVID. 313(b) analysis, at A22-26.

334. Although there are practical difficulties in scaling this rule of evidence up to address a large city's implementation of a suspicionless-search regime, some instances of misuse will still be relatively obvious and accessible to civilian defense attorneys. For example, the establishment of a subway checkpoint immediately following the report of a robbery in a neighborhood, when such a checkpoint was not planned prior to the report, would support the inference of subterfuge, just as it would in the military context. This is not to understate the difficulties of the defense establishing the predicates to trigger the rule in all instances, but the existence of the rule provides an incentive to the police not to abuse the special needs search exception in the first place, and does incentivize the prior planning of both the searches and their implementation by higher level, "insulated" police officials, leaving little discretion to officers in the field. *But see* Corn, *supra* note 7, at 162–63.

335. *See, e.g.*, United States v. Ayala, 69 M.J. 63, 64–66 (C.A.A.F. 2010) (applying the clear-and-convincing standard and holding that the primary purpose of the commander's policy requiring a follow-up urinalysis after a positive result from a prior random urinalysis was not to obtain evidence for trial; therefore, the evidence was obtained from a lawful inspection); United States v. Attucks, 64 M.J. 518, 521–522 (A.F. Ct. Crim. App. 2006) (finding none of the three Rule 313(b) triggering circumstances present; therefore, the appropriate standard was preponderance of the evidence); *Jackson*, 48 M.J. at 296 (finding that the government satisfied the clear-and-convincing standard necessary to rebut the presumption under Rule 313); United States v. Thatcher, 28 M.J. 20, 25 (C.M.A. 1989) (finding that the government failed to establish under the clear-and-convincing standard that the primary purpose of the room inspection was not the collection of evidence where the defendant was the primary suspect in the theft of tools and where no further inspections of other rooms were conducted until later in the day); United States v. Parker, 27 M.J. 522, 524–25, 527–28 (A.F.C.M.R. 1988) (holding that the government failed to meet the clear-and-convincing standard that urinalysis inspection was for a proper purpose when the two conditions of Rule 313(b) were met); United States v. Ellis, 24 M.J. 370, 371–72 (C.M.A. 1987) (holding an inspecting officer's inspection of a zipped bag hanging from a bed during a health-and-welfare inspection did not stray from the authorizing officer's instructions to check for "neatness and cleanliness" and confiscate any unauthorized property found within the barracks rooms); United States v. Johnston, 24 M.J. 271, 274–75 (C.M.A. 1987) (holding that the selection of a date based on operational requirements did not violate the regulation requiring that urinalysis dates be chosen at random; therefore, the search was not a subterfuge); United States v. Shepherd, 24 M.J. 596, 600 (A.F.C.M.R. 1987) (finding nothing in the record to support a conclusion that the search of the defendant was a subterfuge).

serves three important purposes. First, it provides a concrete authorization for judges to evaluate the subjective motivations of the government officials ordering and performing the searches, with explicit burdens of proof established by law. Second, it establishes a government policy protective of the Fourth Amendment through its requirement of clear and convincing evidence to rebut the presumption. Third, and perhaps most importantly, the existence of Rule 313 ensures that the legal standard is incorporated into the government's planning and implementation of the inspections themselves.

Military commanders, knowing the requirements for valid inspections under Rule 313, often plan the parameters of inspections in depth, selecting persons to be inspected either at random or using neutral selection criteria that will withstand scrutiny and challenge under Rule 313—e.g., every third person on a unit roster being tested in a routine urinalysis, often with the pattern determined by random draw, or searching every person living in the barracks. Persons implementing inspections are trained to inspect each person in the same way and to the same level of detail, with increased scrutiny only allowed if it is justified by an articulable suspicion or probable cause developed during the inspection.[336] Thus, the knowledge that the military commander may be required to prove a valid purpose in court ensures not only the education of government officials authorizing the searches on the applicable law but also their tailoring of inspections to comply with the law in the first instance. Similar effects on civilian police authorities can be expected if an analogous federal rule is adopted. While courts already evaluate many of the factors that are delineated in Rule 313,[337] such a rule would provide a framework for courts to look into the details of purpose and implementation, while still giving appropriate deference to the Executive in its determination of security needs. If enacted by Congress, the existence of such an analog rule would legitimize the Judicial Branch's inquiries into these security searches. Further, the rule's use of rebuttable presumptions would create incentives for the police to plan their operations with the knowledge that they would be subject to challenge if mismanaged.

The creation of a rebuttable presumption of improper purpose in the circumstances identified in Rule 313(b) is particularly relevant to searches conducted under the special-needs exception. The Supreme Court has required a special need apart from the general interest in law

336. *See, e.g.*, Cpt. Craig E. Tellcr, *Litigating the Validity of Compulsary Urinalysis Inspections Under Mil. R. Evid. 313(b)*, ARMY LAW., Mar. 1986, at 41, 43–44; United States v. Hay, 3 M.J. 654, 656 (A.C.M.R. 1977).

337. *See* MacWade v. Kelly, 460 F.3d 260, 269 (2d Cir. 2006).

enforcement.[338] This is remarkably similar to the requirement for a nonprosecutorial primary purpose required by Rule 313(b). Also, the three circumstances in Rule 313(b) are relevant in ferreting out improper purposes or implementation by government agents in special-needs searches, and serve the additional purpose of cabining the discretion of the implementing government officers.

Under Rule 313(b), the burden of persuasion shifts when the timing of the decision to search occurs after the report of a specific offense, in effect creating a presumption that the primary purpose of such a search is to gather evidence of criminal wrongdoing.[339] The burden also shifts when particular persons are chosen to be searched, or when specific persons are subject to different intrusions in the inspection.[340] These three circumstances are objective manifestations of a possible improper purpose, and although not barring the evidence categorically, Rule 313(b) instead imposes a higher burden on the government in order to use such evidence, serving as a deterrent to subterfuge searches.

Additionally, under Rule 313(b), while the prosecution can show an improper purpose in the absence of these three circumstances, it "need not meet the higher burden of persuasion when the issue is whether the commander's purpose was prosecutorial, in the absence of these circumstances."[341] Thus, implementing a similar rule in the Federal Rules of Evidence to evaluate special-needs searches, or other searches without individualized suspicion,[342] should attempt, as Rule 313(b) does, to achieve

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338. *See* discussion *supra* Part IV.B.

339. *See* NICHOLAS RESCHER, PRESUMPTION AND THE PRACTICES OF TENTATIVE COGNITION 1 (2011)("[P]resumptions provide a way of filling in—at least pro tem—the gaps that obtain in conditions of incomplete information. . . . Such a legal presumption (*praesumptio juris*) is an inference from a fact that, by legal prescription, stands until refuted.").

340. MCM, *supra* note 6, MIL. R. EVID. 313(b).

341. MCM, *supra* note 6, MIL. R. EVID. 313(b) analysis, at A22-26.

342. Such a proposed rule might look something like the following:

> Proposed Federal Rule of Evidence: Special Needs or Other Searches/Inspections Not Requiring Individualized Suspicion.
>
> An "inspection" is an examination of persons and their belongings when the examination serves a special need apart from the general interest in law enforcement as defined by relevant case law. If a purpose of an examination is to locate weapons or contraband, and if:
>
> (1) the examination was directed immediately following a report of a specific offense in the area where the search is implemented and was not previously scheduled;
>
> (2) specific individuals are selected for examination on a nonrandom basis; or
>
> (3) persons examined are subjected to substantially different intrusions during the same examination,
>
> the prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of this rule. Inspections shall be conducted in a reasonable fashion. Inspections may utilize any reasonable natural or technological aid

a balance between legitimate governmental needs and the privacy interests of the person undergoing the search. The potential remedy of exclusion, absent clear and convincing evidence of a proper purpose, provides a deterrent to government overreach or pretext. Layering such an evidentiary rule on top of the current requirements to sustain a valid special need, highway checkpoint, or administrative search may provide similar protections against subterfuge or pretext searches, or as stated in the analysis to Rule 313(b), "provide[] objective criteria by which to measure a subjective standard."[343]

The three circumstances and their potential to be rebutted are explained in the analysis of Rule 313(b):[344]

> For example, when an examination is ordered immediately following a report of a specific offense in the unit, the prosecution might prove the absence of subterfuge by showing that the evidence of the particular offense had already been recovered when the inspection was ordered and that general concern about the welfare of the unit was the motivation for the inspection. Also, if a commander received a report that a highly dangerous item (e.g., an explosive) was present in the command, it might be proved that the commander's concern about safety was the primary purpose for the examination, not prosecution.

When commanders examine specific individuals or subject them to more intrusive examinations than others, these signs of subterfuge may be rebutted by proof that these individuals were not chosen in anticipation of prosecution, but on other grounds—e.g., persons were chosen because they had not been examined previously or were new to the unit.[345]

In order to overcome the presumption of subterfuge established by Rule 313, the government would have to provide clear and convincing evidence of similar neutral or legitimate motivations. This requirement would in turn provide an incentive for government entities establishing such search regimes to ensure that legitimate reasons and neutral, permissible implementing guidance was provided to meet such a high burden.

New York City's Subway Container Inspection Program is a good example of a program that would, properly implemented, meet the requirements of both the special-needs exception and the proposed Rule 313(b) analog. In its evaluation of *MacWade*, the Second Circuit found persuasive that the NYPD

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and may be conducted with or without notice to those inspected. Unlawful weapons, contraband, or other evidence of crime located during an inspection may be seized.

343. MCM, *supra* note 6, MIL. R. EVID. 313(b) analysis, at A22-26.

344. *See id.* at A22-25 to -26.

345. *Id.* at A22-26.

> selects the checkpoint locations "in a deliberative manner that may appear random, undefined, and unpredictable[,]" . . . var[ying] their number, staffing, and scheduling so that the "deployment patterns . . . are constantly shifting." While striving to maintain the veneer of random deployment, the NYPD bases its decisions on a sophisticated host of criteria, such as fluctuations in passenger volume and threat level, overlapping coverage provided by its other counter-terrorism initiatives, and available manpower.[346]

Officers give both verbal and written notice of the searches, and make clear they are voluntary and "exercise virtually no discretion in determining whom to search."[347]

> The supervising sergeant establishes a selection rate, such as every fifth or tenth person, based on considerations such as the number of officers and the passenger volume at that particular checkpoint. The officers then search individuals in accordance with the established rate only.
>
> Once the officers select a person to search, they limit their search as to scope, method, and duration. As to scope, officers search only those containers large enough to carry an explosive device, which means, for example, that they may not inspect wallets and small purposes.[348]

Moreover, an officer searching an eligible container must only inspect "what is minimally necessary to ensure that the . . . item does not contain an explosive device."[349] They may not deliberately seek out other contraband, but if officers happen to find such contraband during the limited inspection, they may arrest the individual carrying it.[350] Finally, because an inspection must last no longer than necessary to ensure an item does not contain an explosive device, a typical inspection only lasts for a couple of seconds. [351]

For the Second Circuit, factors such as the notice to passengers, the limited scope of the searches and limited time for a typical search, the fact that the searches were conducted by uniformed personnel in the open thereby reducing fear and stigma, and that "police exercise no discretion in selecting whom to search, but *rather employ a formula that ensures they do not arbitrarily exercise their authority*," were critical to the reasonableness

346. MacWade v. Kelly, 460 F.3d 260, 264 (2d Cir. 2006) (fourth alteration in original).
347. *Id.* at 264–65.
348. *Id.* at 265.
349. *Id.* (alteration in original).
350. *Id.*
351. *Id.*

of the program under the Fourth Amendment.[352] The factors evaluated by the Second Circuit in *MacWade* are evidence of the lack of the three circumstances listed in Rule 313, and are relevant even in the presence of full privacy interests on the part of the passengers.[353] In fact, all three of the circumstances in the proposed rule focus on containing the discretion of the government agents, thus encouraging the use of programmatic guidelines to deter subterfuge or pretext searches.

Additionally, an analog to Rule 313 of the Federal Rules of Evidence would also impose limitations on the implementation of suspicionless searches. Taking *MacWade* as an example, the rule would be triggered if police either choose to search specific people based on something other than neutral criteria (every fifth person, for example), or subjected some individuals to more in-depth searches than others (for example, more extensive searches for African-American men). Knowing that the rule would trigger the government's obligation to prove with clear and convincing evidence that the search was not a subterfuge, police would be less likely to misuse that authority. Although the Second Circuit examined these elements in *MacWade*, a rule would focus a court's attention on those issues as relevant in all cases.

The key to the special-needs exception, highway checkpoint, and administrative-inspection cases is the focus on the requirement for a need apart from the general interest in law enforcement in the first instance. The Supreme Court, although using different language in these three lines of cases, required a government interest apart from normal law enforcement to sustain these government intrusions.[354] These interests included border enforcement in *Martinez-Fuerte*, safety of roadways from the perils of drunken driving in *Sitz*, the government's interest in railway safety in *Skinner*, its interest in the fitness of government agents who carried firearms or held critical positions in *Von Raab*, and programs held to be unconstitutional in the absence of such a separate interest as in *Edmond* and *Ferguson*.[355]

But the point of contention in the dispute seen between Justices O'Connor and Rehnquist, Thomas, and Scalia in *Edmond*, and continued in

352. *Id.* at 273 (emphasis added) (citing Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 667 (1989)) (upholding military-base entrance inspections).

353. *Id.* at 270–73, 275 (concluding both that the Container Inspection Program serves "special needs," and that subway riders retain a full expectation of privacy in their containers). Recall that Justice Brennan dissented in *Sitz* on the basis that the reasonableness-balancing test only applied where there was a diminished privacy interest. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 457 (1990) (Brennan, J., dissenting).

354. *See* discussion *supra* Part III.

355. *Id.*

dicta by Justice Scalia in *al-Kidd*, was the relevance of the subjective motivations of the government officials in traffic checkpoint cases. For Justice O'Connor and the majority, such subjective motivations were relevant in evaluating programmatic purpose for search programs not involving individualized suspicion.[356] Thus, Justice O'Connor limited *Whren* to those instances not requiring probable cause, or later in the opinion, not requiring individualized suspicion.[357] Chief Justice Rehnquist, joined in dissent by Justices Thomas and Scalia, however, unsuccessfully argued that a more general test should apply.[358] For the three dissenting Justices, the subjective motivations or primary programmatic purpose of such a traffic checkpoint were irrelevant if a valid governmental purpose outweighed the minimal intrusions on the privacy rights of motorists:

> The reasonableness of an officer's discretionary decision to stop an automobile, at issue in *Whren*, turns on whether there is probable cause to believe that a traffic violation has occurred. The reasonableness of highway checkpoints, at issue here, turns on whether they effectively serve a significant state interest with minimal intrusion on motorists. The stop in *Whren* was objectively reasonable because the police officers had witnessed traffic violations; so too the roadblocks here are objectively reasonable because they serve the substantial interests of preventing drunken driving and checking for driver's licenses and vehicle registrations with minimal intrusion on motorists.[359]

In *al-Kidd*, Justice Scalia, recognizing that this view had not prevailed in *Edmond*, conceded that subjective motivations in determining primary programmatic purpose were relevant for special-needs and administrative-

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356. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 46–47 (2000).

> Petitioners argue that the Indianapolis checkpoint program is justified by its lawful secondary purposes of keeping impaired motorists off the road and verifying licenses and registrations. If this were the case, however, law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check. For this reason, we examine the available evidence to determine the primary purpose of the checkpoint program. While we recognize the challenges inherent in a purpose inquiry, courts routinely engage in this enterprise in many areas of constitutional jurisprudence as a means of sifting abusive governmental conduct from that which is lawful. As a result, a program driven by an impermissible purpose may be proscribed while a program impelled by licit purposes is permitted, even though the challenged conduct may be outwardly similar. While reasonableness under the Fourth Amendment is predominantly an objective inquiry, our special needs and administrative search cases demonstrate that purpose is often relevant when suspicionless intrusions pursuant to a general scheme are at issue.

Id. (citations omitted).

357. *Id.* at 45–46.

358. *Id.* at 49–50 (Rehnquist, C.J., dissenting).

359. *Id.* at 51–52.

search cases "where actual motivations do matter."[360] Nevertheless, in reframing *Edmond*, Justice Scalia rejected the Ninth Circuit's view that "'programmatic purpose' is relevant to Fourth Amendment analysis of programs of seizures without probable cause."[361] Instead, he cast the *Edmond* test as another exception to the general practice of not probing subjective intent, with the subjective inquiry "relevant [only] to the validity of Fourth Amendment intrusions undertaken *pursuant to a general scheme without individualized suspicion*."[362] Thus, in traffic checkpoint cases, in addition to administrative-search and special-needs cases, programmatic purpose is relevant to intrusions undertaken pursuant to a general scheme without individualized suspicion. Because of the continued validity of these subjective inquiries into primary programmatic purpose in all three categories of cases—special needs, administrative exceptions, and traffic checkpoints—providing a "means of sifting abusive governmental conduct from that which is lawful" will remain critical for courts evaluating searches undertaken pursuant to a general scheme without individualized suspicion.[363] An analog to Rule 313 of the Federal Rules of Evidence would provide a tool for that judicial task.

Equally important, these three categories all attempt to establish limitations that would prohibit the particular exception from swallowing the Fourth Amendment rule, creating functional limitations beyond focusing on needs that are apart from the general interest in law enforcement.[364] Key to these cases and those implementing the Supreme Court's guidance are the existence of alternatives to the constraints provided by the Fourth Amendment's warrant requirements. For administrative inspections, these constraints are provided either through administrative warrants, or sufficient "reasonable legislative or administrative standards," to limit the scope of such searches, as in *Camara* or *Davis*, or even *Skinner*.[365]

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360. Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080–81 (2011) (internal quotation marks omitted).

361. *Id.* at 2081 (quoting al-Kidd v. Ashcroft, 580 F.3d 949, 968 (9th Cir. 2009), *rev'd*, 131 S. Ct. 2074 (2011)).

362. *Id.* (quoting *Edmond*, 531 U.S. at 45–46).

363. *Edmond*, 531 U.S. at 47.

364. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 453–55 (1990) (upholding suspicionless highway sobriety checkpoint based on the state's specific interest in preventing drunk driving and the reasonableness of the intrusion upon individual motorists); *see also Edmond*, 531 U.S. at 37–38 (noting that the three categories of exceptions go beyond the state's general interest in law enforcement).

365. *See* Camara v. Mun. Court, 387 U.S. 523, 538–39 (1967); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 667, 672 n.2 (1989) (holding that the program's procedures established the scope and date of the search in advance and that the program participants were aware of the requirements); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 622 (1989) (allowing the search because detailed regulations curtailed discretion).

For cases involving highway checkpoints, the contextualized reasonableness-balancing test imposed similar constraints, with the intrusion limited by a required nexus to the government's claimed purposes and external constraints on officers' discretion. Thus, in *Martinez-Fuerte*, as opposed to *Brignoni-Ponce*, the intrusion was brief and the location of the checkpoints was established not by "officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources[,] . . . [with] less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops."[366] Further, in *Delaware v. Prouse*, after disapproving roving-traffic stops to enforce vehicle and driver registration, the Court suggested that a fixed checkpoint, which stopped all oncoming traffic at a roadblock-type stop, and which did not involve the "unbridled discretion of law enforcement officials," might be constitutionally reasonable.[367] In *Sitz*, the sobriety traffic checkpoints were selected pursuant to guidelines: the police stopped all oncoming vehicles, leaving no discretion to exercise, and the intrusion was brief, as in *Martinez-Fuerte*.[368]

For special-needs cases like *Von Raab* and *Skinner*, the program regulations themselves limited the government's discretion.[369] Again, the specifics of New York City's Container Inspection Program, evaluated by the Second Circuit in *MacWade*, substantially curtailed the discretion of the individual officers, and were reflections of neutral policy determinations made at a much higher level in the NYPD.

The statistics gathered from Britain's § 44 searches, which required no articulable suspicion at all, clearly show the evils that unbridled discretion can bring—racial, ethnic, and religious discrimination, and interferences with free speech, assembly, and press rights.[370] Similar findings are apparent in *Floyd v. City of New York*, the case attacking the NYPD's practice of stopping and frisking minority members of the population based on specious justifications of reasonable suspicion under *Terry*.[371] It is this same unbridled discretion that has been of concern to the Supreme Court in

366. United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976). The Court concluded: "As the intrusion here is sufficiently minimal that no particularized reason need exist to justify it, we think it follows that the Border Patrol officers must have wide discretion in selecting the motorists to be diverted for the brief [follow-on] questioning involved." *Id.* at 563–64.

367. *See* Delaware v. Prouse, 440 U.S. 648, 661–63 (1979) (emphasis added).

368. *Sitz*, 496 U.S. at 453.

369. *See Von Raab*, 489 U.S. at 672–73 n.2; *Skinner*, 482 U.S. at 622.

370. *See generally* REVIEW FINDINGS AND RECOMMENDATIONS, *supra* note 317 (analyzing the statistics regarding which ethnicities and races are stopped most frequently when there is no reasonable-suspicion requirement); SUMMARY OF RESPONSES TO THE CONSULTATION, *supra* note 317 (discussing public opinions and reactions to the suspicionless-search program).

371. *See* authorities cited *supra* note 285.

many of the cases discussed in this Article. The military has a long history of balancing the need for legitimate inspections to ensure the fitness and readiness of military units with the need to protect against illegitimate subterfuge searches based on that ability—with the primary means of policing this balance being Rule 313.

A similar Federal Rule of Evidence, such as that proposed in this Article, provides two advantages as the nation attempts to achieve a similar protective balance. First, it provides a judicial tool to sift the lawful from the unlawful when evaluating searches based on no individualized suspicion, one well within the institutional competency of courts. Rather than forcing courts to substitute their determination of the necessary measures to achieve security for that of the Executive, the rule instead evaluates the reasons for the implementation of the special-need security search, requiring a special need separate from that in general law enforcement, and also requires a program that is implemented in a neutral way, oriented or calibrated to the accomplishment of the government need motivating the search. The existence of Rule 313 provides a framework to challenge in the same way that the Supreme Court's prophylactic rule in *Miranda* provided the framework to challenge unwarned custodial confessions.

The structure of the proposed rule also creates incentives for police to plan and implement their special-needs searches to meet the requirements of the exception. The heightened burden to rebut the presumption will encourage documentation of valid search programs, in the same way that military commanders have incorporated the requirements of Rule 313 into the planning of unit inspections. For example, an understanding of Rule 313's requirements has resulted in commanders who plan unit urinalysis inspections in advance, and who use neutral criteria to select those personnel subject to the administrative inspections and to ensure that all persons are subject to the same degree of intrusion in the inspection.[372] This compliance with Rule 313's requirements is done partially out of concern that the results will be challenged in court, but also because commanders are trained to understand and comply with the requirements of the law because of the existence of Rule 313. This is a true example of the rule of law being the best tool to reconcile the needs of security and liberty.

The increase in these "security" special-needs searches in all aspects of modern life, from the now familiar airport searches, to those in subways, on ferries, or in public venues, including courthouses themselves, make judicial involvement in their evaluation critical to the continued viability of

372. *See* discussion *supra* Part V.

the Fourth Amendment. In addition to providing a tool for the courts, the proposed rule's structure—the shifting burden of proof triggered when the three categories most likely to evidence subterfuge or pretext exist—shows a policy determination that however valid security special-need searches remain in our modern post-9/11 society, the courts will remain the final arbiter of reasonableness under the Fourth Amendment. Implementation of such an analog rule would also encourage creation of search regimes likely to withstand the scrutiny imposed by Rule 313. By contributing to the achievement of a balance between liberty and security, such an evidentiary rule allows courts to appropriately test these measures against the Constitution. It also reflects the continued importance of the Fourth Amendment's protection of individual privacy as one of our nation's foremost values, one necessary to liberty.

MDL PRACTICE: AVOIDING THE BLACK HOLE

GEORGE M. FLEMING* & JESSICA KASISCHKE**

I. INTRODUCTION

"[B]lack hole: a region of space-time from which it is not possible to escape . . . ."[1]

Most of today's multidistrict litigation (MDL) has strayed far from the statutory mandate enacted to handle mass litigation.[2] Future MDLs would benefit greatly from returning to the original intent of the statute. Going back to compliance with the statute—especially as it pertains to early

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* George Fleming is a lawyer with Fleming, Nolen & Jez, L.L.P. in Houston, Texas. He has been involved in mass actions and multidistrict litigation since he represented a party in MDL 107, *In Re 1971 Alaska Airlines Disaster* near Juneau, Alaska.

** Jessica Kasischke is a lawyer with Fleming, Nolen & Jez, L.L.P. in Houston, Texas. The authors would like to thank Sylvia Davidow, an attorney at Fleming, Nolen & Jez, L.L.P., and Tamara Sharkey for their assistance in completing this Article.

1. S.W. Hawking, *The Quantum Mechanics of Black Holes*, SCI. AM., Jan. 1977, at 34, 34.

2. See 28 U.S.C. § 1407(a) (2012), which states in pertinent part:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated . . . .

Id.

remand—would improve MDLs for the litigants and the public. With 281 MDLs active today,[3] a large portion of the country's federal civil cases are conducted through MDLs. With the small number of MDL judges managing such a large share of active cases, there is a tendency for some of these cases to become stagnant. When this happens, the MDL can become the proverbial "black hole," taking in cases with virtually no hope of fair and efficient resolution.

This Article contrasts the procedure for handling mass litigation as intended by the 1968 MDL statute with the present handling of some MDLs. The manner in which some MDLs are conducted today is inconsistent with Congress's design in the MDL statute, as approved by the U.S. Supreme Court.[4] This Article will begin by providing a brief history of 28 U.S.C. § 1407. Part II will outline the vast number of cases involved in MDL litigation. Part III will discuss the black-hole effect of MDL, which is caused by courts engaging in case-specific discovery and conducting what are known as "bellwether" trials. This Article will then analyze the black-hole effect on a litigant's right to trial by jury. Finally, this Article will offer a solution to avoid the black hole: remand to the original court, as the statute intended.

II. THE STATUTORY FRAMEWORK FOR HANDLING MASS LITIGATION

In 1968, Congress passed a statute to address a growing concern: in a number of different types of litigation, cases with similar questions of fact and law were being filed in different U.S. district courts all over the country.[5] There was a need for increased efficiency and the avoidance of duplication by many different courts in many different districts.[6] There was also a fear that conducting pretrial proceedings in different districts would produce different results, which would be confusing to the litigants and the public.[7]

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3. *MDL Statistics Report-Docket Summary Listing*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. (Oct. 15, 2014), http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_by_MDL_Number-October-15-2014.pdf.

4. *See* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998).

5. *See* Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL L. REV. 2245, 228 (2008).

6. *See id.*

7. *Cf.* Mike Roberts, *Multidistrict Litigation and the Judicial Panel, Transfer, and Tag-Along Orders Prior to a Determination of Remand: Procedural and Substantive Problem or Effective Judicial Policy?*, 23 MEMPHIS ST. U. L. REV. 841, 845 (1993) ("[The Judicial Panel's power] is limited by the requirement that consolidation and single court supervision be in the best

Congress addressed this issue by enacting § 1407. This MDL statute provided for a number of significant procedural changes. First, it established the Judicial Panel on Multidistrict Litigation (JPML or the Panel).[8] The Panel consists of seven judges selected by the Chief Justice of the U.S. Supreme Court.[9] The Panel is tasked with determining whether different federal civil cases filed in the many district courts should be "centralized in a single MDL docket."[10] Second, once the Panel determines that consolidation is appropriate, § 1407 authorizes it to transfer cases from different districts (called transferor courts) to one district court (the MDL transferee court),[11] which is designed to conduct "coordinated or consolidated pretrial proceedings."[12] Congress allows transfers "for the convenience of parties and witnesses and [to] promote the just and efficient conduct of such actions."[13]

Over the years, in many MDL proceedings the transfer to a single transferee court has provided a number of efficiencies. For example, hardworking transferee judges and counsel for both plaintiffs and defendants have adopted procedures to handle dispositive motions, standardize discovery, develop expert testimony, and other mechanisms. These procedures were all designed by transferee courts and MDL counsel "to secure the just, speedy, and inexpensive determination of every action."[14] The statute also provides that each transferred action is to be remanded "at or before the conclusion of such pretrial proceedings to the district from which it was transferred."[15]

Therefore, the congressional design of the statute is straightforward: the Panel is to transfer cases with common issues to a transferee court to supervise pretrial proceedings.[16] The Panel then transfers these cases back to their respective transferor courts.[17] The U.S. Supreme Court has addressed the manner in which the MDL is to be conducted. In 1998, the Court considered *Lexecon Inc. v. Milberg Weiss Berschad Hynes & Lerach*.[18] This class-action lawsuit was brought by an economics consulting

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interests of justice, convenient for the parties, and efficient for preparing the action for trial or at least for discovery.").

8. 28 U.S.C. § 1407(a) (2012).

9. Hon. John G. Heyburn II & Francis E. McGovern, *Evaluating and Improving the MDL Process*, LITIG. J., Summer 2012, at 26, 26.

10. *Id.*

11. 28 U.S.C. § 1407(b).

12. *Id.* § 1407(a).

13. *Id.*

14. FED. R. CIV. P. 1.

15. 28 U.S.C. § 1407(a).

16. *Id.*

17. *Id.*

18. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998).

firm against a law firm and was transferred pursuant to § 1407(a).[19] The transferee district court transferred the case back to itself for trial when it could have sent the issue back to the transferor court.[20] The Court, in a unanimous decision, disagreed with the transferee district court.[21] The Court found that the MDL transferee district court was obligated under § 1407(a) to transfer the case back to the district court from which it was transferred for trial.[22]

There are some who have limited *Lexecon* to the narrow proposition that a transferee judge may try only those cases that could originally have been filed in that court.[23] However, *Lexecon* is not nearly so limited. The Court identified the dual function of the statute: (1) the JPML transfers cases to the transferee court for coordinated or consolidated pretrial proceedings, and (2) at or before the conclusion of the pretrial proceedings, the transferee court must send the cases back to the transferor court for trial.[24]

The Court recognized the JPML's authority to transfer for coordinated or consolidated pretrial proceedings, and then acknowledged that the second function of the statute is to remand:

> Beyond this point [i.e., transfer by the JPML to the transferee court], however, the textual pointers reverse direction, for § 1407 not only authorizes the Panel to transfer for coordinated or consolidated pretrial proceedings, but obligates the Panel to remand any pending case to its originating court when, at the latest, those proceedings have run their course. . . . The Panel's [remand] instruction comes in terms of the mandatory "shall," which normally creates an obligation impervious to judicial discretion.[25]

The Court referred to remand as the "plain command" in "straightforward language."[26] According to the Court, the MDL statute says what it means and means what it says: "at or before the conclusion of such pretrial proceedings," transferee courts shall remand cases back to their respective transferor courts for trial.[27]

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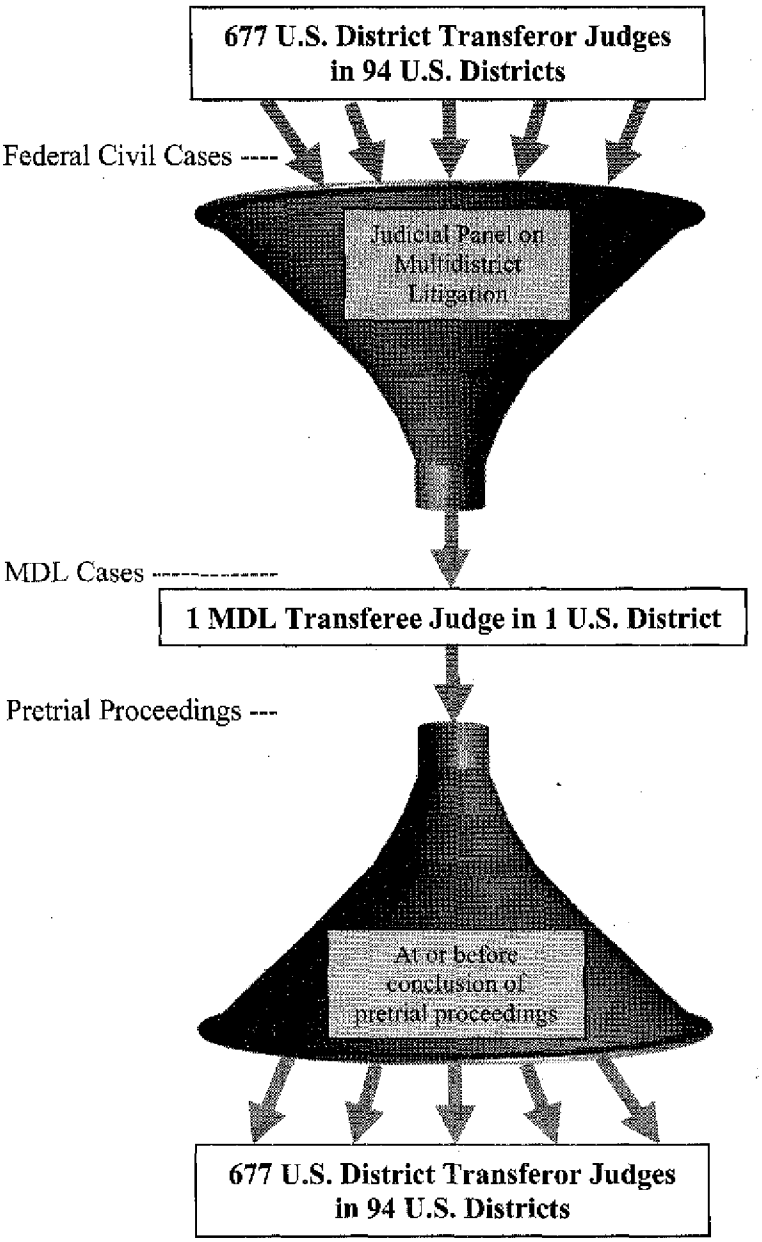
19. *Id.* at 29–30.
20. *Id.* at 30–31.
21. *Id.* at 27–28.
22. *Id.* at 34, 40.
23. *See* Delaventura v. Colum. Acorn Trust, 417 F. Supp. 2d 147, 152 (D. Mass. 2006).
24. *Lexecon Inc.*, 523 U.S. at 28.
25. *Id.* at 34–35 (citing Anderson v. Yungkau, 329 U.S. 482, 485 (1947), *superseded by statute*, FED. R. CIV. P. 25 (1963)); *see also* Metro. Stevedore Co. v. Rambo, 515 U.S. 291, 300 (1995); Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 476 (1992).
26. *Lexecon Inc.*, 523 U.S. at 35, 40.
27. *Id.* at 28, 35, 37 (quoting 28 U.S.C. § 1407(a) (2012)).

Graphically, MDL mass actions are designed to work as follows:

Figure 1



Thus, there is the potential for 677 U.S. district transferor judges[28] in 94 separate U.S. districts[29] throughout the country to transfer cases (by way of the Panel) to one MDL transferee judge in one U.S. district. In accordance with the statute and the U.S. Supreme Court's unanimous decision in *Lexecon*, that transferee district court's responsibility is only to conduct pretrial proceedings.

Then, as the Supreme Court indicated in *Lexecon*, "the textual pointers reverse direction."[30] As shown in the above graphic, the transferee court must remand the cases back to its respective transferor court at or before the conclusion of pretrial proceedings, in accordance with both § 1407 and *Lexecon*. The obligation of the transferee court to remand is mandatory; it is not subject to judicial discretion.[31]

However, MDL litigation does not work that way today. The actual practice is very different from the design envisioned by Congress. To see that, one need only study the statistical data.

III. MDL LITIGATION—BY THE NUMBERS

"Since the creation of the [JPML] in 1968, there have been 515,594 civil actions centralized for pretrial proceedings. As of September 30, 2014, [only] 13,911 had been remanded for trial . . . ."[32] Therefore, only 2.7% of the transferred cases in the entire history of the MDL statute have actually been remanded.[33] As of September 2014, 127,704 MDL cases are pending.[34] Of those 127,704 cases, only 478 cases have been remanded.[35] Presently, therefore, less than .4% of all MDL cases have been remanded.[36] The JPML contains no statistics regarding how long the transferred cases stay in the transferee district court before they are remanded. By all

28. *Federal Judgeships*, U.S. CTS., https://web.archive.org/web/20141101013021/http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx (last visited May 22, 2015) (accessed by searching for the original URL in the Internet Archive search engine).

29. Office of the U.S. Att'ys, *Introduction to the Federal System*, U.S. DEP'T JUST., http://www.justice.gov/usao/justice-101/federal-courts (last visited May 22, 2015).

30. *Lexecon Inc.*, 523 U.S. at 34.

31. *Id.* at 34–35.

32. *Statistical Analysis of Multidistrict Litigation: Fiscal Year 2014*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. 3, https://web.archive.org/web/20141028154652/http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-2014_0.pdf (last visited May 22, 2015) (accessed by searching for the original URL in the Internet Archive search engine).

33. *See id.* at 5.

34. *Id.* at 3, 5.

35. *Id.* at 5.

36. *See id.*

indications, they can be retained in the transferee court for a considerable period of time.

Stewart Albertson, a California lawyer, describes cases going into MDL as a graveyard: "When a case gets joined to an MDL, it dies a slow death and its value drops significantly."[37] Courts and commentators have referred to these types of MDL cases as "black hole" MDLs.[38]

That might explain the increase of MDL cases compared to the total civil caseload of U.S. district courts. As of June 2014, 334,141 civil cases were pending in U.S. district courts.[39] Of those 334,141 cases, 70,328 were prisoner or Social Security cases.[40] These cases typically do not require much time from Article III judges,[41] meaning Article III judges work primarily on a total of 263,813 active civil cases. From these 263,813 cases, 120,449 pending civil cases are MDLs.[42] Therefore, approximately 45.6% of the U.S. district courts' pending active civil cases reside in MDL transferee courts.[43]

Since 2009, the MDL docket has expanded from 88,000 to 120,449 civil cases.[44] Of those cases, 105,644 are concentrated in the largest MDLs.[45] Recently, the largest MDLs have generally consisted of major mass actions involving disasters (e.g., Deepwater Horizon), product-liability cases (e.g., GranuFlo, testosterone, and other pharmaceutical cases), or medical-device cases (e.g., transvaginal mesh, hip, and knee replacements).[46] Some U.S. district transferee judges manage over 10,000 or more individual MDL cases.[47] As of August 2014, one U.S. district court

37. Sindhu Sundar, *AbbVie Can't Keep AndroGel Death Suit Out of State Court*, LAW360 (Oct. 1, 2014, 6:47 PM ET), http://www.law360.com/articles/583039/abbvie-can-t-keep-androgel-death-suit-out-of-state-court.

38. Hon. Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2330 (2008); *see also infra* note 53.

39. *MDL Standards and Best Practices*, DUKE L. SCH. CTR. FOR JUD. STUD., x n.2 (Sept. 11, 2014), https://law.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf.

40. *Id.* at x–xi.

41. *Id.*

42. *Id.*

43. *Id.*; *see also Table C-3A, U.S. District Courts—Civil Cases Pending, by Nature of Suit and District, During the 12-Month Period Ending September 30, 2005*, U.S. CTS., http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2005/appendices/c3a.pdf (last visited Feb. 16, 2015).

44. *Ascendancy and Concentration of MDLs*, DUKE U. SCH. L. CTR. FOR JUD. STUD. (Sept. 11, 2014), http://pdfserver.amlaw.com/nlj/Graphs_and_MDL_Statistics.pdf.

45. *See MDL Statistics Report—Distribution of Pending MDL Dockets By District*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. (Aug. 15, 2014), http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-August-15-2014.pdf.

46. *See id.*

47. *See id.*

transferee judge, Judge Joseph Goodwin of the Southern District of West Virginia, was managing over 60,000 cases in several MDLs.[48] These are not consolidated class actions. The U.S. Supreme Court has determined that there are too many individualized issues in these types of cases to meet class certification requirements.[49] Instead, these are individual cases.

The small percentage of remands strongly indicates an aversion to remand by the transferee judges. Indeed, the Judicial Conference has lobbied for legislation that would "over-rule [*Lexecon*] by statutory amendment."[50] The chair of the Panel could not have been more direct:

> We're hopeful that in this Congress the legislation will pass and that [*Lexecon*] will be a thing of the past.
>
> It's hard to know how many multidistrict dockets actually have been affected in some substantial way by the requirement of [*Lexecon*] that constituent actions be remanded to the transferor courts as soon as the case is ready for trial. A number of devices, frankly, have been utilized by innovative judges since [*Lexecon*] to minimize its effect.[51]

Some courts have even recognized that "it is almost a point of honor among transferee judges" not to remand cases back to their transferor courts.[52] The statistics support this aversion to remand. If less than .4% of the cases are being remanded, then these cases, once deposited in their transferee courts, most certainly remain there for their life or death, no matter how long that takes. As a practical matter, while some remands are granted (typically after an extended period of time), not many cases escape the MDL transferee courts—they are lost in the MDL black hole. Unlike Figure 1, here is what actual MDL practice looks like:

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48. *Id.*; *e.g.*, *In re* Neomedic Pelvic Repair Sys. Prods. Liab. Litig., 999 F. Supp. 2d 1371, 1371, 1373 (J.P.M.L. 2014); Pretrial Order #71 at 1, *In re* Am. Med. Sys., Inc., Pelvic Repair Sys. Prods. Liab. Litig., MDL No. 2325 (S.D. W. Va. July 1, 2013) [hereinafter Pelvic Repair Sys. Pretrial Order]; *In re* Cook Med., Inc., Pelvic Repair Sys. Prods. Liab. Litig., 949 F. Supp. 2d 1373, 1375–76 (J.P.M.L. 2013); *In re* Coloplast Corp. Pelvic Support Sys. Prods. Liab. Litig., 883 F. Supp. 2d 1348, 1349–50 (J.P.M.L. 2012); Pretrial Order #1 at 1–2, *In re* Bos. Sci. Corp., Pelvic Repair Sys. Prods. Liab. Litig., MDL No. 2326 (S.D. W. Va. Feb. 29, 2012).

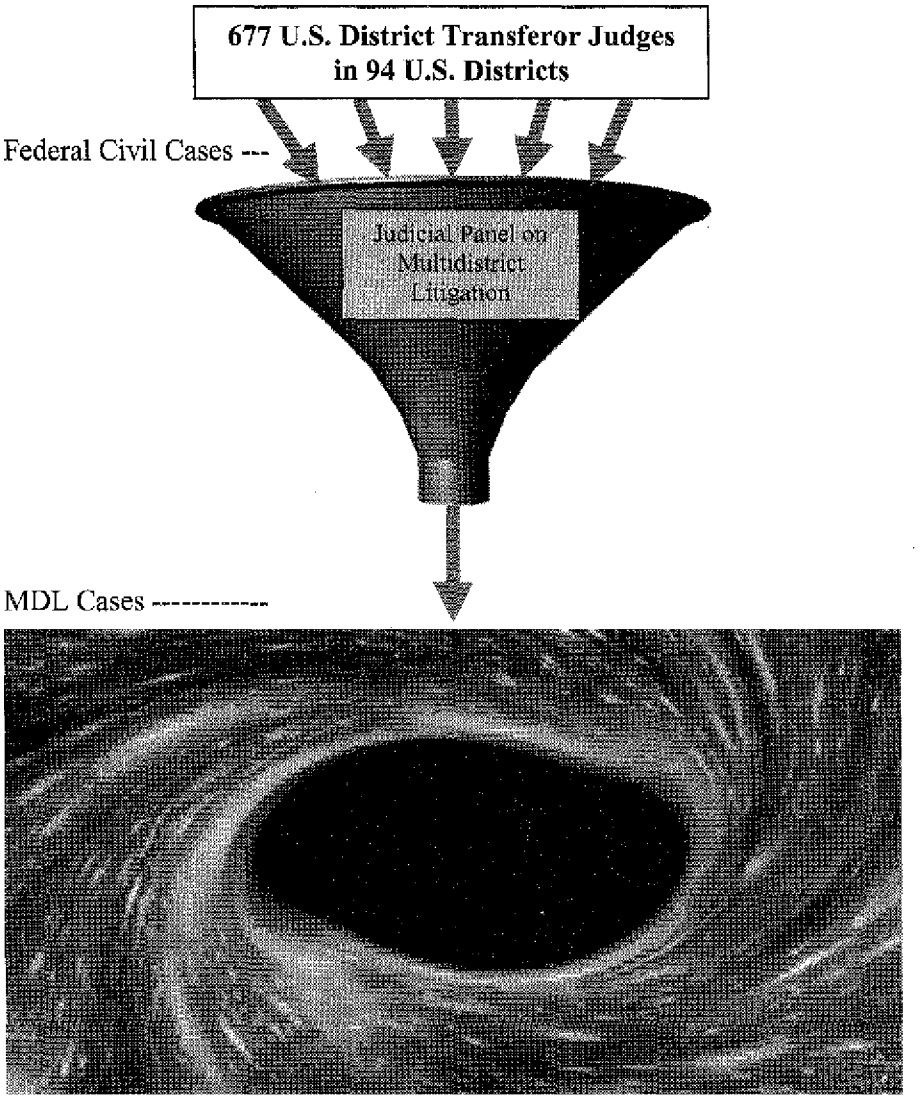
49. *See* FED. R. CIV. P. 23; *see, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999) (holding that mandatory class action was not valid in asbestos-related cases because the class action could not adequately protect the rights of potential future claimants); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 627 (1997) (holding that the class action would not adequately protect the rights of future claimants).

50. *Chair of Judicial Panel Sees Role as Gatekeeper*, THIRD BRANCH (Nov. 2005), http://www.jpml.uscourts.gov/sites/jpml/files/The%20Third%20Branch%20-%20November-2005-Hodges%20Interview.pdf.

51. *Id.*

52. Delaventura v. Colum. Acorn Trust, 417 F. Supp. 2d 147, 152 (D. Mass. 2006).

Figure 2



In rare instances, the Panel has suggested remand to MDL judges after an extended period of time.[53] However, in practice this is the

53. *See In re* Aredia & Zometa Prods. Liab. Litig., No. 3-06-1760, 2011 WL 2182824, at *2 (M.D. Tenn. June 3, 2011); Final Pretrial Order and Suggestion of Remand at 22, *In re* Seroquel Prods. Liab. Litig., No. 6:06-md-1769-Orl-22DAB (M.D. Fla. May 13, 2010); *In re* Prempro Prods. Liab. Litig., MDL No. 4:03-CV-1507-WRW, 2010 WL 703151, at *1 (E.D. Ark. Feb. 23, 2010); Final MDL Pretrial Order at 2, *In re* Phenylpropanolamine (PPA) Prods. Liab.

exception rather than the rule. Remand occurs in only a very tiny fraction of cases despite the language of the statute and a unanimous Supreme Court decision. How black-hole cases are created—and how MDL courts and counsel avoid them—is important to our judicial system.

IV. AVOIDING THE BLACK HOLE

Cases that have stayed much too long in the transferee court have been referred to by courts and commentators as black holes.[54] There have been attempts to change § 1407 and *Lexecon* to allow a transferee judge to retain jurisdiction over certain MDL cases for trial.[55] Those attempts have failed. Therefore, both MDL courts and lawyers should deal with the structure of § 1407 as it is supposed to exist.

This Article suggests that implementing the framework of the statute as designed would increase the efficiency of MDLs. Conversely, the attempts to avoid or circumvent the framework of the statute have impeded the performance of MDL litigation and led to its poor reputation. How should we avoid black-hole cases that go on forever? To answer that we can look to the past and identify techniques or devices that have led to black-hole cases.

Litig., MDL No. 2:01-md-01407-BJR (W.D. Wash. May 19, 2004); *In re* Orthopedic Bone Screw Prods. Liab. Litig., No. MDL 1014, 1998 WL 118060, at *1 (E.D. Pa. Jan. 12, 1998).

54. *See In re* U.S. Lines, Inc., No. 97 Civ. 6727 (MBM), 1998 WL 382023, at *7 (S.D.N.Y. July 9, 1998) (referring to appellant's metaphor that the asbestos MDL is a "'black hole' and 'the third level of Dante's inferno'"); Fallon et al., *supra* note 38, at 2330 ("Indeed, the strongest criticism of the traditional MDL process is that the centralized forum can resemble a 'black hole,' into which cases are transferred never to be heard from again."); Hon. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 126 (2013) ("[S]ome litigants . . . refer to MDL-875 as a 'black hole,' where cases disappear[] forever from the active dockets of the court."); *see also Delaventura*, 417 F. Supp. 2d at 150 ("MDL practice is slow, very slow."); Benjamin W. Larson, Comment, Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*: Respecting the Plaintiff's Choice of Forum*, 74 NOTRE DAME L. REV. 1337, 1364 (1999) ("[E]fficiency gains of consolidated trial [by MDL] are not supported by reality.").

55. *See, e.g.*, Multidistrict Litigation Restoration Act of 2005, S. 3734, 109th Cong. § 3 (2006); Multidistrict Litigation Restoration Act of 2005, H.R. 1038, 109th Cong. § 2 (2005); Multidistrict Litigation Restoration Act of 2004, H.R. 1768, 108th Cong. § 2 (2004); Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001, H.R. 860, 107th Cong. § 1 (2001); Multidistrict Litigation Act of 2000, H.R. 5562, 106th Cong. § 2 (2000); Multidistrict Jurisdiction Act of 1999, S. 1748, 106th Cong. § 2 (1999); Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999, H.R. 2112, 106th Cong. § 2 (1999); Multidistrict Trial Jurisdiction Act of 1999, H.R. 1852, 106th Cong. § 2 (1999).

A. *Case-Specific Discovery Prolongs the MDL*

Transferee courts routinely engage in plaintiff and defendant fact sheets, a uniform set of questions asked of all MDL plaintiffs and defendants that generally serve as interrogatories.[56] The fact sheets give both the court and the litigants a feel for common issues of fact and law.[57] While fact sheets are helpful to courts and litigants, in-depth, case-specific discovery can be counterproductive.

For example, in *In re Diet Drugs Products Liability Litigation* numerous cases were filed in both state and federal courts.[58] A number of cases were tried in state courts in Pennsylvania, Georgia, Missouri, Illinois, Texas, Mississippi, as well as other states.[59] Meanwhile, trials were not being conducted in the MDL court. However, as a prerequisite for remand and upon threat of dismissal, the MDL court required extensive case-specific discovery.[60] The discovery requirement resulted in subjecting one firm's cases to over 12,000 depositions before the MDL court would remand even one case.[61] But most of these depositions did not involve any common factual or legal issues. Rather, the depositions taken were of particular plaintiffs, their family members, and their treating physicians. The MDL court held all cases for almost two years while these depositions were ongoing. Not a single case was remanded while the thousands of depositions were being completed. Finally, the MDL court remanded eleven cases. Of those eleven cases, only one reached a verdict.[62] Thus, at the conclusion of 12,000 depositions, one federal case was tried. During the course of the same litigation, however, the firm tried cases twenty-six times in state courts.

Consider the instruction of § 1407 that transfers "will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions."[63] Observe the cost to both sides of conducting 12,000 depositions. By way of example, if 12,000 depositions take six hours each at an hourly billing rate of $500 per attorney in attendance, each side will spend roughly $36 million in billable hours or a

56. *MDL Standards and Best Practices*, *supra* note 39, at 11–13.

57. *See id.*

58. Anderson v. Am. Home Prods. Corp. (*In re* Diet Drugs Prods. Liab. Litig.), 220 F. Supp. 2d 414, 417–18 (E.D. Pa. 2002).

59. *Id.* at 418, 421. This refers to the cases tried by Fleming, Nolen & Jez, L.L.P.

60. *See id.* at 420.

61. This refers to the cases of Fleming, Nolen & Jez, L.L.P., in which the firm represented approximately 8,000 clients in *In re Diet Drugs Products Liability Litigation*.

62. Order Denying Plaintiff's Motion for New Trial at 1, Geers v. Wyeth, Inc., No. 7:03-cv-00107-HLH (W.D. Tex. Apr. 10, 2006).

63. 28 U.S.C. § 1407(a) (2012).

total of $72 million for both parties if only one attorney is present for each party. But that does not go nearly far enough. Consider that most depositions generally require additional lawyer and paralegal time, as well as additional expenses, such as court reporting services, video, and travel, among other expenses. When taking this into consideration, the costs can be substantially higher than $72 million.

Case-specific discovery increases the cost to the parties while at the same time decreasing the efficiency of the MDL. While such case-specific discovery is ongoing, the other cases in the MDL caseload generally lie dormant. Case-specific discovery across an MDL creates delay and can lead to the black-hole case.

B. Bellwether Trials May Prolong the MDL

Bellwether trials are named after the leader of a flock of sheep who wears a bell around her neck.[64] They are meant to be an indicator or predictor of the result in similar cases.[65] Bellwether trials are designed to give the parties actual exposure to a jury to assist them in evaluating their cases in light of trial results.[66] As a result of these features, bellwether trials can be helpful. Bellwether trials can result in transferee court orders on motions to dismiss, summary judgment motions, *Daubert* motions, and motions in limine.[67] Bellwether trials can assist the lawyers for both sides in creating trial packages, such as exhibit lists, witness lists, expert reports, and other similar items.[68] They can also allow the parties to test their theories regarding liability and damages before an actual jury.[69] When all of the bellwether cases' pretrial proceedings are complete, many of the other cases should be ripe for remand. But without remand of the other MDL

64. H. Thomas Wells, Jr., *Recent Issues Arising in Multidistrict Litigation Bellwether Trials*, A.B.A. SEC. LITIG. 3 (Jan. 2012), http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012_jointcle_materials1/8_1_RE.authcheckdam.pdf.

65. *Id.*

66. *Id.*

67. *See* Eldon E. Fallon, Jeremy T. Grabill, & Robert Pitard Wynn, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2328 (2008); James M. Beck & Mark Herrmann, *How to Prepare Motions in Limine*, DRUG & DEVICE L. (Nov. 20, 2008), http://druganddevicelaw.blogspot.com/2008/11/how-to-draft-motions-in-limine.html; Isabella C. Lacayo, *Win Some, Lose Some: Recent Federal Court Rulings on* Daubert *Challenges to Plaintiffs' Experts*, PRODUCT LIAB. MONITOR (Aug. 30, 2012), http://product-liability.weil.com/expert-issues/win-some-lose-some-recent-federal-court-rulings-on-daubert-challenges-to-plaintiffs-experts/.

68. *See* Wells, *supra* note 64, at 3.

69. *Id.*

cases, or when bellwethers are used repetitively without remand, they can delay progress in the case.[70]

Early on, bellwether trials were used to bind the parties to the trial results.[71] However, the appellate courts have rejected that approach.[72] Transferee courts have now adopted a nonbinding approach for bellwether trials.[73] Extensive time and preparation go into selecting a case for bellwether participation.[74] The time and preparation fall on the lawyers and, most importantly, the transferee court.[75] The selection process involves assessing the entire litigation, identifying major variables in the law and facts, putting together a pool of potential bellwether cases, and determining a selection approach—whether by the court, counsel, or a combination of both.[76] In the meantime, most of the MDL docket lies stagnant, waiting for the bellwether trial to conclude.

Sometimes bellwether trials occur when cases are set for trial, but sometimes they do not. For example, in *In re American Medical Systems Products Liability Litigation* the bellwether selection process was completed after a great deal of time and effort by MDL counsel and the MDL transferee court.[77] It ultimately resulted in the selection of four candidates for bellwether trials. However, prior to the commencement of those trials, all four cases were settled on a confidential basis.[78] Therefore, there was no information, based on a jury verdict, to aid the parties in evaluating the remainder of the cases pending in the MDL.

This result is not unusual. Plaintiffs' lawyers try to get their best cases to bellwether trial. Defense lawyers try to get their best cases, which are the plaintiffs' worst, to bellwether trial. Sometimes this results in the plaintiffs dismissing their worst, or the defendants' best, bellwether cases. Or this results in the defendants entering into confidential settlements on

70. *See* BARBARA J. ROTHSTEIN & CATHERINE R. BORDEN, FED. JUD. CTR. & JUD. PANEL ON MULTIDISTRICT LITIG., MANAGING MULTIDISTRICT LITIGATION IN PRODUCTS LIABILITY CASES: A POCKET GUIDE FOR TRANSFEREE JUDGES 47 (2011), *available at* http://www2.fjc.gov/sites/default/files/2012/MDLGdePL.pdf.

71. Fallon et al., *supra* note 38, at 2331.

72. *See, e.g.*, Phillips v. E.I. Dupont de Nemours & Co. (*In re* Hanford Nuclear Reservation Litig.), 497 F.3d 1005, 1025 (9th Cir. 2007); Dodge v. Cotter Corp., 203 F.3d 1190, 1199 (10th Cir. 2000); *In re* TMI Litig., 193 F.3d 613, 725 (3d Cir. 1999); Cimino v. Raymark Indus., Inc., 151 F.3d 297, 318 (5th Cir. 1998).

73. Wells, *supra* note 64, at 4.

74. *See, e.g.*, *id.* ("Judge Fallon of the United States District for the Eastern District of Louisiana has suggested a three step process for selecting and implementing a case management plan that includes bellwether trials based on his experience with the Vioxx multidistrict litigation.").

75. *Id.*

76. *Id.* at 3–5.

77. *See* Pelvic Repair Sys. Pretrial Order #71, *supra* note 48, at 1.

78. *Id.* These are four of the cases of Fleming, Nolen & Jez, L.L.P.

their worst, or the plaintiffs' best, bellwether cases. In either case, no jury data are derived from the extensive bellwether selection process and bellwether trial settings.

But assume a bellwether case does go to trial and results in a substantial, multimillion-dollar plaintiff's verdict. Or assume a bellwether case goes to trial and results in a defense no-liability, no-damage verdict. In either case, in the settlement negotiations counsel for both sides try to set aside a plaintiff's or defense "anomaly" and negotiate regardless of the verdict.

Therefore, while the bellwether trial process is helpful, repetitive bellwether trials without remand of other pending cases can also lead the transferee court and MDL counsel into a black hole. These black holes are not without a cost. Preparing for trial is expensive. Trials require fact and expert depositions, sometimes taking place all over the country. They also require extensive motion practice. As shown above, MDL costs can be gigantic. Ultimately, the plaintiffs and the defendants incur substantial costs in the bellwether trial process.

There is also another cost. In a prolonged MDL, a percentage of the plaintiffs may be forced to file for bankruptcy.[79] Most of these bankruptcy filings are a direct result of the plaintiffs' injuries that led to the MDL litigation. Typically, these are medical bankruptcies. For example, imagine that a woman contracts breast cancer as a result of a drug.[80] She is a working, single mom. She has health insurance through her employer. She has to go in for treatment on multiple occasions. She may be required to have surgery. Finally, she is forced to leave her job. She loses her health insurance. Now she cannot rely on a health insurance carrier to get medical care. She has to rely on her own pocketbook, which can quickly be emptied. As a result, she files for bankruptcy. She has yet to get any relief from the black-hole MDL and her family suffers.

Additionally, some plaintiffs die during the black-hole MDL. In *In re Diet Drug Litigation*, almost five percent of the plaintiffs died during the course of the proceedings.[81] The deceased plaintiffs' estates then became the plaintiffs. The actual plaintiffs received no relief from the MDL. As a result of bankruptcies and deaths, when settlements or judgments finally arrive, approval by bankruptcy courts and probate courts is required.

79. About 10% of the Fleming, Nolen & Jez clients in *In re Diet Drugs Products Liability Litigation* filed for bankruptcy.

80. For an example of such a situation, see Beylin v. Wyeth (*In re* Prempro Prods. Liab. Litig.), 738 F. Supp. 2d 887, 889 (E.D. Ark. 2010).

81. The Fleming, Nolen & Jez clients in *In re Diet Drugs Products Liability Litigation* had about a 5% death rate.

Consequently, prolonged black-hole MDLs put a burden on bankruptcy trustees and courts, as well as state probate courts.

Bellwether trials have their advantages. However, repetitive, time-consuming bellwether trials without remand of other pending cases can create a prolonged black-hole MDL that is inconsistent with a "just, speedy, and inexpensive determination of every action."[82]

V. DELAY FORFEITS THE RIGHT TO TRIAL BY JURY

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."[83] Many courts and commentators have extolled the virtue of U.S. citizens' right to trial by jury. Trial judges believe in the right to trial by jury. Trial lawyers believe in the right to trial by jury. Judge Keith P. Ellison of the United States District Court for the Southern District of Texas in Houston, after noting the inconvenience to the prospective jurors, stated: "Now we ask you to do that for a number of reasons; but they can all be summed up in this simple truth, that we think the American jury system is the most powerful method yet devised for the ascertainment of truth."[84]

Both the American Bar Association and the National Center for State Courts have expressed their concern when courts are unable to resolve cases in a reasonably prompt manner.[85] They cite the impact on public safety, the economy, those who need the protection of the courts, and on citizens' faith in our system of government.[86]

One of the serious consequences of the delays caused by black-hole MDLs—through the devices of extensive, case-specific discovery and repetitive bellwether trials—is the loss of the right to trial by jury. The delay sustained by those MDL cases that are denied remand to the transferor courts causes many to lose their right to trial by jury.

For example, in *In re Prempro Products Liability Litigation*, after almost ten years of litigation, the case had been tried several times in federal court before being appealed to and decided by the Eight Circuit.[87]

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82. FED. R. CIV. P. 1.

83. U.S. CONST. amend. VII.

84. Hon. Keith P. Ellison, Opening Remarks in *United States v. Carter*, No. H-09-CR-336 (Apr. 19, 2010).

85. A.B.A. TASK FORCE PRESERVATION JUST. SYS., CRISIS IN THE COURTS: DEFINING THE PROBLEM 1 (2011), *available at* http://www.micronomics.com/articles/aba_report_to_the_house_of_delegates.pdf.

86. *Id.* at 3–7; *see also* Peter T. Grossi, Jr., Jon L. Mills & Konstantina Vagenas, *Crisis in the Courts: Reconnaissance and Recommendations*, *in* FUTURE TRENDS IN STATE COURTS 83, 83–85 (2012).

87. *In re* Prempro Prods. Liab. Litig., 591 F.3d 613, 616–17 (8th Cir. 2010).

The case had also been tried in a state district court, was similarly appealed to and decided by the state's intermediate appellate court, and ultimately decided by the supreme court of that state.[88] Motions to remand in the federal transferee court were denied.[89] Cases continued to be maintained, without any activity, in that MDL. One firm calculated that at the rate cases were being tried in the MDL court or remanded by the MDL court, it would take almost ten years for the firm's clients to go to trial.[90]

This was a case in which the plaintiffs were primarily women in their 50s to 70s, many of whom had contracted breast cancer as a result of a pharmaceutical product.[91] Many had suffered through single or double mastectomies.[92] Many were receiving ongoing treatment. Faced with the realization of a ten-year delay to even reach a trial court, there was a significant discounting of the settlement value of their cases. That type of delay coerces plaintiffs into forfeiting their right to trial by jury. That is a serious consequence to MDL litigants and to our society.

VI. THE CASE FOR EXPEDITIOUS REMAND

It is important to recognize the congressionally established design of conducting mass litigation. Congress established a system in which there are transfers to one transferee court, pretrial preparation, and then remand to transferor courts "at or before the conclusion of such pretrial proceedings."[93] The MDL statute does not specify, nor does it envision, extensive case-specific discovery. Further, it does not specify or envision bellwether trials. Neither in-depth, case-specific discovery nor bellwether trials are even mentioned in the statute.

Similarly, when the U.S. Supreme Court had the opportunity to consider MDL mass litigation, it described the remand process as a "plain command."[94] In its "Ten Steps to Better Case Management: *A Guide for Multidistrict Litigation Transferee Judges*," the JPML urged transferee judges to "[e]xercise [y]our [p]rimary [r]esponsibilities," stating: "Good management techniques are a means, not an end. Never lose sight of your

88. Wyeth v. Rowatt, 244 P.3d 765 (Nev. 2010).

89. *Id.* at 617–18.

90. Fleming, Nolen & Jez, L.L.P. represented approximately 520 clients in *In re Prempro Products Liability Litigation*.

91. *In re Prempro Prods. Liab. Litig.*, 591 F.3d at 616–17.

92. *See, e.g.*, Scroggin v. Wyeth (*In re* Prempro Prods. Liab. Litig.), 586 F.3d 547, 553 (8th Cir. 2009).

93. 28 U.S.C. § 1407(a) (2012).

94. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998).

statutory responsibility, which is to efficiently and fairly manage pretrial proceedings."[95]

One good management technique is delegation to other courts—and that is what the remand feature is all about.[96] One transferee judge, no matter how hard he or she works, no matter how intelligent he or she is, cannot try or settle all the cases in an MDL alone. That is not how the system is designed, and that is not what should be expected of a transferee judge.[97] After all, the transferee judge has 677 U.S. District Judges in 94 districts at his or her disposal, all of whom are also hardworking and intelligent.[98] These judges are competent trial judges who can be a substantial resource to MDL transferee judges, if they will only use them.[99] Why use the "one-riot, one-Ranger mode"[100] when so much efficiency can be realized through delegation to other competent U.S. district judges?

However, the statistical data shown earlier indicate that remand is a rarely used tool in the toolbox of most MDLs.[101] Perhaps MDL counsel should consider urging transferee courts to exercise their remand function earlier and more often. Some courts have commented on the "settlement culture" of MDLs.[102] Perhaps MDLs should try setting aside attempts to settle every case, no matter how long it takes. Perhaps MDLs should set aside the settlement culture and let the system work as designed. Why keep fighting the design of the system with "innovations" that result in extraordinary expenditures of time and money? Perhaps MDLs should not try to force entire dockets of cases into settlement. Perhaps MDL counsel should urge MDL transferee judges to remand cases "at or before the conclusion of such pretrial proceedings."[103]

Some states have instituted procedures in their own courts to avoid delay and to assure access to jury trials. For example, the Philadelphia Court of Common Pleas has a Complex Litigation Center devoted to mass torts.[104] In every mass tort program "there are regular monthly or bi-

95. JUD. PANEL ON MULTIDISTRICT LITIG. & FED. JUD. CTR., TEN STEPS TO BETTER CASE MANAGEMENT: A GUIDE FOR MULTIDISTRICT LITIGATION TRANSFEREE JUDGES i, 9 (2009).

96. *Id.* at 10.

97. *Id.*

98. *See* discussion *supra* notes 28–29.

99. JUD. PANEL ON MULTIDISTRICT LITIG. & FED. JUD. CTR., *supra* note 95.

100. Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1844 (1995) (reasoning that this mode presents itself when judges feel they must handle and complete the entire litigation themselves).

101. *See supra* Part III.

102. *E.g.*, Delaventura v. Colum. Acorn Trust, 417 F. Supp. 2d 147, 150 (D. Mass. 2006) (internal quotation marks omitted).

103. 28 U.S.C. § 1407(a) (2012).

104. Lynn Jokela & David F. Herr, *Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool*, 31 WM. MITCHELL L. REV. 1299, 1321 (2005).

monthly meetings of counsel, the Coordinating Judge, and the Director."[105] At the meetings, "case management procedures [are] tailored to each program."[106] Agendas are circulated before the meetings.[107] Typically, pretrial motions are decided by one of the judges in the first jury trial, and then multiple judges are delegated cases to try.[108] Sometimes there may be five or six of the same type of MDL cases being tried simultaneously. Retired judges are pressed into service.[109] The Philadelphia courthouse has been involved in mass litigation in asbestos as well as virtually every major piece of mass litigation that followed asbestos.[110] The Philadelphia Complex Litigation Center was the first courthouse in the nation "designed exclusively for complex, multi-filed, [m]ass [t]ort cases" when it opened in 1992.[111]

MDLs do not have to be settlement machines. Two examples are the Texas state asbestos MDL and the current federal asbestos MDL. In Texas, the Honorable Mark Davidson, a state district judge, has presided over the state asbestos MDL for many years.[112] He regularly holds hearings on motions that involve, among other things, *Daubert* issues and motions in limine.[113] Texas law makes the orders of the MDL pretrial court binding on the trial court after remand.[114] Judge Davidson remands cases to the transferor courts all over the State of Texas for jury trial. Texas law states that "[t]he MDL pretrial court should, as far as reasonably possible, ensure that such action is brought to trial . . . within six months from the date the action is transferred to the MDL pretrial court."[115] Judge Davidson ensures his cases are remanded within that statutory timeframe.

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105. Complex Litigation Center, *Civil Administration at a Glance 2005-2006*, PHILA. CT. COM. PL. 2, https://web.archive.org/web/20100602124535/http://www.courts.phila.gov/pdf/manuals/civil-trial/complex-litigation-center.pdf (last visited May 22, 2015) (accessed by searching for the original URL in the Internet Archive search engine).

106. *Id.*

107. *Id.*

108. *Id.* at 3.

109. *See MDL Standards and Best Practices*, *supra* note 39, at 78–79; *see also* A.B.A. TASK FORCE PRESERVATION JUST. SYS., *supra* note 85, at 9.

110. Complex Litigation Center, *supra* note 105, at 2.

111. *First Judicial District: 2009 Annual Report*, PHILA. CTS. 58, https://courts.phila.gov/pdf/report/2009-First-Judicial-District-Annual-Report.pdf (last visited Mar. 3, 2015).

112. *Judge Mark Davidson Resume*, HARRIS CNTY. DIST. CTS., http://www.justex.net/courts/civil/CourtSection.aspx?crt=62&sid=245 (last visited Mar. 20, 2015).

113. These observations are a result of the experience of Fleming, Nolen & Jez, L.L.P.

114. TEX. R. JUD. ADMIN. 13.8, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. F app. (West 2013).

115. TEX. CIV. PRAC. & REM. CODE ANN. § 90.010(c) (West 2011 & Supp. 2014).

Another example of the use of expeditious remand is the current federal asbestos MDL. On October 1, 2008, Judge Eduardo Robreno of the United States District Court for the Eastern District of Pennsylvania was assigned the federal asbestos MDL.[116] Prior to Judge Robreno's assignment, the MDL was essentially dormant—no major hearings had occurred and no cases had been remanded for almost nine years. As soon as Judge Robreno took over, he applied additional resources to MDL-875, including: (1) asking other judges in the Eastern District of Pennsylvania to assist, (2) appointing four magistrate judges to have day-to-day responsibilities by district or by circuit, and (3) appointing a case administrator to assist the magistrate judges in case administration.[117] Engaging these resources resulted in show-cause hearings, fast-track discovery, referrals to a magistrate for pretrial proceedings, rulings on motions for summary judgment, and finally, remand to the transferor courts for trial.[118] Judge Robreno has suggested that remand should occur "at the conclusion of the summary judgment stage of the litigation."[119] In commenting on the settlement culture of MDLs and the negative perception of remand by federal transferee judges, Judge Robreno stated:

> As a matter of judicial culture, remanding cases is viewed as an acknowledgment that the MDL judge has failed to resolve the case, by adjudication or settlement, during the MDL process. That view . . . interfered with the litigation of individual cases in the MDL court.
>
> . . .
>
> After 2009, MDL-875 departed from this regimen. Remand was no longer viewed as a failure, but rather very much as a part of the MDL process.[120]

Because promptly remanding cases to the transferee court should occur once the goal of addressing pretrial issues has been achieved, Judge Robreno has got it right. He has demonstrated that efficient management of an MDL can be accomplished. As a result of his actions, a stagnant docket was revived and started to move toward resolution. Litigants were once again assured the right to trial by jury.

Consequently, the remand tool, when exercised by the transferee court, would result in trial dates that would lead more quickly to the

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116. Robreno, *supra* note 54, at 126 ("This stage of litigation led some litigants to refer to MDL-875 as a 'black hole,' where cases disappeared forever from the active dockets of the court.").

117. *See id.* at 128–29.

118. *See id.* at 139–43.

119. *Id.* at 145.

120. *Id.* at 144 (footnotes omitted).

conclusion of MDL cases. In the end, lawyers settle cases. Trial judges do not settle cases, but they can establish the environment in which cases can be settled. When faced with multiple jury trial dates, cases will be resolved either by settlement or by trial. That is the beauty of trial by jury, and it is also the design of mass-action MDL proceedings.

VII. CONCLUSION

The design of MDL litigation by Congress is straightforward. The U.S. Supreme Court's approval of Congress's framework for MDL litigation is similarly direct. Use of the remand tool in the future, as it was designed in the past, will result in enforcement that "secure[s] the just, speedy, and inexpensive determination of every action."[121] In the future, going back to, and complying with, the statute's framework would improve the administration of justice and would avoid the black hole.

121. FED. R. CIV. P. 1.

A FALSE SENSE OF SECURITY: DUE PROCESS FAILURES IN REMOVAL PROCEEDINGS

DARLENE C. GORING*

I. INTRODUCTION

This Article will examine the scope of due process rights afforded to aliens[1] facing criminal prosecution for unauthorized return to the United States after prior removal by immigration officials. Federal enforcement of the Immigration and Nationality Act (INA)[2] is generally handled in administrative court proceedings that are civil in nature.[3] In addition to civil enforcement, immigration violators are often subject to criminal prosecution in federal court.[4] This Article will specifically examine the

* Sam D'Amico Endowed Professor of Law and Nolan J. Edwards Professor of Law, Louisiana State University Paul M. Hebert Law Center. The author wishes to thank her colleague, Joseph Bockrath, for his support and encouragement, and Cody Reed, for his wonderful research assistance. This Article is dedicated to the author's lifelong friend and staunchest supporter, Laura L. Davenport.

1. The term "alien" is defined as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (2012).

2. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952).

3. *See* Padilla v. Kentucky, 559 U.S. 356, 365 (2010) ("We have long recognized that deportation is a particularly severe penalty, but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process." (citations omitted) (internal quotation marks omitted)).

4. *See id.*

intersection between due process rights afforded to immigration violators who are reconciling the dual impact of criminal and civil proceedings.

The United States is currently "home" to millions of aliens, including over 11 million aliens who are present in the U.S. without authorization or documentation.[5] Notwithstanding their immigration status, aliens residing in the United States remain subject to removal[6] for being either inadmissible[7] or deportable.[8] The U.S. Immigration and Customs Enforcement agency (ICE) annually removes over 300,000 aliens from the United States.[9] Many of these aliens impermissibly re-enter the country without first obtaining consent from the United States Attorney General or the United States Secretary of Homeland Security.[10]

Aliens who were previously removed return to the United States at great risk of criminal prosecution by federal law enforcement agencies. Pursuant to 8 U.S.C. § 1326(a),[11] it is a criminal offense punishable by imprisonment for up to two years to effect unauthorized return to the United

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5. Jeffery S. Passel et al., *Population Decline of Unauthorized Immigration Stalls, May Have Reversed*, PEW RES. CENTER (Sept. 23, 2013), http://www.pewhispanic.org/2013/09/23/population-decline-of-unauthorized-immigrants-stalls-may-have-reversed/.

6. *See* United States v. Lopez-Vasquez, 227 F.3d 476, 479 n.2 (5th Cir. 2000) ("Before IIRIRA's [Illegal Immigration and Reform and Immigrant Responsibility Act of 1996] enactment in 1996, individuals such as Lopez-Vasquez who were ineligible for admission into the United States and were never admitted into the United States were referred to as excludable, while aliens who had gained admission, but later became subject to expulsion from the United States, were referred to as deportable. . . . In addition, the IIRIRA has done away with the previous legal distinction among deportation, removal, and exclusion proceedings. Now, the term removal proceedings refers to proceedings applicable to both inadmissible and deportable aliens." (citations omitted) (internal quotation marks omitted)).

7. Aliens who seek admission to the United States are subject to the provisions of 8 U.S.C. § 1182.

8. Aliens admitted to the United States are subject to the deportation provisions of 8 U.S.C. § 1227.

9. *See* ICE, *Fiscal Year 2013 ICE Immigration Removals*, U.S. DEP'T HOMELAND SEC., http://www.ice.gov/removal-statistics/ (last visited June 27, 2014).

10. *See* Peter A. Schulkin, *The Revolving Door: Deportations of Criminal Illegal Immigrants*, CTR. FOR IMMIGR. STUD. (Nov. 2012), http://cis.org/revolving-door-deportations-of-criminal-illegal-immigrants. In 2003, the Immigration and Naturalization Services (INS) was incorporated as an agency within the newly formed Department of Homeland Security and renamed the United States Citizenship and Immigration Services. *Our History*, U.S. CITIZENSHIP & IMMIGR. SERVS. (last updated May 25, 2011), http://www.uscis.gov/about-us/our-history.

11. Section 1326(a) provides, in pertinent part, that:

> Subject to subsection (b) of this section, any alien who—
>
> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States, . . .
>
> shall be fined under title 18, or imprisoned not more than 2 years, or both.

8 U.S.C. § 1326(a) (2012).

States.[12] Section 1326 is unlike most immigration statutes. Section 1326(d)[13] provides that aliens can, under prescribed and limited circumstances, collaterally attack the validity of the underlying removal order that serves as a predicate element of the § 1326(a) offense.[14]

Criminal prosecution and incarceration for previously removed aliens who return to the United States without authorization represent a "significant chunk of all criminal enforcement actions."[15] Prosecution of removed aliens for re-entry is one of the most frequent immigration charges imposed on aliens in federal courts.[16] From 2008–2010, 33.83% of aliens charged in federal courts were indicted for re-entry.[17] This rising surge of § 1326(a) prosecutions has caught the attention of at least one district circuit. In *United States v. Boliero*, a Massachusetts district court noted that "[i]t has not, however, escaped this [c]ourt's notice that prosecutions for illegal reentry have been initiated against about twenty-three percent of the criminal defendants whose prosecutions have commenced in federal district courts over the past three years."[18]

In 1987, the United States Supreme Court in *United States v. Mendoza-Lopez* held that an alien being prosecuted under § 1326(a) for illegal re-entry following a previous order of removal may collaterally

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12. *Id.*

13. Section 1326(d) provides, in pertinent part, that:

> In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) . . . or subsection (b) . . . unless the alien demonstrates that—
>
> (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
>
> (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
>
> (3) the entry of the order was fundamentally unfair.

Id. § 1326(d).

14. *Id.*

15. United States v. Boliero, 923 F. Supp. 2d 319, 335 (D. Mass. 2013); *see also Surge in Immigration Prosecutions Continues*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (June 17, 2008), http://trac.syr.edu/immigrationreports/188/ (noting that illegal reentry was "the most frequent recorded lead charge" for immigration prosecutions in U.S. District Courts during March 2008).

16. *See* MARK MOTIVANS, U.S. DEP'T JUST., IMMIGRATION OFFENDERS IN THE FEDERAL JUSTICE SYSTEM, 2010, at 6 (Doris J. James & Jill Thomas eds., 2012), *available at* http://www.bjs.gov/content/pub/pdf/iofjs10.pdf.

17. *Id.* at 17 tbl.2.

18. *Boliero*, 923 F. Supp. 2d at 335 (citing *Table D-2: U.S. District Courts—Criminal Defendants Commenced, by Offense, During the 12-Month Periods Ending June 30, 2008 Through 2012*, U.S. CTS, http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2012/junc/D02DJun12.pdf (last visited Aug. 6, 2014)).

attack the legality of the prior removal order.[19] Although the legislative history of § 1326 did not reveal a congressional intent to give aliens the opportunity to collaterally attack the validity of a prior removal order, the Court held that "where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceedings."[20]

After the *Mendoza-Lopez* decision, Congress incorporated the concerns expressed by the Court into the amended language of § 1326 by adding subsection (d).[21] Section 1326(d) provides, in pertinent part, that an alien seeking judicial review of an underlying deportation order must demonstrate that: "(1) the alien exhausted any administrative remedies that may have been available to [challenge] the order; (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair."[22]

Following the passage of § 1326(d), federal circuit courts became divided regarding whether the failure to advise an alien of the right to appeal the removal order in federal court improperly deprives the alien of the opportunity for judicial review such that the order can be collaterally attacked in a criminal proceeding.[23] The Eighth Circuit is the only federal circuit that imposes "an affirmative obligation on the government to advise an alien effectively of . . . her right to judicial review of deportation proceedings if the government wants to use the deportation later to prove a criminal offense."[24]

The Second, Sixth, and Eleventh Circuits adopted the contrary position that "general explanations at the conclusion of a deportation hearing advising the alien of his right to appeal the deportation order satisfy *Mendoza-Lopez* and provide the alien with notice of his appellate rights sufficient to satisfy due process."[25] The First, Third, Fifth, Seventh, and

19. United States v. Mendoza-Lopez, 481 U.S. 828, 829, 837–839 (1987), *superseded in part by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

20. *Id.* at 837–38 (citing Estep v. United States, 327 U.S. 114, 121–22 (1946); Yakus v. United States, 321 U.S. 414, 444 (1944)).

21. United States v. Reyes-Bonilla, 671 F.3d 1036, 1043 n.4 (9th Cir. 2012) ("Through the addition of subsection (d) to [8 U.S.C. § 1326] in 1996, Congress partially codified the Court's decision in *Mendoza-Lopez*."), *cert. denied*, 133 S. Ct. 322 (2012).

22. 8 U.S.C. § 1326(d) (2012).

23. *See infra* Part IV.

24. United States v. Santos-Vanegas, 878 F.2d 247, 251 (8th Cir. 1989).

25. United States v. Lopez-Solis, 503 F. App'x 942, 945–46 (11th Cir. 2013) (per curiam) (citing United States v. Escobar-Garcia, 893 F.2d 124, 126 (6th Cir. 1990)).

Tenth Circuits have not expressly ruled on whether an alien defendant is entitled to notice of the right to a judicial appeal.

This Article will attempt to reconcile this conflicting interpretation of *Mendoza-Lopez*, and seek to determine whether the Fifth Amendment requires disclosure of the availability of judicial review to aliens facing removal from the United States before the removal order can be used as a predicate element of a criminal offense. The opportunity for judicial review must, however, be the result of a considered and intelligent understanding of the remedies available to the alien following the disclosure of such information by immigration officials.

II. ENACTMENT OF § 1326(D)

In 1893, the United States Supreme Court clearly established that the Constitution offers no protection to an alien facing removal from the United States.[26] In *Fong Yue Ting v. United States*, the Court held that an "order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment."[27] As such, the Court continued, aliens subject to deportation have not "been deprived of life, liberty or property, without due process of law, and the provisions of the [C]onstitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application."[28]

Notwithstanding the lack of substantive due process rights, both Congress and the Supreme Court have recognized limited procedural due process rights for aliens in removal proceedings. The Fifth Amendment's[29] procedural due process guarantees apply to citizens, lawful resident aliens, and undocumented aliens.[30] Although the Supreme Court has not identified all of the procedural safeguards that must be afforded to aliens in removal proceedings, it is clear that all aliens in removal proceedings are entitled to some procedural safeguards.[31] The due process protections afforded to

26. Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

27. *Id.*

28. *Id.*

29. The Fifth Amendment to the United States Constitution provides, in pertinent part, that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

30. *See* Mathews v. Diaz, 426 U.S. 67, 77 (1976).

31. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."); United States v. Fernandez-Antonia, 278 F.3d 150, 156 (2d Cir. 2002) ("Although the Supreme Court has not specifically delineated the procedural safeguards to be accorded aliens in deportation or

aliens in removal proceedings require that aliens "be provided (1) notice of the charges against [them], (2) a hearing before an executive or administrative tribunal, and (3) a fair opportunity to be heard."[32] Paramount in any due process determination is the question of whether a person received meaningful notice of the rights and remedies afforded to her.

The question, then, transitions to the scope of due process protections afforded to aliens when an order of deportation serves as a predicate element for a criminal prosecution. As originally codified, § 276 (now codified as 8 U.S.C. § 1326) of the INA created a nexus between immigration law and criminal law by subjecting aliens unlawfully present in the United States, following prior removal, to criminal penalties and incarceration.[33] The intersection of both immigration law and criminal law led to the Supreme Court's decision in *United States v. Mendoza-Lopez* to embed procedural due process rights granted to aliens in removal proceedings into the criminal prosecution of § 1326 offenses.[34] In *Mendoza-Lopez*, the Court held that a defendant may collaterally attack an order of deportation on due process grounds where the order becomes an element of a criminal offense.[35] The Court noted that where administrative proceedings "play a critical role in the subsequent imposition of a criminal sanction, there must be some meaningful review of the administrative proceeding."[36]

As originally enacted in 1952, § 1326(a) provided that any alien who had been deported and subsequently re-enters or attempts to re-enter the United States "shall be guilty of a felony, and upon conviction thereof, be

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removal hearings, it is well settled that the procedures employed must satisfy due process." (citing *Shaughnessy*, 345 U.S. at 212)).

32. United States v. Lopez-Ortiz, 313 F.3d 225, 230 (5th Cir. 2002) (citing Kwong Hai Chew v. Colding, 344 U.S. 590, 597–98 (1953)); *see also* Smith v. United States, Nos. 10-21507-Civ-COOKE, 09-20952-Cr-COOKE, 2011 WL 837747, at *6 n.5 (S.D. Fla. Feb. 4, 2011) ("Because removal hearings are civil in nature, the due process protections afforded to aliens are less than those afforded to a criminal defendant."). The due process guarantees afforded to criminal defendants are significantly greater than those afforded to aliens in removal proceedings. *See* Skilling v. United States, 561 U.S. 358, 402–03 (2010) ("To satisfy due process, 'a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.'" (alterations in original) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

33. Immigration and Nationality Act, Pub. L. No. 82-414, § 276, 66 Stat. 163, 229 (1952).

34. *See* United States v. Mendoza-Lopez, 481 U.S. 828, 832–33, 838–39 (1987), *superseded in part by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

35. *Id.* at 838–39.

36. *Id.* at 837–38 (emphasis omitted) ("This principle means at the very least that where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense.").

punished by imprisonment of not more than two years, or by a fine of not more than $1,000, or both."[37] Following the enactment of § 1326, many aliens facing incarceration for returning to the United States after removal sought to collaterally attack the underlying deportation order in the criminal proceeding. A growing conflict among the federal circuits arose regarding whether an alien defendant could collaterally attack a deportation order.[38] In 1987, the issue was finally resolved by the United States Supreme Court in *United States v. Mendoza-Lopez*.[39] In *Mendoza-Lopez*, Justice Marshall, writing for the majority, examined the legislative history of § 1326 and concluded that "the text and background of § 1326 thus indicate no congressional intent to sanction challenges to deportation orders in proceedings under § 1326."[40] Upon failing to find an express congressional authorization for collateral attacks to a prior deportation order within the text or legislative history of § 1326, the Court examined the issue within the framework of the constitutional due process safeguards guaranteed to defendants in criminal proceedings.[41] Justice Marshall, in dictum, expressed reservations about the use of prior deportation orders as predicate elements of a § 1326 offense.[42] Notwithstanding the due process safeguards identified by the Court's holding, Justice Marshall noted that "the use of the result of an administrative proceeding to establish an element of a criminal offense is troubling."[43]

Justice Marshall's concerns are reflected in the Court's decision.[44] The holding in *Mendoza-Lopez* increased the standard imposed on the prosecution of a § 1326 violation.[45] The Court noted that the nexus between possible criminal sanctions arising from a violation of an administrative immigration statute warrants "*some* meaningful review of the administrative proceeding."[46] As a result, the Court crafted a new standard to provide alien defendants with due process rights that were previously absent from the then-existing version of § 1326.

The meaningful-review standard established by *Mendoza-Lopez* requires that "an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish

37. Immigration and Nationality Act, § 276.
38. *Mendoza-Lopez*, 481 U.S. at 832–33.
39. *Id.*
40. *Id.* at 837.
41. *Id.*
42. *Id.* at 838 n.15.
43. *Id.* (citing United States v. Spector, 343 U.S. 169, 179 (1952) (Jackson, J., dissenting)).
44. *Id.*
45. *Id.* at 838.
46. *Id.* (citing Estep v. United States, 327 U.S. 114, 121–22 (1946); Yakus v. United States, 321 U.S. 414, 444 (1944)).

conclusively an element of a criminal offense."[47] The absence of a clearly articulated standard for determining when an alien defendant suffered a deprivation of the right to judicial review created a significant barrier to an alien's ability to address a deprivation of due process rights. While not "enumerat[ing] which procedural errors are so fundamental that they may functionally deprive the alien of judicial review,"[48] the facts in *Mendoza-Lopez* identified two possible procedural defects.

First, the immigration judge failed to explain the aliens' right to suspension of deportation or right to appeal.[49] Second, the immigration judge accepted the aliens' waiver of their right to appeal.[50] The Court held that waivers of appellate rights that were not "considered or intelligent" deprive aliens of judicial review of their prior deportation proceedings.[51] The Court noted that "[t]he [i]mmigration [j]udge permitted waivers of the right to appeal that were not the result of considered judgments by [the aliens], and failed to advise [the aliens] properly of their eligibility to apply for suspension of deportation."[52]

Following the Supreme Court's decision in *Mendoza-Lopez* and the first attack on the World Trade Center in 1993, Senator Bob Dole introduced a bill entitled the "Comprehensive Terror Prevention Act of 1995" before the United States Senate.[53] That bill would eventually become the "Antiterrorism and Effective Death Penalty Act of 1996."[54] The bill easily passed through Congress and was signed by then-President Bill Clinton approximately one year later on April 24, 1996.[55] Senator Orin Hatch noted when introducing the bill that it was designed to "strengthen our counterterrorism efforts."[56] In addition to modifying immigration laws, the bill was intended "to give our law enforcement officials and courts the tools they need to remove alien terrorists from our midst."[57]

After *Mendoza-Lopez*, Congress incorporated concerns expressed in that opinion into the amended language of § 1326 by adding subsection

47. *Id.* at 838–39. The Supreme Court in *Mendoza-Lopez* held that "[d]ue process requires that a collateral challenge to the use of a deportation proceeding as an element of a criminal offense be permitted where the deportation proceeding effectively eliminates the right of the alien to obtain judicial review." *Id.* at 829.

48. *Id.* at 839 n.17.

49. *See id.* at 839.

50. *Id.* at 840.

51. *Id.*

52. *Id.*

53. 141 CONG. REC. 14,654 (1995).

54. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 (1996).

55. *See id.*

56. *See* 141 CONG. REC. 11,408 (1995).

57. *Id.* at 11,409.

(d).[58] Section 1326(d) provides, in pertinent part, that an alien seeking judicial review of an underlying deportation order must demonstrate the following: "(1) The alien exhausted any administrative remedies that may have been available to [challenge] the order; (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair."[59]

III. JUDICIAL REMEDIES FOLLOWING A REMOVAL ORDER

Aliens who are removed frequently return to the United States without obtaining prior consent or authorization from the Attorney General or Secretary of Homeland Security.[60] In the event that the aliens are apprehended after returning, they may be arrested and prosecuted.[61] "[T]he Fifth Amendment requires only that, '[a]n indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charges on the merits.'"[62]

An alien faced with criminal prosecution for violating § 1326(d) may file a motion to dismiss the indictment.[63] This is an unusual motion. "[G]enerally, courts lack authority to review either the competency or sufficiency of evidence which forms the basis of an indictment and may not quash indictments when the errors which produce them, such as prosecutorial misconduct or violation of a statute, do not affect substantial rights."[64] In *Mendoza-Lopez*, relying upon due process considerations, the Supreme Court carved out an exception to this rule for challenges initiated by alien defendants to the crimes raised under § 1326.[65] An alien defendant must satisfy all three prongs of § 1326 to raise a successful collateral attack and obtain a dismissal of the criminal indictment.[66]

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58. United States v. Reyes-Bonilla, 671 F.3d 1036, 1043 n.4 (9th Cir. 2012) ("Through the addition of subsection (d) to 8 U.S.C. § 1326 in 1996, Congress partially codified the Court's decision in *Mendoza-Lopez*.").

59. 8 U.S.C. 1326(d) (2012).

60. *See* MOTIVANS, *supra* note 16, at 6.

61. *Id.*

62. United States v. Munoz-Giron, 943 F. Supp. 2d 613, 619 (E.D. Va. 2013) (alterations in original) (citing United States v. Mills, 995 F.2d 480, 487 (4th Cir. 1993)).

63. *E.g.*, *id.*

64. *Id.* (internal quotation marks omitted).

65. United States v. Mendoza-Lopez, 481 U.S. 828, 831 n.2 (1987), *superseded in part by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

66. United States v. El Shami, 434 F.3d 659, 663 (4th Cir. 2005); United States v. Martinez-Rocha, 337 F.3d 566, 568 (6th Cir. 2003); United States v. Roque-Espinoza, 338 F.3d 724, 728 (7th Cir. 2003); United States v. Barba, No. 3:08-CR-46, 2009 WL 1586793, at *5 (E.D.

The first prong of § 1326 requires an alien defendant to prove that all available administrative remedies to challenge the prior order of removal were exhausted.[67] Generally, aliens do not assert that they were unaware of available administrative remedies. Section 1229a(c)(5) provides that upon issuance of an order of removal, "the judge shall inform that alien of the right to appeal the decision."[68] The Code of Federal Regulations (CFR) similarly provides that "the immigration judge must inform the alien of his right to appeal the disposition."[69] Administrative remedies would include filing a motion to reopen,[70] a motion for reconsideration,[71] or a cancellation of removal made by the Attorney General.[72] An alien may also appeal a removal order through administrative proceedings by filing an appeal to the Board of Immigration Appeals (BIA).[73]

The second prong of § 1326, as well as the holding in *Mendoza-Lopez*, requires that an alien defendant prove that due process deficiencies in the prior deportation proceedings "amount to a complete deprivation of judicial review of the deportation determination before the determination c[an] be collaterally attacked."[74] A judicial appeal is only appropriate after an alien has exhausted all available administrative remedies.[75] Following entry of a final order of removal, an alien may pursue a limited number of judicial options. Section 1252(a)(5) provides, in pertinent part, that the "sole and exclusive means for judicial review of an order of removal" is a "petition for review filed with [the] appropriate court of appeals."[76] Alien defendants facing prosecution under § 1326 often assert that the immigration judge who presided over their removal proceedings, the immigration attorney representing the government, or their own attorney failed to inform them of

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Tenn. June 3, 2009); United States v. Gallegos-Cosio, 363 F. Supp. 2d 388, 392 (N.D.N.Y. 2005) ("Because § 1326(d) is conjunctive, a defendant must satisfy all three of its provisions before he may wage a collateral attack.").

67. *El Shami*, 434 F.3d at 663. This Article will focus specifically on the second prong of § 1326(d).

68. 8 U.S.C. § 1229a(c)(5) (2012) provides that "[i]f the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties." *Id.*

69. *El Shami*, 434 F.3d at 663 n.6 (citing 8 C.F.R. § 242.26 (1993) (current version at 8 C.F.R. § 1240.48 (2014)).

70. 8 U.S.C. § 1229a(c)(7).

71. *Id.* § 1229a(c)(6).

72. *Id.* § 1229b.

73. 8 C.F.R. § 1003.38(a) (2014).

74. United States v. Lopez-Solis, 503 F. App'x 942, 944-45 (11th Cir. 2013) (per curiam).

75. 8 U.S.C. § 1252(d)(1).

76. *Id.* § 1252(a)(5).

their right to judicial review.[77] An examination of the consequences resulting from the failure to notify an alien defendant of this right has resulted in a significant body of divergent jurisprudence. Federal courts have grappled with determining whether due process considerations require immigration judges and attorneys to inform aliens in removal proceedings of their right to seek judicial review of a final removal order.[78]

To satisfy due process guarantees, § 1229a(c)(5) expressly mandates that immigration judges must inform an alien that she has a right to appeal an order of removal.[79] As provided in 8 C.F.R. § 1003.38, "[d]ecisions of [i]mmigration [j]udges may be appealed to the Board of Immigration Appeals."[80] The same notice mandate does not, however, apply to notification that an alien has the right to pursue a judicial review of a removal order.[81] The question of whether an immigration judge has an obligation to inform aliens of their right to judicial review has resulted in a split within the federal circuits.[82] A majority of the circuits hold that immigration judges and attorneys are not required to inform aliens of their right to judicial review.[83] However, one circuit has adopted a contrary position and affirmatively requires immigration officials to provide aliens with notice of their right to appeal to federal courts to satisfy due process concerns.[84]

IV. SPLIT IN THE FEDERAL CIRCUITS

Following the passage of § 1326(d), federal circuit courts became divided regarding whether the failure to advise an alien of the right to judicial review of a removal order improperly deprives the alien of the opportunity for judicial review such that the order can be collaterally attacked in a criminal proceeding. The Eighth Circuit is the only circuit that requires an immigration official to inform an alien of the right to seek judicial review of deportation proceedings.

77. *See infra* Part IV.
78. *See infra* Part IV.
79. 8 U.S.C. § 1229a(c)(5).
80. 8 C.F.R. § 1003.38(a) (2014).
81. *See infra* Part IV.
82. United States v. Vasquez-Montalban, 263 F. App'x 822, 825 (11th Cir. 2008) (per curiam) ("There is a split in the circuits as to whether immigration officials must inform aliens in removal proceedings of their right to review in federal courts.").
83. *See infra* Part IV.
84. *See infra* Part IV.A.

A. *Eighth Circuit*

In a case decided two years after the *Mendoza-Lopez* decision and before the passage of § 1326(d), the Eighth Circuit addressed the notice requirement imposed on immigration judges presiding over removal proceedings. In *United States v. Santos-Vanegas*, an alien defendant facing criminal prosecution for unlawful re-entry into the United States filed a motion to "suppress evidence of [his] prior deportation."[85] Santos-Vanegas argued that the immigration judge failed to advise him of his right to judicial appeal of the deportation order.[86] Santos-Vanegas, who represented himself, "spoke no English and could not read or write in any language."[87] The immigration judge did inform the alien defendant "of his right to appeal the decision to the Board of Immigration Appeals," and the alien did, in fact, file an administrative appeal.[88] However, Santos-Vanegas argued that notice of the right to only an administrative appeal was insufficient, stating that "[n]either . . . the [immigration judge n]or anyone else [had] earlier advised him of any opportunity to appeal beyond the administrative level."[89]

The Eighth Circuit focused on the lack of both written and oral notification during the prior removal proceeding.[90] The written notification that Santos-Vanegas's removal was imminent "did not in any way indicate that he could pursue further appeal in the federal courts."[91] Furthermore, it was established that neither the immigration judge nor any immigration official informed him of his ability to pursue such an appeal.[92] After Santos-Vanegas illegally returned to the United States, he was charged with

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85. United States v. Santos-Vanegas, 878 F.2d 247, 248 (8th Cir. 1989); *see also* United States v. Rodriguez, 420 F.3d 831, 835 (8th Cir. 2005) (Heaney, J., dissenting) (questioning the Eighth Circuit's conclusion that the actions of the immigration judge presiding over the deportation hearing afforded sufficient due process to the alien defendant). The dissent vigorously argued that apprising alien defendants of their right to pursue administrative remedies alone is not sufficient to satisfy the obligation to adequately advise aliens of their rights. *Rodriguez*, 420 F.3d at 835. The dissenting judge noted that "[a]t no point in the hearing, however, did the [immigration judge] inform Rodriguez or the other respondents that they would have the right to judicial review, as opposed to administrative review." *Id.* The dissent argued that the immigration judge's duty was heightened by the fact that Rodriguez was not represented by counsel, and "[t]he failure of the [immigration judge] to inform Rodriguez of his right to appeal to the federal courts before accepting his waiver of his right to appeal was sufficient in itself to deprive Rodriguez of an opportunity for meaningful review." *Id.* at 835–36.

86. *Santos-Vanegas*, 878 F.2d at 248.

87. *Id.* at 249.

88. *Id.*

89. *Id.* at 248, 250.

90. *See id.* at 251.

91. *Id.* at 250.

92. *Id.*

violating § 1326.[93] The Eighth Circuit, quoting *Mendoza-Lopez*, noted that an alien may successfully collaterally attack a prior deportation order by "us[ing] a deportation proceeding as an element of a criminal offense . . . where the deportation proceeding effectively eliminates the right of the alien to obtain judicial review."[94]

In *Santos-Vanegas*, in addition to the language and educational barriers faced by Santos-Vanegas, the Eighth Circuit noted the short temporal interval between the BIA's dismissal of his appeal and his deportation.[95] This short time span also inhibited Santos-Vanegas from properly raising a defense.[96] Consequently, the Eighth Circuit held that the *Mendoza-Lopez* decision "establishes an affirmative obligation on the government to advise an alien effectively of his or her right to judicial review of deportation proceedings if the government wants to use the deportation later to prove a criminal offense."[97]

B. Second and Ninth Circuits

The Second and the Ninth Circuits follow the majority view and do not require immigration officials to advise aliens of their right to pursue judicial review of a removal order in federal court.[98] Unfortunately, the Supreme Court in *Mendoza-Lopez* did not identify which fundamental procedural errors in removal proceedings would deprive aliens of judicial review,[99] but both circuits have identified procedural errors that occur in removal proceedings that result in due process deprivations.[100]

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93. *Id.*

94. *See id.* (second alteration in original) (quoting United States v. Mendoza-Lopez, 481 U.S. 828, 839 (1987), *superseded in part by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996)).

95. *Id.* at 251.

96. *See id.*

97. *Id.*

98. United States v. Gonzalez-Villalobos, 724 F.3d 1125, 1132–33 (9th Cir. 2013); United States v. Lopez, 445 F.3d 90, 95, 100 (2d Cir. 2006). One district court in the Third Circuit has criticized the Ninth Circuit's more expansive application of § 1326(d)(2), noting that "[t]he Ninth Circuit's approach essentially collapses the first and second prongs of [§] 1326(d) into a general fairness inquiry, by applying the same analysis to the exhaustion requirement and to whether the defendant was deprived of judicial review." Davis v. United States, Civil Action No. 06-cv-04079, Criminal Action No. 03-cr-484, 2007 WL 3342407, at *7 (E.D. Pa. Nov. 8, 2007) (citing United States v. Muro-Inclan, 249 F.3d 1180, 1183–84 (9th Cir. 2001)).

99. *Mendoza-Lopez*, 481 U.S. at 839 n.17

100. *Lopez*, 445 F.3d at 96. The Ninth Circuit has held that "[a]n immigration official's failure to advise an alien of his eligibility for relief from removal, including voluntary departure, violates his due process rights." United States v. Garcia-Santana, 743 F.3d 666, 671 (9th Cir. 2014) (citing United States v. Melendez-Castro, 671 F.3d 950, 954 (9th Cir. 2012) (per curiam)).

The Ninth Circuit has taken an expansive approach to determine whether procedural deficiencies in removal proceedings improperly deprived alien defendants of their opportunity for judicial review. As provided in § 1229a(c)(5), an immigration judge must inform alien defendants of their right to take an administrative appeal of a removal order to the BIA.[101] This mandatory requirement is routinely examined when determining whether alien defendants have satisfied the first prong of § 1326(d)(1), which requires that they exhaust "any administrative remedies" available before seeking relief from the removal order.[102]

The Ninth Circuit, in *United States v. Gonzalez-Villalobos*, held that failure to inform alien defendants of their right to an administrative appeal can satisfy § 1326(d)(2), which provides that the removal proceeding cannot improperly deprive alien defendants of the opportunity for judicial review.[103] The Ninth Circuit found that § 1326(d)(2) can be satisfied under circumstances where "alien[s] who fail[ ] to exhaust [their] administrative remedies due to an error in the underlying proceedings, satisfying (d)(1), will typically also be deprived of the opportunity for judicial review, [thus] satisfying (d)(2)."[104] A similar decision was reached in *United States v. Rojas-Pedroza*, where the court held that:

> [T]he same failure to inform an alien regarding "apparent eligibility" for relief also "deprive[s] the alien of the opportunity for judicial review" . . . because "an alien who is not made aware that he has a right to seek relief necessarily has no meaningful opportunity to appeal the fact that he was not advised of that right."[105]

The Second Circuit adopted the majority position "[t]hat there is no stand-alone right to notice of the availability of judicial review."[106] Relying upon the Supreme Court's opinion in *Mendoza-Lopez*, the Second Circuit acknowledged that criminal prosecutions which rely upon "the use of an administrative determination reached in the absence of important

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101. 8 U.S.C. § 1229a(c)(5) (2012); *see also* 8 C.F.R. § 1003.38(a) (2014).

102. 8 U.S.C. § 1326(d)(1).

103. *Gonzalez-Villalobos*, 724 F.3d at 1130 (citing United States v. Reyes-Bonilla, 671 F.3d 1036, 1045 (9th Cir. 2012); United States v. Ubaldo-Figueroa, 364 F.3d 1042, 1050 (9th Cir. 2004)).

104. *Id.* (citing United States v. Pallares-Galan, 359 F.3d 1088, 1096 (9th Cir. 2004)).

105. United States v. Rojas-Pedroza, 716 F.3d 1253, 1262–63 (9th Cir. 2013) (second alteration in original) (quoting United States v. Arrieta, 224 F.3d 1076, 1079 (9th Cir. 2000)), *cert. denied*, 134 S. Ct. 805 (2013).

106. United States v. Lopez, 445 F.3d 90, 96 (2d Cir. 2006).

constitutional safeguards as an element of a crime is 'troubling.'"[107] To combat the "troubling" nature of § 1326, the Supreme Court in *Mendoza-Lopez* held that providing a defendant with the opportunity for judicial review in the first instance "legitimate[s] such a practice."[108]

Notwithstanding its concerns, the Second Circuit stated that "[n]othing in *Mendoza-Lopez*, however, indicates that this principle requires a right to notice about the availability of judicial review."[109] The position adopted by the Second Circuit did not foreclose the ability to collaterally attack a deportation order under § 1326(d)(2) for deprivation of an opportunity for judicial review. In the Second Circuit, collateral challenges raised under § 1326(d)(2) for deprivation of the opportunity for judicial review can be brought in a number of ways. For example, procedural errors in the removal proceedings have been recognized as grounds for establishing that an alien defendant was deprived of judicial review.[110]

In *United States v. Turner*, the district court relied upon a procedural defect to acknowledge a possible deprivation of the opportunity for judicial review when an alien was subject to a deportation order entered in absentia.[111] The alien argued "that he was never served with the Order to Show Cause . . . , never received notice of the deportation hearing in immigration court, and did not know he was going to [be] deported until the Government actually deported him."[112] The district court ordered an evidentiary hearing to determine whether the defendant received proper notice of his deportation hearing:

> But should [the alien] be able to locate and present persuasive evidence of lack of notice to the [c]ourt, the [c]ourt has little doubt that such evidence would also establish that [the alien] was denied an opportunity for judicial review. . . . If it is true that [the alien] did not know—and had no reason to know—that he would be deported before he was actually deported on August 5, 1992, then [the alien] could not have been expected to seek judicial review—through any means—before August 5, 1992.[113]

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107. *Id.* at 95 (quoting United States v. Mendoza-Lopez, 481 U.S. 828, 838 n.15 (1987), *superseded in part by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996)).

108. *Mendoza-Lopez*, 481 U.S. at 838 n.15.

109. *Lopez*, 445 F.3d at 95.

110. *See, e.g.*, *id.* at 96 ("We turn to the question of whether judicial review was realistically available to [the alien defendant]—that is, whether defects in the administrative proceeding otherwise foreclosed judicial review." (citing 8 U.S.C. § 1326(d)(2) (2006))).

111. United States v. Turner, No. 3:08cr34 (MRK), 2010 WL 6634571, at *9–10 (D. Conn. Dec. 10, 2010).

112. *Id.* at *8.

113. *Id.* at *10 (citing United States v. Copeland, 376 F.3d 61, 67–69 (2d Cir. 2004)).

One district court in the Second Circuit has also recognized that alien defendants can suffer deprivation of an opportunity for judicial review where "legal uncertainties regarding the availability of review may render judicial review of a deportation proceeding unavailable to an alien."[114] In *United States v. Etienne*, the district court attributed the alien's delay to open questions regarding his eligibility for § 212(c) relief.[115] The alien's "ability to access review of his deportation order was compromised by the state of the law at the time of his confinement prior to deportation."[116]

Finally, denial of the opportunity for judicial review under § 1326(d)(2) can be demonstrated in the Second Circuit upon a showing that the alien received ineffective assistance of counsel.[117] In *United States v. Perez*, the Second Circuit held that "[d]eprivation of the opportunity for judicial review can be established by demonstrating ineffective assistance of counsel."[118] In *Perez*, *United States v. Cerna*, and *Etienne*, the courts held that the respective attorneys' failure to file an application for § 212(c) relief was "clear evidence of incompetence,"[119] which resulted in a finding that under § 1326(d)(2) the aliens were denied the opportunity for judicial review.[120]

C. Majority Circuits: Fourth, Sixth, and Eleventh

The Fourth, Sixth, and Eleventh Circuits adopted the position that "general explanations at the conclusion of a deportation hearing advising the alien of his right to appeal the deportation order satisfy *Mendoza-Lopez* and provide the alien with notice of his appellate rights sufficient to satisfy due process."[121] These federal circuits are in agreement that due process

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114. United States v. Etienne, No. CRIM.3-03-CR-190 JCH, 2005 WL 165384, at *4 (D. Conn. Jan. 14, 2005) (citing *Copeland*, 376 F.3d at 69).

115. *See id.* at *5.

116. *Id.*

117. United States v. Outram, 445 F. App'x 509, 515 (3d Cir. 2011). Although recognizing that the Second Circuit in *United States v. Perez*, 330 F.3d 97 (2d Cir. 2003) permitted an alien defendant to raise a collateral attack based upon an ineffective assistance of counsel argument, the Third Circuit distinguished the facts of *Outram* from *Perez*. *Id.* at 515–16 (citing *Perez*, 330 F.3d at 101 n.3, 103 n.5).

118. *Perez*, 330 F.3d at 101.

119. *Etienne*, 2005 WL 165384, at *6.

120. United States v. Cerna, 603 F.3d 32, 40 (2d Cir. 2010); *Perez*, 330 F.3d at 101–02; *Etienne*, 2005 WL 165384, at *6.

121. United States v. Lopez-Solis, 503 F. App'x 942, 946 (11th Cir. 2013) (per curiam) (citing United States v. Escobar-Garcia, 893 F.2d 124, 126 (6th Cir. 1990)); United States v. Munoz-Giron, 943 F. Supp. 2d 613, 621 (E.D. Va. 2013).

considerations do not require immigration officials "to advise an alien of the right to judicial review of a deportation or removal order."[122]

The Eleventh Circuit adopted the position held by the Second Circuit that immigration officials are not under an obligation to "specifically inform [an alien] about the availability of judicial review."[123] The Eleventh Circuit held that "[w]e agree with the Second Circuit's persuasive holding that, in an ordinary case, the receipt of a final order of removal puts an alien on notice to look for remedies of that order."[124]

In *Lopez-Solis*, the alien defendant appeared pro se during the removal hearing.[125] The immigration judge who presided over the removal hearing "informed Lopez-Solis that he had the right to appeal the decision to 'a higher court.'"[126] The immigration judge also informed Lopez-Solis that he could appeal to the BIA, which he did, but Lopez-Solis later argued that "he was unaware that he had a right to have the federal courts review his removal order."[127] The Eleventh Circuit held that Lopez-Solis "did receive a general notice of his right to appeal and was able to appeal to the BIA."[128] The court further noted that "Lopez-Solis expressed no confusion over the [immigration judge]'s deportation order and its consequences," and "based on the record, the [immigration judge] did not make any affirmative misstatements that misled Lopez-Solis into believing that he could not appeal to federal court."[129] As such, Lopez-Solis was not deprived of his right to judicial review and could not raise a collateral attack to his deportation order under § 1326(d).[130]

The Sixth Circuit in *United States v. Escobar-Garcia* similarly held that "*Mendoza-Lopez* does not mandate the [immigration officer] to advise an accused of a right to a 'judicial appeal.'"[131] Escobar-Garcia argued that "he was deprived of procedural due process because the [immigration

122. *Lopez-Solis*, 503 F. App'x at 945–46 (citing United States v. Lopez, 445 F.3d 90, 95 (2d Cir. 2006); *Escobar-Garcia*, 893 F.2d at 126).

123. *Id.* at 947. Additionally, another court rejected the argument that a Spanish translation of the waiver of removal deprived the alien of judicial review where the waiver's express language "clearly advised him of his rights to a hearing as set forth in the Notice to Appear." United States v. Estrada-Garcia, No. 13-14009-CR, 2013 WL 1621968, at *1, *5 (S.D. Fla. Apr. 10, 2013).

124. *Lopez-Solis*, 503 F. App'x at 946 (citing *Lopez*, 445 F.3d at 95).

125. *Id.* at 943.

126. *Id.*

127. *Id.*

128. *Id.* at 946.

129. *Id.* (citing United States v. Mendoza-Lopez, 481 U.S. 828, 831–32 (1987), *superseded in part by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); United States v. Santos-Vanegas, 878 F. 2d 247, 250–51 (8th Cir. 1989)).

130. *Id.* at 947.

131. United States v. Escobar-Garcia, 893 F.2d 124, 126 (6th Cir. 1990).

officer] failed to advise him of his right to a 'judicial review' in each of his earlier deportation decisions as opposed to generally informing him of a 'right to appeal' at the conclusion of the hearings."[132] The Sixth Circuit made it clear that immigration officials are not required to specify that the alien has a right to appeal to a federal court.[133] The Sixth Circuit noted that the explanations at the conclusion of the deportation hearing "advising Garcia of his right to appeal the deportation order satisfied *Mendoza-Lopez* and provided him with due process of notice of his appellate rights."[134]

One district court in the Fourth Circuit has followed the majority position adopted by the Second Circuit in *United States v. Lopez* that "'there is no stand-alone right to notice of the availability of judicial review,'" as due process is not offended by the failure to provide notice of judicial remedies that are readily available in case law and statutes.[135]

D. Circuits that Have not Addressed this Issue

The First, Third, Fifth, Seventh, and Tenth Circuits have not expressly ruled on whether alien defendants are entitled to notice of the right to judicial appeal. In *United States v. Luna*, the First Circuit, noting "the uncertainty in the law on this issue," declined to rule on whether § 1326(d)(2) was violated.[136] The court recognized that although the *Mendoza-Lopez* analysis was incorporated into § 1326, *Mendoza-Lopez* falls short of providing guidance as to identification of specific instances that warrant a finding that circumstances within a deportation proceeding deprived an alien defendant of the opportunity for judicial review.[137] The First Circuit noted that the Supreme Court in *Mendoza-Lopez* "declined to further 'enumerate which procedural errors are so fundamental that they may functionally deprive the alien of judicial review.'"[138]

In *Luna*, the government argued that the "availability of judicial review through a writ of habeas corpus is fatal to [an alien's] claim under § 1326(d)(2)."[139] The First Circuit examined conflicting opinions from other

132. *Id.*
133. *Id.*
134. *Id.*
135. United States v. Munoz-Giron, 943 F. Supp. 2d 613, 621 (E.D. Va. 2013) (quoting United States v. Lopez, 445 F.3d 90, 96 (2d Cir. 2006)).
136. United States v. Luna, 436 F.3d 312, 319 (1st Cir. 2006).
137. *Id.*
138. *Id.* (quoting United States v. Mendoza-Lopez, 481 U.S. 828, 839 (1987), *superseded in part by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996)).
139. *Id.*

federal circuits,[140] but due to the "uncertainty in the law" under § 1326(d)(2), it ultimately limited its analysis to whether the alien demonstrated "fundamental unfairness," i.e., the third prong of the collateral attack test under § 1326(d)(3).[141] The First Circuit found that the facts of this case did support a finding that the alien was deprived of an opportunity for judicial review under § 1326(d)(2),[142] since the immigration judge "failed to inform Luna of his eligibility for § 212(c) relief, provide him with an opportunity to apply for that relief, or adjudicate his application for relief."[143]

The First Circuit could have relied on the holding of *Mendoza-Lopez* to find that the immigration judge's failures were similar to the immigration judge's failures in *Mendoza-Lopez* to "adequately explain the availability of relief" to Mendoza-Lopez, resulting in a deprivation of that alien's "opportunity for judicial review."[144] Luna's possible ability to satisfy § 1326(d)(2) would have nevertheless been irrelevant to the disposition of the case because the First Circuit held that Luna did not satisfy the third prong of § 1326(d)(3).[145] Since the elements of § 1326(d) are in the conjunctive, the First Circuit found that "a defendant must satisfy all of them to successfully attack his removal order."[146]

The most recent consideration of § 1326 within the jurisdiction of the First Circuit comes from the district court in *United States v. Boliero*.[147] In *Boliero*, the district court determined that the hearing officer "technically informed"[148] the alien of her right to appeal; however, the district court ultimately found that she was deprived of her opportunity for judicial review.[149] In this case, the court granted Boliero's motion to dismiss the indictment for her purported violation of § 1326(a).[150] The motion to dismiss collaterally attacked the validity of a prior deportation proceeding, which was entered as a result of a conviction that was later vacated.[151]

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140. *Id.*

141. *Id.* at 318–19 ("However, because we conclude that Luna has not established prejudice under 8 U.S.C. § 1326(d)(3), we need not ultimately resolve all the statutory issues.").

142. *Id.* at 321.

143. *Id.*

144. *See id.* at 319 (citing United States v. Mendoza–Lopez, 481 U.S. 828, 842 (1987), *superseded in part by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996)).

145. *Id.* at 319, 321.

146. *Id.* at 317.

147. United States v. Boliero, 923 F. Supp. 2d 319 (D. Mass. 2013).

148. *Id.* at 328.

149. *Id.* at 331.

150. *Id.* at 336.

151. *Id.* at 324.

Boliero successfully argued that she was "prevented from exhausting administrative remedies by due process violations, . . . [which] deprived her of the opportunity for judicial review," and that she suffered prejudice from the issuance of a fundamentally unfair deportation order.[152] The court's due process analysis focused on the adequacy of the notice of Boliero's appellate rights.[153] The court determined that Boliero was deprived of due process protections because the "immigration court failed to advise her of her right to appeal."[154] Although the hearing officer "technically informed" [Boliero] of her right to appeal, he did not indicate the urgency in which the rights should be exercised.[155] The hearing officer only notified her "that she could file an appeal," not that she "*needed*" to appeal.[156] The court was persuaded that a "hearing officer's statement at the start of a hearing that [the defendant] had the right to appeal does not satisfy due process if notice is not provided to the defendant that it is time to appeal."[157] Having established that the due process violations prevented Boliero from exhausting her administrative remedies, the district court concluded that she satisfied the first prong of the § 1326(d)(2).[158] The court found that the second prong of § 1326(d)(2) was also satisfied because "the same violations have deprived her of the opportunity for judicial review."[159]

The Third Circuit has not expressly ruled on whether alien defendants are entitled to notice of their right to judicial appeal. However, several decisions indicate that the Third Circuit is willing to consider lack of notice in determining whether a prior removal hearing deprived an alien of procedural due process.[160] In *United States v. Charleswell*, the Third Circuit

152. *Id.* at 331, 336. In addition to asserting that she was denied due process, Boliero also argued that she received ineffective assistance of counsel in the filing of her motion to reopen. *Id.* at 329. Generally, ineffective assistance of counsel claims are made to support the first prong of a § 1326(d) collateral challenge. *See id.* at 329–30 (quoting United States v. Cerna, 603 F.3d 32, 42 (2d Cir. 2010)). However, this argument can also support a challenge under the second prong of the § 1326 test because "[i]neffective assistance of counsel violates due process where 'the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.'" *Id.* at 330 (quoting Iannetta v. INS, 48 F.3d 1211, 1995 WL 86263, at *2 (1st Cir. 1995) (per curiam) (unpublished table decision)). The court adopted the Second Circuit's analysis of due process deprivations resulting from ineffective assistance of counsel. *See id.*; *see also* United States v. Cerna, 603 F.3d 32, 42–43 (2d Cir. 2010).

153. *Boliero*, 923 F. Supp. 2d at 329 (citing 8 C.F.R. § 1003.38(b) (2013)).

154. *Id.* at 328.

155. *See id.*

156. *Id.* at 328–29.

157. *Id.* at 329.

158. *Id.* at 331.

159. *Id.*

160. *See, e.g.*, Richardson v. United States, 558 F.3d 216, 224 (3d Cir. 2009) ("[F]ailure to notify counsel that counsel's client is facing removal proceedings has been found to deprive the

considered this issue and concluded that alien defendants may raise collateral attacks under § 1326(d)(2) based upon a lack of notice of appellate rights combined with a misunderstanding of the law.[161] Citing *United States v. Copeland* from the Second Circuit, the Third Circuit in *Charleswell* held that "where an alien is misled to believe that he has no opportunity for judicial review, the lack of an affirmative notice of the right to an appeal may combine to constitute a denial of the meaningful opportunity for judicial review, satisfying both § 1326(d)(2) and *Mendoza-Lopez*."[162]

The Fifth Circuit has not held that immigration judges are required to notify alien defendants of their right to challenge removal orders in federal court. In addition to its recognition of the three-prong test set forth in § 1326(d) and the holding in *Mendoza-Lopez*, the Fifth Circuit requires that alien defendants seeking to collaterally attack prior removal orders also satisfy a three-prong test to determine whether due process deficiencies were present in the prior removal proceeding.[163] In *United States v. Lopez-Vasquez*, the Fifth Circuit held that an "alien must establish that (1) the prior hearing was 'fundamentally unfair'; (2) the hearing effectively eliminated the right of the individual to challenge the hearing by means of judicial review of the order; and (3) the procedural deficiencies caused the individual actual prejudice."[164]

One important factor underlying the Fifth Circuit's analysis is whether the prior removal proceeding afforded the alien defendant with due process protections.[165] The Fifth Circuit in *Lopez-Vasquez* noted, however, that the

represented alien of meaningful judicial review." (citing United States v. Dorsett, 308 F. Supp. 2d 537, 543–44 (D.V.I. 2003))).

161. United States v. Charleswell, 456 F.3d 347, 357 (3d Cir. 2006) (citing United States v. Copeland, 376 F.3d 61, 68–69 (2d Cir. 2004)).

162. *Id.* (citing United States v. Copeland, 376 F.3d 61, 68–69 (2d Cir. 2004)) ("Here, [the alien defendant] appeared pro se and indicated his desire to contest the reinstatement order by checking the appropriate box. He was never informed that he had relief beyond this box and its corresponding statement. Consequently, the lack of any notice concerning his right to a direct appeal in combination with the misleading nature of the explicit language of the reinstatement order and the speed with which aliens are deported following a reinstatement process leads us to conclude that he was effectively denied an opportunity to seek judicial review, thereby meeting *Mendoza-Lopez*'s second requirement." (emphasis omitted)).

163. United States v. Lopez-Vasquez, 227 F.3d 476, 483 (5th Cir. 2000).

164. *Id.* at 483 (emphasis omitted); *see also* United States v. Segundo, No. 4:10-cr-0397, 2010 WL 4791280, at *3 (S.D. Tex. Nov. 16, 2010) (citing *Lopez-Vasquez*, 227 F.3d at 483).

165. *Lopez-Vasquez*, 227 F.3d at 484 (quoting United States v. Lara-Aceves, 183 F.3d 1007, 1011 (9th Cir. 1999), *overruled by* United States v. Rivera-Sanchez, 247 F.3d 905 (9th Cir. 2001)).

United States Supreme Court "has not enumerated the procedural protections guaranteed to an alien in a deportation proceeding."[166]

In *United States v. Segundo*, the district court granted the alien defendant's motion to suppress a prior removal order and motion to dismiss the indictment for "one count of illegal re-entry in violation of [§] 1326(a)."[167] The district court focused its inquiry primarily on the procedural errors in the prior removal hearing that prevented the alien defendant from "being aware of, much less pursuing, judicial review" to challenge the order of removal.[168] The procedural errors in *Segundo* "consisted of the failure to explain to [the alien defendant] his right to be represented by counsel, his right to rebut and contest the charges against him, and his right to petition for judicial review of the removal order, in addition to the failure to translate this information into Spanish for him."[169] The district court concluded that these procedural errors were "so fundamental that they functionally deprive[d]" the alien defendant of his right to judicial review.[170]

The Seventh Circuit has not ruled on this issue. However, an alien defendant facing prosecution under § 1326 did argue that he was entitled to a heightened level of notice during his deportation proceedings. In *United States v. Robledo-Gonzales*, the alien defendant asserted that the immigration judge's "failure to inform him of his right to petition for judicial review of an adverse decision by the BIA effectively foreclosed his right to judicial review."[171] The Seventh Circuit held that the availability of a petition for a writ of habeas corpus precluded a finding that the alien defendant was deprived of an opportunity for judicial review.[172] In *United States v. Roque-Espinoza*, the Seventh Circuit again held that the availability—yet lack of filing—of a habeas petition precludes a finding

166. *Id.* (citing United States v. Mendoza-Lopez, 481 U.S. 828, 839, n.17 (1987), *superseded in part by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996)); *see also* Animashaun v. INS, 990 F.2d 234, 238 (5th Cir. 1993) ("To render a hearing unfair, the defect complained of must have been such as might have led to a denial of justice, or there must have been absent one of the elements deemed essential to due process." (citing Ka Fung Chan v. INS, 634 F.2d 248, 258 (5th Cir. 1981))); United States v. Girosky-Garibay, 176 F. Supp. 2d 705, 710 (W.D. Tex. 2001) ("If one of the elements deemed essential to due process is absent from the removal proceeding, then Defendant is denied due process of law." (citing *Animashaun*, 990 F.2d at 238)).

167. *Segundo*, 2010 WL 4791280, at *1.

168. *Id.* at *9.

169. *Id.*

170. *Id.* (alteration in original) (emphasis omitted) (quoting *Mendoza-Lopez*, 481 U.S. at 839).

171. United States v. Robledo-Gonzales, 80 F. App'x 502, 505 (7th Cir. 2003).

172. *Id.* at 504.

that an alien defendant was deprived of an opportunity for judicial review.[173] The court noted that:

> Even though [the alien defendant] may have had good reason for thinking that he was not eligible for discretionary relief from removal, because the [immigration judge] had so informed him, he should have realized that avenues of judicial review were available to him. Apart from a direct appeal to the court of appeals from a BIA order finding him ineligible for § 212(c) relief, which may have been possible, he could also have filed a petition for a writ of habeas corpus under 28 U.S.C § 2241.[174]

The Tenth Circuit has not ruled on this issue. In *United States v. Varela-Cias*, the alien defendant asked the court to adopt the Eighth Circuit's analysis in *Santos-Vanegas*, and impose an obligation on immigration judges to advise aliens of their right to appeal in federal court.[175] Varela-Cias argued that he was denied the opportunity for judicial review where the immigration judge "failed to inform him of his right to file an appeal in federal court."[176] The Tenth Circuit declined to address this issue, noting that "Varela-Cias never argued in the district court that the [immigration judge] should have informed him of his right to file an appeal in federal court."[177]

V. DUE PROCESS DEPRIVATIONS ARISING FROM LACK OF NOTICE

It is a long-standing axiom of both immigration and constitutional law that aliens in removal proceedings are entitled to due process rights under the Fifth Amendment.[178] Due process guarantees require the government to afford an alien with the "most basic procedural protections—notice and a hearing at a meaningful time and in a meaningful manner."[179] The Supreme Court established a framework in *Mathews v. Eldridge* to determine

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173. United States v. Roque-Espinoza, 338 F.3d 724, 729 (7th Cir. 2003).

174. *Id.* (citing Calcano-Martinez v. INS, 533 U.S. 348, 351 (2001); Bosede v. Ashcroft, 309 F.3d 441, 446 (7th Cir. 2002)).

175. United States v. Varela-Cias, 425 F. App'x 756, 760 (10th Cir. 2011) (quoting United States v. Santos-Vanegas, 878 F.2d 247, 251 (8th Cir. 1989)).

176. *Id.*

177. *Id.*

178. Landon v. Plasencia, 459 U.S. 21, 32–33 (1982); Mathews v. Diaz, 426 U.S. 67, 77 (1976); United States v. Gonzalez-Roque, 301 F.3d 39, 45 (2d Cir. 2002) ("Although the Supreme Court has not specifically delineated the procedural safeguards to be accorded aliens in deportation or removal hearings, it is well settled that the procedures employed must satisfy due process." (quoting United States v. Fernandez-Antonia, 278 F.3d 150, 156 (2d Cir. 2002))).

179. Walters v. Reno, 145 F.3d 1032, 1037 (9th Cir. 1998) (citing *Landon*, 459 U.S. at 32–33).

whether due process deprivations occurred as a result of an administrative proceeding.[180] The *Mathews* factors are as follows:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[181]

The first *Mathews* factor is easily satisfied. Removal proceedings are brought under § 1229a. The Supreme Court in *Bridges v. Wixon* held that aliens in removal proceedings have substantial liberty interests at stake.[182] The Supreme Court has also provided that even undocumented aliens are entitled to constitutional rights.[183] In *Mathews v. Diaz*, the Supreme Court recognized that "[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection."[184]

The second *Mathews* factor examines the risk of an erroneous deprivation of the alien's liberty interest.[185] Without question, alien defendants, due to a lack of notice of their right to appeal, are deprived not only of their right to review the removal order in federal court but, more importantly, are deprived of an opportunity to collaterally challenge the prior removal order in subsequent criminal proceedings. As a result, alien defendants are subject to both removal from the United States and subsequent incarceration upon their unauthorized return to the United States because neither the immigration judge nor immigration officials are required to advise aliens of their right to appeal in federal court.

The risk of erroneous deprivations of due process for aliens in removal proceedings is heightened by the demographics of this group. The Second Circuit in *United States v. Lopez* argued that access to judicial remedies in case law and statutes is readily available to aliens after removal orders are entered.[186] That argument is, however, a difficult one to make in light of

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180. Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

181. *Id.* at 335 (citing Goldberg v. Kelly, 397 U.S. 254, 263–71(1970)).

182. Bridges v. Wixon, 326 U.S. 135, 154 (1945) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom.").

183. *Diaz*, 426 U.S. at 77.

184. *Id.*

185. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

186. *See* United States v. Lopez, 445 F.3d 90, 96 (2d Cir. 2006). In *Lopez*, the immigration judge failed to notify the alien defendant of his right to habeas corpus review, although he was apprised of the right to appeal to the BIA. *Id.* at 95. The Second Circuit rejected the argument that failure to give notice, standing alone, could serve as grounds for a due process attack. *Id.* at 96.

demographic factors such as language, literacy, and unfamiliarity with the American legal system.[187] Additionally, the duration between entry of a removal order and physical removal of an alien from the United States must also be considered.[188] The demographics of the alien population, coupled with the complexity of the statutory framework of the INA and CFR and ineffective or nonexistent legal representation clearly serve as barriers that limit aliens' access to information about their legal remedies following entry of a removal order.[189]

The final *Mathews* factor examines the potential administrative and fiscal burdens on the government that could arise from providing notice to aliens in removal proceedings that they have a right to appeal a removal order in federal court.[190] Clearly, the federal government has an interest in strictly interpreting immigration statutes and preventing frivolous appeals. As the Ninth Circuit opined in *Lopez-Velasquez* and *Valencia v. Mukasey*, the government should not be obligated to inform aliens of "all possible ways of obtaining relief" because "aliens would be encouraged to file frivolous applications, burdening the immigration system and possibly resulting in frivolousness determinations."[191] Although reducing possible frivolous appeals in federal courts is certainly a laudable governmental interest, the burden on immigration judges and immigration officials would not be significant.

The Third Circuit in *United States v. Charleswell* questioned whether the government has a legitimate reason to withhold notice of appellate rights to aliens in removal proceedings. The Third Circuit noted that "[w]e are simply unable to fathom or rationalize a legitimate reason why the government would not want to fully inform aliens of their statutory right to

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The court argued that "the receipt of a final order of deportation ordinarily would put an alien on notice to look for remedies for that order." *Id.* at 95. The court further placed the burden on the alien defendant to seek information about the avenues of relief available, stating that "where judicial remedies are readily available in case law and statutes, due process is not offended where no notice of those remedies is provided." *Id.* at 96.

187. *See* United States v. Yunis, 859 F.2d 953, 965 (D.C. Cir. 1988) (quoting United States v. Nakhoul, 596 F. Supp. 1398, 1402 (D. Mass. 1984)) (highlighting the aliens' argument that waivers of their rights afforded by *Miranda* were not knowing and intelligent due to a lack of "understanding of American law, customs and constitutional rights").

188. *See Lopez*, 445 F.3d at 97 (quoting United States v. Copeland, 376 F.3d 61, 68 (2d Cir. 2004)).

189. *See* United States v. Cerna, 603 F.3d 32, 35 (2d Cir. 2010) ("This case gives us occasion once again to take note of the exceptionally poor quality of representation often provided by attorneys retained by aliens as they attempt to negotiate the complexities of our immigration law.").

190. *Eldridge*, 424 U.S. at 335.

191. United States v. Lopez-Velasquez, 629 F.3d 894, 899 (9th Cir. 2010); Valencia v. Mukasey, 548 F.3d 1261, 1263–64 (9th Cir. 2008).

appeal."[192] Recognizing that effective notification is essential, the court determined that "a sensibly easy way to cure this glaring deficiency" would require a "slight change" in the forms and an amendment to the immigration regulations.[193]

VI. CONCLUSION

The number of criminal prosecutions in federal court for aliens returning to the United States following entry of a removal order is rising dramatically. Although it is undisputed that aliens are afforded due process right during removal proceedings, the lack of notice about available remedies continues to deprive those aliens of any meaningful due process. The Supreme Court and Congress have created an avenue for aliens to collaterally challenge prior removal orders, but that remedy has been rendered effectively meaningless by the federal government's unwillingness to inform aliens of their statutory right to judicial review of the orders. Immigration officials must certainly realize that aliens do not have realistic opportunities to research case law and interpret complex immigration statutes in search of remedies during the short time period between entry of the removal order and actual departure from the United States. This problem could easily be remedied by broadly interpreting the statutory language in the INA and CFR to impose an affirmative obligation on immigration officials to notify aliens of both administrative and judicial appellate rights.

192. United States v. Charleswell, 456 F.3d 347, 357 (3d Cir. 2006).

193. *Id.*; *see also* Martinez-De Bojorquez v. Ashcroft, 365 F.3d 800, 805 (9th Cir. 2004) ("Finally, the additional burden imposed on the government in having to provide a warning regarding the effect of 8 C.F.R. § 1003.4 is not substantial. While we do not decide what type of warning would be appropriate under the circumstances because it is clear from the record that notice was given to [the alien], we are confident that providing notice to a person such as [the alien] would result in minimal cost to the government. Providing such notice, however, would go a long way in remedying the inequities that the application of 8 C.F.R. § 1003.4 can cause."); Walters v. Reno, 145 F.3d 1032, 1044 (9th Cir. 1998) ("Requiring the government to alter slightly its procedures in document fraud proceedings will achieve the desired effect—additional safeguards—without visiting upon it any inordinate hardship. . . . Providing constitutionally adequate notice requires only minor changes in the content of the forms themselves and equally slight adaptions in the INS's method of presenting the forms.").

RIFE WITH LATENT POWER: EXPLORING THE REACH OF THE IRS TO DETERMINE TAX-EXEMPT STATUS ACCORDING TO PUBLIC POLICY RATIONALE IN AN ERA OF JUDICIAL DEFERENCE

AMY MOORE*

I. INTRODUCTION

Chief Justice Marshall famously intoned in *McCulloch v. Maryland* that "[a]n unlimited power to tax involves, necessarily, a power to destroy."[1] The Internal Revenue Service (IRS)—a federal agency within the Department of Treasury and charged with the administration and interpretation of the laws pertaining to internal revenue—is no stranger to public controversy regarding its destructive nature. Throughout American history, the IRS has been used as a political tool,[2] at one time even denying "tax-exempt status [to] many organizations [that had] alleged communist

* Associate Professor of Law at Belmont University College of Law. Special thanks to Landon Breazeale, Margaret Hearn, Patrick Ober, and Richard Stewart for their research assistance during this project.

1. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 327 (1819).

2. *See* JOHN A. ANDREW III, POWER TO DESTROY: THE POLITICAL USES OF THE IRS FROM KENNEDY TO NIXON 3 (2002) (discussing the abuse of the IRS by presidential and congressional figures).

leanings."[3] More recently, in 2013, the IRS was accused of targeting certain groups that were applying for tax-exempt status with closer scrutiny based on their political ideologies.[4] At the same time, California introduced a bill in the state legislature to deny tax-exempt status to the Boy Scouts of America and other groups that discriminate on the basis of sexual orientation.[5]

Why does the IRS feel that it has the authority to use tax-exempt status to judge the political or ideological views of an organization? Why does the California legislature think that it can revoke the tax-exempt status of the Boy Scouts of America due to discrimination? The answer to both questions appears to be "public policy." In large part, this is all due to the Supreme Court's decision in *Bob Jones University v. United States*.

Bob Jones was a landmark case in which the IRS revoked the tax benefits of a private, religious university practicing racial discrimination.[6] In that case, the Supreme Court reasoned that the university was acting contrary to established public policy and the IRS had the legal authority to revoke an entity's status on that basis.[7] This Article argues that the logic of this case—especially in light of changing law in other areas—has the possibility of being extended on a grand scale, and the IRS could legally revoke the tax benefits of any institution for violation of any IRS-declared public policy. Although the original holding in no way limits the use of the public policy doctrine to cases of discrimination, cases expanding to additional categories of discrimination beyond race would most closely follow the argumentation from the original case. Moreover, developments in case law regarding judicial deference and the treatment of agency interpretations intersect peculiarly with case law regarding discrimination to more powerfully endow the IRS with a proclamation that a particular institution is acting contrary to public policy. Thus, the initial extension of this power could be that the IRS chooses to revoke the tax-exempt status of private, religious universities similar to Bob Jones University that discriminate on the basis of other traits, namely gender or sexual orientation.

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3. Thomas Stephen Nueberger & Thomas C. Crumplar, *Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration*, 48 FORDHAM L. REV. 229, 243 n.101 (1979).

4. *See* Alex Altman, *The Real IRS Scandal*, TIME (May 14, 2013), http://swamplan d.time.com/2013/05/14/the-real-irs-scandal/.

5. Scott Detrow, *California Lawmakers Target Boy Scouts' Tax-Exempt Status*, NPR (Sept. 3, 2013, 4:15 PM EST), http://www.npr.org/2013/09/03/218572821/california-lawmakers-target-boy-scouts-tax-exempt-status.

6. Bob Jones Univ. v. United States, 461 U.S. 574, 581 (1983).

7. *Id.* at 598–99.

The scope of this Article is narrow, considering only the application of revocation of federal tax benefits and the likely judicial deference to such revocation. The hypothetical revocations could extend to private, religious universities that discriminate on the basis of gender or sexual orientation in either a student or employee context. This is a much smaller question than asking what actions the government may take to stop what it perceives to be intolerance in institutions of higher learning. This Article is focused on the argument that the specific method of tax benefit revocation (or denial) by the IRS would be both legally permissible *and* supported by the courts.

To explore this argument fully, the first step is a detailed analysis of how Congress and the IRS confer and revoke tax benefits, and how the IRS used this power to instigate the litigation in *Bob Jones*. Next, context must be given, both historically and currently, for how the judicial system reviews choices that the IRS makes about issues like tax-exempt status. This perspective will allow for an analysis of where *Bob Jones* fits in the paradigm of traditional judicial deference and will facilitate how to predict courts' attitudes toward similar IRS actions. Finally, because this Article also discusses extending possible revocation of tax benefits to include issues of employment, the religious defense advanced in the case must be considered before entertaining extensions of the public policy argument to discrimination on the basis of gender and sexual orientation.

Law professor David Brennen frames the issue as follows: "[S]hould we permit our tax system to fund groups that engage in invidious discrimination based on race, gender, disability, age, or sexual orientation?"[8] This view suggests that if the government permits tax exemptions for organizations that discriminate, it is effectively rewarding such behavior. Conversely, the real legal issue entails whether the courts will support an agency's decision to punish organizations that engage in discrimination. The Supreme Court supported the IRS's refusal to reward racially discriminatory behavior toward students in *Bob Jones*,[9] but would it give such staunch support for this type of refusal on other grounds?

II. TAX EXEMPTION FOR CERTAIN ORGANIZATIONS

Any entity that desires tax-exempt status must file the appropriate forms and supporting documentation with the IRS.[10] Section 501(c)(3) of

8. David A. Brennen, *Tax Expenditures, Social Justice, and Civil Rights: Expanding the Scope of Civil Rights Laws to Apply to Tax-Exempt Charities*, 2001 BYU L. REV. 167, 169 (2001).

9. *Bob Jones*, 461 U.S. at 605.

10. IRS PUBLICATION 557: TAX-EXEMPT STATUS FOR YOUR ORGANIZATION (Oct. 2013), http://www.irs.gov/pub/irs-pdf/p557.pdf.

the Internal Revenue Code (Tax Code) lists the type of organizations, pursuant to § 501(a), which are exempt from taxation unless the IRS has denied them tax exemptions based on other sections of the Tax Code: "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable . . . or educational purposes."[11] As a corollary, § 170 has allowed gifts or charitable contributions to § 501(c)(3) organizations to be tax-deductible.[12] This same language that is codified in § 501(c)(3) also appeared in the first income tax law, enacted in 1894.[13] The 1894 law stated that "nothing herein contained shall apply . . . to corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes."[14]

Exemptions for institutions of higher learning have a long-established history in the United States from the beginning of colonial America.[15] The "educational exemption" was originally "connected to the historic exemption for churches and [other] religious institutions" because, at that time, most educational facilities had the primary mission of training ministers.[16] This set of exemptions for religious educational institutions "grew from the medieval notion that one could not tax God."[17] These exemptions have become "essential to the existence of many organizations."[18] Correspondingly, as reliance on tax-exempt status grew, "the IRS's classification of such organizations" for the purpose of these exemptions "became increasingly routine."[19] However, eventually the use

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11. I.R.C. § 501 (2012) ("An organization described in subsection (c) or (d) or [§] 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under [§] 502 or 503. . . . [Exempt organizations include] any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes."). This is the current language of the Tax Code but was the same language applicable in *Bob Jones*. *See Bob Jones*, 461 U.S. at 574.

12. I.R.C. § 170 (West 2011 & Supp. 2014).

13. Wilson–Gorman Tariff Act, ch. 349, § 73, 28 Stat. 570 (1894), *declared unconstitutional by* Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895). The corresponding deduction for donations to these organizations did not exist until 1917. War Revenue Act, ch. 63, § 1201(2), Pub. L. No. 65-50, 40 Stat. 300, 330 (1917).

14. § 32, 28 Stat. at 556.

15. John D. Colombo, *Why Is Harvard Tax-Exempt? (and Other Mysteries of Tax Exemption for Private Educational Institutions)*, 35 ARIZ. L. REV. 841, 844 (1993).

16. *Id.* at 844–45.

17. *Id.* at 857.

18. Russell J. Upton, *Bob Jonesing' Baden-Powell: Fighting the Boy Scouts of America's Discriminatory Practices by Revoking Its State-Level Tax-Exempt Status*, 50 AM. U. L. REV. 793, 815 (2001); *see also* Michael Yaffa, Comment, *The Revocation of Tax Exemptions and Tax Deductions for Donations to 501(c)(3) Organizations on Statutory and Constitutional Grounds*, 30 UCLA L. REV. 156, 156 (1982).

19. Upton, *supra* note 18, at 815.

of this classification power became entangled in political pressure and public policy.[20]

Exemption status may be denied to an organization at the outset or it may be revoked once it has been conferred.

> A ruling or determination letter recognizing exemption may be revoked or modified by:
>
> 1. A notice to the organization to which the ruling or determination letter originally was issued,
> 2. Enactment of legislation or ratification of a tax treaty,
> 3. A decision of the United States Supreme Court,
> 4. Issuance of temporary or final regulations by the IRS, or
> 5. Issuance of a revenue ruling, a revenue procedure, or other statement published in the Internal Revenue Bulletin or Cumulative Bulletin.[21]

An organization that is denied tax-exempt status (or is stripped of it) must appeal through the IRS before looking to the federal courts for remedy.[22] In Publication 557—a guidance document for organizations wishing to receive tax-exemp't status—there is now an explicit requirement that a private school must include a statement of its racially non-discriminatory policy in governing documents.[23] However, this requirement does not appear in the Tax Code or any Treasury Regulations.

How does the IRS get the ability to make these types of pronouncements through bulletins and regulations to interpret the Tax Code in pursuit of its job to collect revenue? The authority of the IRS begins with Congress' delegation of power in the Tax Code.[24] After laying down a statutory rubric for the collection of taxes, Congress provides not only explicit delegations of power but also the general command that "the Secretary [of the Treasury] shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue."[25] The most formal of these "rules and regulations" are Treasury

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20. *See* Yaffa, *supra* note 18, at 157 ("Since 1970 . . . there has been a vigorous debate as to whether organizations that violate or otherwise frustrate national public policy should be accorded tax-exempt status.").

21. IRS PUBLICATION 557, *supra* note 10, at 6.

22. *Id.* at 7–8. Typically, to challenge agency action in federal courts, a party must completely exhaust all administrative remedies required by the agency.

23. *Id.* at 26–28.

24. *See* John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the* Chevron *Era*, 64 GEO. WASH. L. REV. 35, 52 (1995) ("The Internal Revenue Code contains more than 1000 specific grants of regulatory authority.").

25. I.R.C. § 7805(a) (2012).

Regulations, which are issued in accordance with the notice, comment, and publication requirements of the Administrative Procedure Act (APA), which governs federal-agency action.[26] Although the APA does not require the use of notice-and-comment procedures for "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice,"[27] the IRS uses notice-and-comment procedures for most Treasury Regulations, whether they are substantive or interpretive.[28]

The IRS does not use traditional demarcation between what is a legislative rule and what is an interpretive rule.[29] Instead, the IRS has distinguished between legislative regulations and interpretive regulations according to what grant of power allows the regulation to be promulgated.[30] Thus, regulations borne of a specific, explicit delegation of authority are *legislative*, while regulations borne of a general delegation of authority are *interpretive*.[31] However, the Treasury still uses notice-and-comment procedures from the APA to promulgate the interpretive rules,[32] suggesting a higher level of procedural formality than interpretive rules in other administrative areas. Therefore, it is more helpful to refer to this split as specific-authority regulations and general-authority regulations.[33] In the broader administrative-law context, a legislative rule is not defined by the grant of power that allows it to be established, but rather the extent to which it will establish a new duty, whereas an interpretive rule merely explains the meaning of a duty already established by the legislature or an agency.[34]

However, interpretations of both the Tax Code and Treasury Regulations are not confined to the Treasury Regulations themselves. The IRS also issues Revenue Rulings, private letter rulings, and an assortment

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26. *See* 5 U.S.C. §§ 551–559, 701–706 (2012) (describing APA procedures); *see also* Treas. Reg. § 601.601(a)–(c), (d)(1) (as amended in 1987) (listing the specific procedures, rules, regulations, and forms required for IRS compliance). While notice-and-comment rules are considered to be informal under the APA, these regulations still comply with APA procedures and are more formalized than other rulings.

27. 5 U.S.C. § 553(b)(3)(A).

28. Treas. Reg. § 601.601(a)(2) (discussing that notice-and-comment procedures are followed when required by § 553 "and in such other instances as may be desirable").

29. Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 517, 520 (2011).

30. *Id.* at 521–22 ("Under general administrative law doctrine, whether the rule was promulgated pursuant to a specific or general grant of rulemaking authority is simply no longer relevant to the question whether it is legislative because general grants of rulemaking authority are now understood to delegate the power to promulgate binding rules creating new rights and duties.").

31. *Id.* at 522.

32. *See* Coverdale, *supra* note 24, at 55.

33. *Id.*

34. WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE & PRACTICE: PROBLEMS AND CASES 345 (4th ed. 2010).

of both published and unpublished guidance.[35] Revenue Rulings are not promulgated under notice-and-comment procedures nor published in the Federal Register, but they are published in the Cumulative Bulletin and the Internal Revenue Bulletin.[36] However, Revenue Rulings are still considered by the IRS to be "an official interpretation of the tax laws."[37] Revenue Rulings generally provide a hypothetical fact pattern, an outline of the applicable provisions of statutes, regulations, or holdings of cases, and a conclusion interpreting how the law applies to that fact pattern.[38] The binding nature of Revenue Rulings prohibits them from being labeled "mere policy statements" that notify the populous of the IRS's views.[39] Revenue Rulings are thus the fundamental example of an interpretive rule in the administrative-law sense.[40]

Taxpayers may also request private letter rulings and the IRS will give them "whenever appropriate in the interests of sound tax administration."[41] Letter rulings are used to determine tax liability if the representations in the request are true, but may not be used or cited as precedent by the IRS or relied on by taxpayers other than the original requester.[42]

The IRS clearly has the power, through specific- and general-authority regulations and a host of more informal mechanisms, to interpret the Tax Code.[43] How the agency grapples with that power and uses it both to shape the law and enforce the law in the area of exemptions is critical. Treasury Regulations meant to interpret and clarify the statutory wording of § 501(c)(3) provide that "[a]n organization is not organized or operated exclusively for one or more of the purposes specified . . . unless it serves a public rather than a private interest,"[44] and that "[t]he term charitable is

35. *See* Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239, 239–40 (2009) ("Agencies adopt interpretations of law informally using a range of formats from official pronouncements vetted by top agency officials to letters and e-mails issued by relatively low-level agency employees. The relative weight and significance of such informal guidance varies tremendously, although prudent regulated parties take seriously agency guidance in virtually any form." (footnote omitted)). *See generally* MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE ¶¶ 3.01–.04, at 3-1 to 3-75 (1981) (describing the various IRS practices and procedures).

36. Coverdale, *supra* note 24, at 79; SALTZMAN, *supra* note 35, ¶ 3.03(1), at 3-16.

37. Coverdale, *supra* note 24, at 79.

38. *Id.*; Hickman, *supra* note 35, at 242.

39. Coverdale, *supra* note 24, at 80.

40. Wing v. Comm'r, 81 T.C. 17, 27 (1983).

41. SALTZMAN, *supra* note 35, ¶ 3.03(1), at 3-16 (citing 26 C.F.R. § 601.201(a) (1981)).

42. *Id.* ¶ 3.03(1), at 3-17.

43. *The Supreme Court Gives More Authority to the IRS*, T&K TAX KNOWLEDGE (Feb. 27, 2011), http://www.tktaxknowledge.com/2011/02/the-supreme-court-gives-more-authority-to-the-irs.html.

44. Treas. Reg. § 1.501(c)(3)–1(d)(1)(ii) (as amended in 2012).

used in [§] 501(c)(3) in its generally accepted legal sense."[45] In a Revenue Ruling, the IRS expounded that "[t]he law of charity provides no basis for weighing or evaluating the objective merits of specific activities carried on in furtherance of a charitable purpose, if those activities are reasonably related to the accomplishment of the charitable purpose, and are not illegal or contrary to public policy."[46]

The Supreme Court explained in 1958 the congressional intent that mirrored this concept of public-policy limitations in the tax context.[47] In *Tank Truck Rentals v. Commissioner*, a trucking company was forced to pay fines for violating state maximum weight laws.[48] Before 1950, the IRS had allowed deductions of such payments but changed the policy during that year and did not allow the payments to qualify as deductions.[49] The Tax Court upheld the Commissioner, reasoning that allowing this type of deduction would frustrate state policy.[50] The Supreme Court would not presume that Congress intended to encourage violations of the declared policy of a state and inferred that "[t]o allow the deduction sought here would but encourage continued violations of state law by increasing the odds in favor of noncompliance."[51] However, the Court continued, "This is not to say that the rule as to frustration of sharply defined national or state policies is to be viewed or applied in any absolute sense. . . . [E]ach case must turn on its own facts."[52] The Court reified the concept that the IRS's policy of structuring tax benefits to comply with state and national policies in some cases would fall in line with congressional intent.[53] Justice O'Connor would later frame the issue of governmental endorsement as follows: "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[54] This idea is reflected in tax exemptions as well as deductions; if an institution is allowed to be exempt, it is approved, and if it cannot be exempt, it is disapproved in some fashion.

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45. *Id.* § 1.501(c)(3)–1(d)(2).
46. Rev. Rul. 80-278, 1980-2 C.B. 175.
47. Tank Truck Rentals, Inc. v. Comm'r, 356 U.S. 30, 30 (1958).
48. *Id.* at 31.
49. *Id.*
50. *Id.*
51. *Id.* at 35.
52. *Id.*
53. *Id.* at 30.
54. Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

Section 501(c)(3) exemptions and corresponding § 170 deductions are thus culturally more about approval and stigma than they are simply about paying more taxes than a university otherwise would. Private, religious schools must feel this even more forcefully, as they can trace their history of exemptions not only as educational institutions but also as religious ones. Although this type of cultural stigma is usually only extended in a tax scheme, it may be executed on both the federal and state level. "[S]tate tax exemption tends to follow the federal pattern."[55] Either the state statutes automatically follow the same exemption pattern, or they use it as a guide to create their own pattern.[56] Exemptions as a whole do have a documented history in America, and the IRS was endowed with the power to consider public policy as a factor for such exemptions.[57] This is a power it exerts in "public rulings and privately issued determinations."[58]

III. RACIAL-DISCRIMINATION LITIGATION IMMEDIATELY PRIOR TO *BOB JONES UNIVERSITY*

In May of 1969, several African-American families filed a lawsuit in federal court "seeking to enjoin the Secretary of the Treasury and [the] Commissioner of Internal Revenue from according tax exempt status to private schools in Mississippi" that sought to exclude children "on the basis of race or color."[59] The plaintiffs in that case, *Green v. Connally*, argued that granting tax-exempt status to these schools violated the provisions of the Internal Revenue Code of 1954 and was, in the alternative, unconstitutional.[60] After the U.S. District Court for the District of Columbia had issued a preliminary injunction in favor of the plaintiffs, the IRS deviated from its path with respect to segregated private schools.[61]

The IRS issued two successive press releases in July 1970 announcing its position, stating "it could no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination nor can it treat

55. Colombo, *supra* note 15, at 855.

56. *Id.* at 855–56; *see also* Mark A. Hall & John D. Colombo, *The Charitable Status of Nonprofit Hospitals: Toward a Donative Theory of Tax Exemption*, 66 WASH. L. REV. 307, 323–24 (1991) (discussing several state-statute exemption patterns).

57. IRS PUBLICATION 557, *supra* note 10, at 29.

58. Johnny Rex Buckles, *Reforming the Public Policy Doctrine*, 53 KAN. L. REV. 397, 407 (2005).

59. Green v. Connally, 330 F. Supp. 1150, 1155 (D.D.C.), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971).

60. *Id.*

61. *Id.* at 1155–56.

gifts to such schools as charitable deductions for income tax purposes."[62] To further explain this position, Randolph W. Thrower, then Commissioner of Internal Revenue, testified before a Senate Committee that "[a]n organization seeking exemption as being organized and operated exclusively for educational purposes, within the meaning of [§] 501(c)(3) and [§] 170, must meet the tests of being 'charitable' in the common-law sense."[63] With the IRS no longer standing in opposition to the families from Mississippi, the U.S. District Court for the District of Columbia granted both declaratory and injunctive relief for the plaintiffs.[64] The court explained that it did not need to decide whether an educational organization that practices racial discrimination could qualify as a charitable trust under general trust law, but it did engage in a discussion of the question to provide a "helpful perspective."[65]

The statute allowing for exemptions, § 501(c)(3), states that an organization may be exempt from taxation if it is formed and operated exclusively for one or more of a list of specific purposes.[66] Treasury Regulations provided guidance that "charitable" was to be interpreted in the general legal sense.[67] The *Green* court reasoned that because the law grants many privileges to charitable trusts, these privileges create a disadvantage for other entities in the community.[68] Thus, the trust must provide an advantage to the community that counters the damage that these privileges provide.[69] The court cited to the Supreme Court's decision in *Ould v. Washington Hospital for Foundlings* for the foundational principle that "[a] charitable use, where neither law nor public policy forbids, may be applied to almost any thing that tends to promote the well-doing and well-being of social man."[70] At least since 1877, the conventional understanding of charity included legal undertakings that were compliant with public policy.[71] This concept was repeated in the Restatement (Second) of Trusts: "A trust for a purpose the accomplishment of which is contrary to public policy, although not forbidden by law, is invalid."[72] The problem with

62. *Id.* at 1156; *IRS News Releases*, [1970] Standard Fed. Tax Rep. (CCH) ¶ 6790 (July 10, 1970); *IRS News Releases*, [1970] Standard Fed. Tax Rep. (CCH) ¶ 6814 (July 19, 1970).

63. *Hearing before the Comm. on Equal Educational Opportunity*, 91st Cong. 1995 (1970) (statement of Randolph W. Thrower, Commissioner of the IRS).

64. *Green*, 330 F. Supp. at 1179.

65. *Id.* at 1157.

66. I.R.C. § 501(c)(3) (2012).

67. Treas. Reg. § 1.501(c)(3)-1(d)(2) (as amended in 2012).

68. *Green*, 330 F. Supp. at 1157.

69. *Id.*

70. *Id.* at 1158 (quoting Ould v. Wash. Hosp. for Foundlings, 95 U.S. 303, 311 (1877)).

71. *Id.*

72. *Id.* at 1159–60 (citing RESTATEMENT (SECOND) OF TRUSTS § 377 cmt. C (1957)).

public policy is that the definition and understanding of what is "charitable" remain in a state of "constant flux" across different time periods and communities.[73] The *Green* court stated, in dicta, that scholarship and case law combined had foreshadowed a shift in public policy that made racially discriminatory trusts contrary to public policy.[74] However, "the ultimate criterion for determin[ing] whether such schools are eligible under the 'charitable' organization provisions of the Code rests not on a common law referent but on . . . [f]ederal policy."[75]

To properly interpret the Tax Code in light of federal policy, the *Green* court focused on two principles. First, "[c]ongressional intent in providing tax deductions and exemptions is not construed to be applicable to activities that are either illegal or contrary to public policy."[76] The court considered this point to be "well-established"[77] and relied on Supreme Court precedent from *Tank Truck Rentals* in 1958 to support the proposition that there is a "presumption against congressional intent to encourage violation of declared public policy."[78] The court reasoned that this "limitation on tax benefits applies . . . [to § 501(c)(3) charitable] institutions because they serve the public good."[79]

The second principle governing the *Green* court's interpretation of the Tax Code was that it "must be construed and applied in consonance with the [f]ederal public policy against support for racial segregation of schools, public or private."[80] The court traced this policy from the passage of the Thirteenth Amendment to the Civil Rights Act of 1964 and case law including *Brown v. Board of Education* and *Bolling v. Sharpe*.[81] As a result of this clear and overarching federal policy, private schools engaging in racial discrimination could no longer receive charitable-organization exemptions and deductions.[82] The IRS's construction of the statute conformed to this federal policy and, to the court, was a "proper construction of the [Tax] Code in light of that policy."[83] Public policy

73. *Id.* at 1158–59; *see also* GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 369, at 79 (2nd. ed. 1991); 4A AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 368, at 133 (4th ed. 1967); Elias Clark, *Charitable Trusts, The Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979, 997 (1957).

74. *Green*, 330 F. Supp. at 1160–61.

75. *Id.* at 1161.

76. *Id.*

77. *Id.*

78. *Id.* at 1162 (quoting Tank Truck Rentals v. Comm'r, 356 U.S. 30, 35 (1958)).

79. *Id.*

80. *Id.* at 1163.

81. *Id.* at 1163–64.

82. *Id.* at 1164.

83. *Id.*

dictated that racial discrimination would not be tolerated via tax exemptions in private schools.[84] Would a private, religious university with a religious basis for discrimination be subject to the same public-policy analysis?

IV. *BOB JONES UNIVERSITY V. UNITED STATES*: LITIGATION AND AFTERMATH

The paramount case for public-policy revocation of tax-exempt status for a private, religious university is *Bob Jones University v. United States*.[85] In July of 1970, the IRS stated in a news release "that it could no longer legally justify allowing tax-exempt status [under § 501(c)(3)] to private schools which practice racial discrimination."[86] The agency also decided that it would no longer "treat gifts to such schools as charitable deductions for income-tax purposes under [§ 170]."[87] The reasoning behind the change in policy was that the IRS was conforming to the common-law idea of "charity," which meant that an organization falling under § 501(c)(3) would have to conform to settled public policy in order to be exempt.[88] In a "letter dated November 30, 1970, the IRS formally notified private schools, including [Bob Jones University], of this change in policy" and the subsequent application "to all private schools in the United States at all levels of education."[89] This letter was formalized into a Revenue Ruling dated January 1, 1971.[90]

The Revenue Ruling issued by the IRS was extremely pointed and concise. The agency noted that it "ha[d] been asked whether a private school that otherwise meets the requirements of [§] 501(c)(3) of the Internal Revenue Code of 1954 [would] qualify for exemption from [f]ederal income tax if it [did] not have a racially nondiscriminatory policy as to students."[91] This racially non-discriminatory policy was defined to include admission, scholarships, and "all the rights, privileges, programs, and activities generally accorded or made available to students at that school."[92] The agency made the argument that the language of § 501(c)(3), which included "religious, charitable . . . or educational [institutions]," meant that each or all of those institutions must comport with the common-law

84. *Id.* at 1164–65.
85. Bob Jones Univ. v. United States, 461 U.S. 574 (1983).
86. *Id.* at 578 (alteration in original) (internal quotation marks omitted).
87. *Id.* (alteration in original).
88. *Id.* at 579 (citing Rev. Rul. 71-447, 1971-2 C.B. 230).
89. *Id.* at 578.
90. *Id.*; Rev. Rul. 71-447, 1971-2 C.B. 230.
91. Rev. Rul. 71-447, 1971-2 C.B. 230.
92. *Id.*

understanding of "charity."[93] Charity, again as reflected in the Restatement (Second) of Trusts, meant that the institution could not behave "illegal[ly] or contrary to public policy."[94] Although there was no federal statutory law to prohibit discrimination in schools, the IRS concluded that there was a "well-settled" public policy against racial discrimination.[95] Since racial discrimination in education conflicted with public policy, an institution engaged in such discrimination could not be charitable and thus could not qualify under the exemption standard of § 501(c)(3).[96] The IRS's entire explanation was barely two pages long.

At the same time this explanation was being formulated and issued, "[t]he sponsors of [Bob Jones] University genuinely believe[d] that the Bible forbids interracial dating and marriage."[97] To this end, the University did not allow any African Americans to be admitted until 1971.[98] After 1971, only African Americans who were already married within their race were admitted, and no African Americans were permitted to matriculate unless they had been on staff at least four years.[99]

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93. *Id.* (first alteration in original). Here, the Revenue Ruling refers to another Revenue Ruling to parallel the understanding from § 170 to § 501(c)(3) and a vague reliance on the notion that the courts have recognized the statutory requirement as falling under this interpretation with no citations for this support. *Id.* (citing Rev. Rul. 67-325, 1967-2 C.B. 113).

94. *Id.* (citing RESTATEMENT (SECOND) OF TRUSTS § 377 cmt. C (1957)). The Restatement states: "A trust for a purpose the accomplishment of which is contrary to public policy, although not forbidden by law, is invalid." RESTATEMENT (SECOND) OF TRUSTS § 377 cmt. C (1957).

95. Rev. Rul. 71-447, 1971-2 C.B. 230. Only a few sources are used to demonstrate this policy:

> Titles IV and VI, The Civil Rights Act of 1964, Public Law 88-352, 78 Stat. 241, 42 U.S.C. 2000c, 2000c-6, and 2000d and Brown v. Board of Education, 347 U.S. 483, 500 (1954), and many subsequent [f]ederal court cases, demonstrate a national policy to discourage racial discrimination in education, whether public or private.

Id.

96. *Id.*

97. Bob Jones Univ. v. United States, 461 U.S. 574, 580 (1983). Bob Jones University was not the only religious institution of higher learning to deal with the sometimes-conflicting issue of race and religion. *See generally* MERRIMON CUNINGGIM, PERKINS LED THE WAY: THE STORY OF DESEGREGATION AT SOUTHERN METHODIST UNIVERSITY (1994) (detailing the history of racial desegregation at Southern Methodist University); CLARENCE L. MOHR & JOSEPH E. GORDON, TULANE: THE EMERGENCE OF A MODERN UNIVERSITY 1945–1980 (2001) (discussing the development of racial desegregation at Tulane University); Alan Scot Willis, *A Baptist Dilemma: Christianity, Discrimination, and the Desegregation of Mercer University*. 80 GA. HIST. Q. 595 (1996) (describing the conflict between conservative religious views and racial desegregation at Mercer University); Courtney Louise Tollison, Moral Imperative and Financial Practicality: Desegregation of South Carolina's Denominationally-Affiliated Colleges and Universities (2003) (unpublished Ph.D. dissertation, University of South Carolina) (on file with University of South Carolina) (discussing the race-based relations at Bob Jones University).

98. *Bob Jones*, 461 U.S. at 580.

99. *Id.* at 580 n.5.

Although Bob Jones University believed its practices were in accordance with the Bible, the University itself adhered to the tenets of no one denomination.[100] However, Bob Jones University is dedicated to both "the teaching and propagation of its fundamentalist Christian religious beliefs."[101] It is simultaneously an educational and religious institution: "Its teachers are required to be devout Christians, and all courses at the University are taught according to the Bible."[102] The University's policies are all Biblically based.[103]

The United States Court of Appeals for the Fourth Circuit decreed in 1980 that racial exclusion was prohibited in private schools; thus, Bob Jones University was forced to revise its policies as to the admission of unmarried African Americans.[104] Bob Jones University allowed unmarried African Americans to enroll but developed a lengthy set of disciplinary requirements on the matter[105]:

> *There is to be no interracial dating.*
>
> 1. Students who are partners in an interracial marriage will be expelled.
>
> 2. Students who are members of or affiliated with any group or organization which holds as one of its goals or advocates interracial marriage will be expelled.
>
> 3. Students who date outside of their own race will be expelled.
>
> 4. Students who espouse, promote, or encourage others to violate the University's dating rules and regulations will be expelled.[106]

Bob Jones University also still refused admission to anyone currently "engaged in an interracial marriage or known to advocate interracial marriage or dating."[107] The policies of Bob Jones University were clear: interracial dating was not Biblically approved, nor university sanctioned, and the institution would take all steps necessary to bar it from campus.[108]

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100. *Id. See generally* MARK TAYLOR DALHOUSE, AN ISLAND IN THE LAKE OF FIRE: BOB JONES UNIVERSITY, FUNDAMENTALISM, AND THE SEPARATIST MOVEMENT (1996) (discussing the various denominations that create the fundamentalist views of Bob Jones University).

101. *Bob Jones*, 461 U.S. at 580.

102. *Id.*; *see also* DALHOUSE, *supra* note 100, at 148–63 (discussing the mechanics of Bob Jones University's approach to religiously driven education).

103. *See Bob Jones*, 461 U.S. at 580.

104. Bob Jones Univ. v. United States, 639 F.2d 147, 149 (4th Cir. 1980), *aff'd*, 461 U.S. 574 (1983); *Bob Jones*, 461 U.S. at 582.

105. *Bob Jones*, 461 U.S. at 580–81.

106. *Id.* (internal quotation marks omitted).

107. *Id.* at 581.

108. *Id.* at 580–81.

After both parties fought over an injunction and back taxes, the Fourth Circuit held in favor of the IRS.[109] The court concluded that "the IRS acted within its statutory authority in revoking the University's tax-exempt status," and determined that the University no longer qualified as a § 501(c)(3) organization.[110] That particular section of the Tax Code, the court reasoned, said that "[t]o be eligible . . . an institution must be 'charitable' in the common-law sense, and therefore must not be contrary to public policy."[111] Bob Jones University was acting in direct opposition to public policy with respect to racial discrimination and thus clearly was not a charitable organization.[112]

The Supreme Court affirmed the Fourth Circuit's ruling.[113] In doing so, the Supreme Court came to four separate conclusions: (1) The IRS did not overstep its granted authority, (2) the IRS properly interpreted the rule, (3) there was no Free Exercise Clause violation, and (4) there was no Establishment Clause violation.[114]

The Court referred to Bob Jones University as being part of a certain class of petitioners: "nonprofit private schools that prescribe and enforce racially discriminatory admissions standards on the basis of religious doctrine."[115] Thus, the main issues for the Court were whether this class of petitioners qualified as a tax-exempt organization under the Tax Code at the time, and whether the IRS had correctly established that Bob Jones University should not receive such an exemption.[116]

Bob Jones University argued that the IRS had overstepped its bounds of authority by altering the scope of § 170 and § 501(c)(3), as only Congress could make such changes.[117] The Court rejected this argument, contending that the IRS had the authority to interpret and apply these sections as it saw fit.[118] The Court found that while the IRS should only

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109. *Id.* at 582.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 585.
114. *Id.* at 575, 584.
115. *Id.* at 577. While this could have been greatly expanded, the Court chose to limit it to educational institutions. *See id.* Not only does this support the canon of constitutional avoidance and the practice of the Court to limit certified questions to more narrow interpretations, it also reflects a direct review of the Revenue Ruling issued by the IRS.
116. *Id.* at 577, 605.
117. *Id.* at 596.
118. *Id.* ("[T]his Court has long recognized the primary authority of the IRS and its predecessors in construing the Internal Revenue Code."). The nondelegation doctrine provides that Congress may delegate decision-making powers as long as it provides an "intelligible principle" to guide agencies in exercising that power. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001). Therefore, the IRS has the ability to exercise power through the nondelegation doctrine.

make such determinations when there was no doubt of the public-policy violation, unclear federal policy was not at issue.[119] The IRS was not *declaring* policy but rather enforcing the public policy already in existence, which made a significant difference in determining the scope of the IRS's authority.[120] Moreover, Congress' inaction on the issue indicated that it did not disagree with this interpretation.[121]

Bob Jones University's next argument before the Court was that because Bob Jones University fell into more than one § 501(c)(3) category, it should qualify for tax-exempt status automatically, regardless of its conformity to the common-law notion of charity.[122] Bob Jones University, after all, easily qualified as an institution created for educational purposes, as well as religious ones.[123] The Supreme Court declined to look simply at the language of the regulation when reviewing this argument, preferring instead to analyze the Tax Code against the background of congressional intent.[124] The Court concluded that the intent of § 501(c)(3) was that any "institution seeking tax-exempt status" under this section "must serve [some sort of] public purpose and not be contrary to established public policy."[125]

The idea of charity as a common-law concept was not difficult to ascribe to § 170, which allows deductions for "charitable contributions."[126] The list of organizations eligible under § 170 was almost identical to the list

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Additionally, the Supreme Court has long held that the IRS has broad discretion under the Internal Revenue Code. Va. Educ. Fund v. Comm'r, 85 T.C. 743, 752 (1985), *aff'd per curiam*, 799 F.2d 903 (4th Cir. 1986) ("The Supreme Court has held that the Commissioner has broad discretion, under [§] 7805(b) and its predecessor, in deciding whether to revoke a ruling retroactively and that his determination is reviewable by the courts only for abuse of that discretion." (citing Auto. Club of Mich. v. Comm'r, 353 U.S. 180, 184 (1957))); *see also* Comm'r v. Portland Cement Co. of Utah, 450 U.S. 156, 169 (1981) (holding that since Congress has delegated to the Secretary of the Treasury the power to administer the country's tax laws, the Court gives deference to the Treasury Regulations that communicate Congress' decision in a reasonable matter); United States v. Correll, 389 U.S. 299, 307 (1967) ("The role of the judiciary in cases of this sort begins and ends with assuring that the Commissioner's regulations fall within his authority to implement the congressional mandate in some reasonable manner."); Boske v. Comingore, 177 U.S. 459, 469–70 (1900) (upholding the power of the Secretary of the Treasury to "prescribe regulations not inconsistent with law"); Crellin v. Comm'r, 46 B.T.A. 1152, 1155–56 (1942); James Sprunt Benevolent Trust v. Comm'r, 20 B.T.A. 19, 24–25 (1930) (discussing the Tax Court's interpretation of certain statutes).

119. *Bob Jones*, 461 U.S. at 598.

120. Thus, for the IRS to make a similar case about another issue, it should be seen as merely enforcing public policy and not declaring it. The public-policy arguments must already be in place before the agency ruling. *See* Buckles, *supra* note 58, at 421–22.

121. *Id.* at 600–01.

122. *Bob Jones*, 461 U.S. at 585–86.

123. *Id.* at 580.

124. *Id.* at 586.

125. *Id.*

126. *See id.* at 586–87.

of organizations available under § 501(c)(3), further revealing Congress' intention according to the Court.[127] This led the Court to expound on the rich history of the common-law usage of charity as a privileged status and its clear link to public policy.[128]

In the larger context of tax policy, the Court noted, the tax scheme impacts every citizen.[129] Thus, any deductions or exemptions offered by the agency affect the entire design, and it was not a large logical leap for the Court to say this was where the public connection made itself abundantly clear.[130] If an institution gains a benefit from the tax system, it is because that institution does some public good or supplements the public interest in some way.[131] The federal government legitimizes the body's very existence and work by permitting the privileged position of tax-exempt status.[132]

Even so, the Court cautioned that the IRS should only declare that an institution "is *not* charitable" when there can be "*no doubt*" that the activity involved is contrary to a federal policy.[133] This presumably keeps the IRS, or any other agency making a similar determination, from being arbitrary or capricious in bestowing or revoking charitable status on an organization.[134] A university might have unpleasant or alternative policies, but that should not automatically make it uncharitable. However, in the case of racial discrimination, the Court concluded there was, indeed, no doubt that such actions directly contradicted contemporary anti-discrimination policy.[135]

Racial discrimination was a clear-cut case for the Court. Not only had Congress explicitly expressed "its agreement that racial discrimination in education violates a fundamental public policy,"[136] but the Court also acknowledged that few issues had been more extensively discussed than the issue of racial discrimination in education.[137] Additionally, according to the Court, Bob Jones University was indeed engaging in discriminatory practices, including its admissions policies, "its prohibition of association between men and women of different races," and its flat ban on interracial

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127. *Id.*
128. *See id.* at 586–90.
129. *Id.* at 591.
130. *See id.* at 591–92.
131. *Id.*
132. *Id.*
133. *Id.* at 592 (emphasis added) (internal quotation marks omitted).
134. *See* 5 U.S.C. § 706(2)(A) (2012). This is the section of the APA that provides the extent to which a reviewing court shall set aside agency action, including whether or not the findings or conclusions are arbitrary and capricious. *Id.*
135. *Bob Jones*, 461 U.S. at 592.
136. *Id.* at 594.
137. *Id.* at 595.

marriage.[138] The Court overlapped its analysis with that of the Revenue Ruling, as if proving the correctness of the IRS's position independently from the document itself.[139] There was no need for a lengthy discussion of deference because the Court was certain of the proper position of the IRS in this case.

After all other previous arguments failed, Bob Jones University alternatively contended that even if the new interpretation was binding on nonreligious private schools, it should not be binding on *religious* private schools.[140] If racial discrimination was the end product of sincerely held religious beliefs, Bob Jones University reasoned, it should be constitutionally protected under the Free Exercise Clause of the First Amendment.[141]

It is important to note here that this case was taking place prior to the landmark case of *Employment Division, Department of Human Resources of Oregon v. Smith*,[142] which completely changed the face of free-exercise claims. Before *Smith*, the Court had broadly held that if the complainant possessed a sincere religious belief and met the threshold requirement, the next step was to review the government's action with the highest level of scrutiny.[143] Thus, in order to be valid, the government would need to further a compelling state interest, and use narrowly tailored means to accomplish its goal.[144]

The Court had several answers to the free-exercise argument. First, the Court noted that denial of tax exemption would "not *prevent*" Bob Jones University from being racially discriminatory or, in Bob Jones University's view, from exercising its religious beliefs.[145] Such a denial would only preclude tax benefits for the school, which, while understandably influential, were not prohibitive.[146] Second, the government did present a compelling interest in "eradicating racial discrimination in education," which it could not accomplish by "less restrictive means."[147] The IRS and

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138. *Id.* at 605.

139. *See id.*

140. *Id.* at 602.

141. *Id.* at 603.

142. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Cutter v. Wilkinson, 544 U.S. 709 (2005).

143. *See* John P. Forren, *Revisiting Four Popular Myths About the Peyote Case*, 8 U. PA. J. CONST. L. 209, 209 (2006).

144. *Id.* The Court did, in fact, apply strict scrutiny in this case. *Bob Jones*, 461 U.S. at 603–04.

145. *Bob Jones*, 461 U.S. at 603–04 (emphasis added).

146. *Id.* at 604.

147. *Id.* It is unclear from the Court's position whether public policy is the proxy for compelling interest or whether public policy requires some additional proof beyond what would

the government either condoned these practices by labeling Bob Jones University as charitable, or they did not by denying them that status—there were no other means available to the government within the concept of tax-exempt status.

As an alternative religious analysis, Bob Jones University argued that it was entitled to relief under the Establishment Clause of the Constitution.[148] Bob Jones University argued that the government was favoring religions that were not racially discriminatory over those that were.[149] The Court soundly rejected this idea, noting that "[t]he IRS policy at issue [was] founded on a 'neutral, secular basis'" applicable to all schools and thus "[did] not violate the Establishment Clause" on any count.[150]

Although he joined the judgment of the Court, Justice Powell was "troubled by the broader implications of the Court's opinion with respect to the authority of the . . . [IRS] and its construction of [the statutes]."[151] Justice Powell conceded that the language of the statute is unclear and that there may be some circumstances where an organization acts "in a manner so clearly contrary to the purpose of [the] laws" that giving it an exemption could not be said "to serve the enumerated statutory purposes."[152] But Justice Powell took issue with the majority's notion that an exempt organization must "demonstrably serve and [be] in harmony with the public interest."[153] According to Justice Powell's concurrence, the majority opinion reads as though the "primary function of a tax-exempt organization is to act on behalf of the [g]overnment in carrying out governmentally approved policies."[154] This "ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints."[155] Justice Powell was comforted enough to join in the judgment of the case because he felt that *Congress* had determined that the "policy against racial discrimination in education" has outweighed

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be required for compelling interest. *See* Ralph D. Mawdsley & Steven Permuth, Bob Jones University v. United States*: A Decision with Little Direction*, 12 EDUC. L. REP. 1039, 1049 (1983).

148. *Bob Jones*, 461 U.S. at 604 n.30.

149. *Id.*

150. *Id.* (quoting Gillette v. United States, 401 U.S. 437, 452 (1971)). This same response would satisfy the free-exercise inquiry post-*Smith*. When a neutral law of general applicability is at issue, the fact that there is a disparate impact on a particular religion no longer factors into the analysis. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 880 (1990) (citing *Gillette*, 401 U.S. at 452), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Cutter v. Wilkinson, 544 U.S. 709 (2005).

151. *Id.* at 606 (Powell, J., concurring in part and concurring in the judgment).

152. *Id.* at 606-07.

153. *Id.* at 609.

154. *Id.*

155. *Id.*

the "private behavior."[156] However, he maintained that Congress was in charge of balancing the substantial interests at issue, not the IRS or the courts.[157]

Justice Rehnquist dissented in the case, but not on the proposition that Congress, in furtherance of a policy against racial discrimination, "could deny tax-exempt status to educational institutions that promote" it.[158] Justice Rehnquist failed to understand how the majority could read a public-policy standard into § 501(c)(3) when there was currently no such standard.[159] Congress could have added a public-policy standard into the statute, but it had not done so, and thus no such standard existed.[160] Again, Justice Rehnquist, like Justice Powell, put the decision of public-policy limitations with Congress and not with the IRS.[161]

Although this case involved many different questions—e.g., interpretation of tax regulations, the common law understanding of charity, and several inquiries into the religion clauses of the Constitution—the fact that Bob Jones University was a religious *educational* establishment was important. Part of the majority's analysis hinged on the fact that Bob Jones University was actually a school and not purely a religious institution.[162] In a footnote, the Court quoted its 1973 decision in *Norwood v. Harrison*, noting that "racially discriminatory schools 'exer[t] a pervasive influence on the entire educational process,'" which outweighs any public benefit that such a school might provide.[163]

Following *Bob Jones University v. United States*, the biggest legal change was the validation of the power of the IRS—its ability to use its own sense of what public policy was, subject to possible judicial review, in classifying organizations as tax exempt. The sheer volume of commentary on the subject—in which legal analysts picked apart the Supreme Court's reasoning—was overwhelming,[164] leading one critic to contend, "Perhaps

156. *Id.* at 610.
157. *Id.* at 611–12.
158. *Id.* at 612 (Rehnquist, J., dissenting).
159. *See id.* at 614–15.
160. *Id.* at 612–13.
161. *Id.* at 621–22.
162. *Id.* at 580, 604 n. 29 (majority opinion).
163. *Id.* at 604 (quoting Norwood v. Harrison, 413 U.S. 455, 469 (1973)).
164. *See generally* Walter J. Blum, *Dissenting Opinions by Supreme Court Justices in Federal Income Tax Controversies*, 82 MICH. L. REV. 431 (1983) (offering commentary on the Court's reasoning for denying tax-exempt status to organizations for discriminatory behavior); Miriam Galston, *Public Policy Constraints on Charitable Organizations*, 3 VA. TAX REV. 291 (1984) (discussing policy constraints on charitable organizations after *Bob Jones*); Charles O. Galvin & Neal Devins, *A Tax Policy Analysis of* Bob Jones University v. United States, 36 VAND. L. REV. 1353 (1983) (questioning the *Bob Jones* decision regarding its model for tax-exempt status); Elliot M. Schachner, *Religion and the Public Treasury After* Taxation With

no aspect of tax exemption for educational institutions (or, for that matter, exemption in general) has received more commentary than the IRS's decision to withhold exemption from racially discriminatory schools."[165] Several critics used Justice Rehnquist's dissent as an opportune place from which to launch disapproval:

> Some commentators have echoed the observations contained in Justice Rehnquist's dissent. They strongly criticized the Court for improperly deciding a policy issue reserved to the other branches of government. They agreed with the dissent that, regardless of the merits, it was beyond the authority of the Court to adjudicate a policy question. Furthermore, employing a common law concept of charity in order to create a public policy requirement may be undesirable from a practical standpoint. The IRS may applaud the decision to bestow broad discretion upon it

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Representation of Washington, Mueller, *and* Bob Jones, 1984 UTAH L. REV. 275 (1984) (discussing *Bob Jones* and two other decisions that changed the tax-exemption standards for religious institutions); Karla W. Simon, *Applying the* Bob Jones *Public-Policy Test in Light of* TWR *and* U.S. Jaycees, 62 J. TAX'N 166 (1985) (applying the *Bob Jones* decision regarding violations of basic public policies); Paul B. Stephan III, Bob Jones University v. United States*: Public Policy in Search of Tax Policy*, 1983 SUP. CT. REV. 33 (1983) (noting the significance of the *Bob Jones* decision on tax exemptions); William Chamblee, Case Note, *Internal Revenue Service—Tax Exemptions—IRS Acted Within Its Authority in Determining that Racially Discriminatory Non-Profit Private Schools are Not "Charitable" Institutions Entitled to Tax-Exempt Status*, 15 ST. MARY'S L.J. 461 (1984) (agreeing with the *Bob Jones* decision not to extend tax-exempt status to racially discriminatory nonprofit private schools); William A. Drennan, Note, Bob Jones University v. United States*: For Whom will the Bell Toll?*, 29 ST. LOUIS U. L.J. 561 (1985) (explaining the application of the *Bob Jones* tax-exempt decision); Kenneth E. Fleischmann, Note, Bob Jones University v. United States*: Closing the Sectarian Loophole in Private Education*, 11 OHIO N.U. L. REV. 217 (1984) (interpreting the Court's decision in *Bob Jones* regarding tax-exempt status); Daniel L. Johnson, Jr., Note, *Federal Taxation*—Bob Jones University v. United States*: Segregated Sectarian Education and IRC Section 501(c)(3)*, 62 N.C. L. REV. 1038 (1984) (analyzing the *Bob Jones* decision and discussing the issue of considering public policy in determining tax-exempt status); R. Tyrone Kee, Case Note, *The I.R.S. Fights Racial Discrimination in Higher Education: No Tax Exemption for Religious Institutions that Discriminate Because of Race.* "Bob Jones University," 10 S.U. L. REV. 291 (1984) (supporting the IRS's fight against racial discrimination via the *Bob Jones* decision); Joe W. Miller, Note, *Applying a Public Benefit Requirement to Tax-Exempt Organizations:* Bob Jones University v. United States, 49 MO. L. REV. 353 (1984) (discussing the IRS's ability to control private actions via the funding received through denial of tax-exemption status); Kathryn R. Renahan, Note, Bob Jones University v. United States*—No Tax Exemptions for Racially Discriminatory Schools—Supreme Court Clarifies Thirteen-Year Policy Imbroglio*, 11 J.C. & U.L. 69 (1984) (discussing the *Bob Jones* decision regarding tax exemptions and private, religious institutions); Sherri L. Thornton, Case Note, *Taxation in Black and White: The Disallowance of Tax-Exempt Status to Discriminatory Private Schools:* Bob Jones University v. United States, 27 HOW. L.J. 1769 (1984) (noting the development of racial discrimination and tax exemption before and after *Bob Jones*).

165. Colombo, *supra* note 15, at 853–54.

> (as well as the courts), but the ambiguity associated with the broad notion of charity would surely make its job more difficult.[166]

The single biggest problem in the reception of the case, outside of the power bestowed on the IRS, was the ambiguity entwined in that power. A large grant of power mixed with broad discretion seemed a recipe for disaster: The standard was "open-ended and beclouded, leaving far too much discretion in the hands of the IRS."[167] Would the IRS now also begin investigations into schools' policies and practices to find violations of public policy?[168] As Justice Powell had worried about the tradition of American pluralism in the wake of broad powers given to the IRS,[169] so did scholars, leaving one to wonder:

> [P]erhaps of greatest concern is that tax exemption which has been a form of governmental encouragement of and acquiescence in diversity and pluralism may now become a powerful instrument to erode away religious practices so that religious institutions become gradually secularized. It may be that one of the dangers in an increasingly complex society is a greater tendency toward fragmentation and some degree of conformity may be necessary if society is not to fly apart from the centrifugal force of its own diversity; if so, the Court has provided a mechanism in [the] IRS to strive for more conformity. It can only be hoped that the cure will not be more devastating than the perceived illness.[170]

As for the institution itself, Bob Jones University chose to resign itself to nonexempt status and continued to disallow interracial dating until 2000.[171] While Bob Jones University *had* lost its tax-exempt status, it was not forced to remedy the practices that had brought about that loss.[172] A

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166. Michael J. Barry, Comment, *A Sensible Alternative to Revoking the Boy Scouts' Tax Exemption*, 30 FLA. ST. U. L. REV. 137, 156–57 (2002); *see* Thomas McCoy & Neal Devins, *Standing and Adverseness in Challenges of Tax Exemption for Discriminatory Private Schools*, 52 FORDHAM L. REV. 441, 464 (1984); *see also* Galston, *supra* note 164, at 292 ("[T]he Supreme Court has misread the common law of charity into Code while confusing the public policy and public benefit strands of charitable trust law."); Tommy F. Thompson, *The Unadministrability of the Federal Charitable Tax Exemption: Causes, Effects and Remedies*, 5 VA. TAX REV. 1, 8 (1985) (noting that the charitable exemption originated in 1894).

167. Colombo, *supra* note 15, at 855 (footnote omitted) (internal quotation marks omitted); *see* Galvin & Devins, *supra* note 164, at 1373; Ricki J. Schweizer, Comment, *Federal Taxation—Exempt Organizations—Constitutional Law—First Amendment—Right to Free Exercise of Religion*—Bob Jones University v. United States, 30 N.Y.L. SCH. L. REV. 825, 855–56 (1985).

168. Mawdsley & Permuth, *supra* note 147, at 1049.

169. Bob Jones Univ. v. United States, 461 U.S. 574, 609–10 (1983) (Powell, J., concurring in part and concurring in the judgment).

170. Mawdsley & Permuth, *supra* note 147, at 1051.

171. Evangelical Press, *Bob Jones Univ. Drops Interracial Dating Ban*, CHRISTIANITY TODAY (Mar. 1, 2000), http://www.christianitytoday.com/ct/2000/marchweb-only/53.0.html.

172. DALHOUSE, *supra* note 100, at 148–63.

2000 newspaper report announced that the president of Bob Jones University lifted the ban in response to the national media attention they had received following a campaign visit by then Texas Governor George W. Bush.[173] However, at virtually the same time the ban on interracial dating was repealed, Bob Jones University's president was quoted as saying that "his university would not keep a gay student in school, just as it would not keep an adulterer or thief."[174] Therefore, while the University had made a last reluctant step to rid itself of racial discrimination, it was not yet ready to be discrimination-free.

Critics have noted that "[t]he University's reluctance to change its polic[ies] even after losing § 501(c)(3) status suggests that more pressure than revocation of tax-exempt status alone is necessary to encourage policy change."[175] Although exemption revocation is *supposed* to be a highly stigmatizing event, one that pursuers of social justice hope would shame the organization into change, or at least cause its supporters to feel uneasy about their relationship with the outcast organization, Bob Jones University apparently felt little pain other than the actual payment of taxes.

V. AGENCY POWER AND JUDICIAL DEFERENCE: PUTTING *BOB JONES* IN CONTEXT

Because the Court held in *Bob Jones* that the IRS was acting within the proper scope of its authority to declare public policy in a Revenue Ruling and apply that understanding to revoke the tax-exempt status of an institution, the logical next question is how far does that power extend. The Office of Chief Counsel of the IRS took the *Bob Jones* holding to its reasonable conclusion, remarking that "[a]lthough applying on its face only to race discrimination in education . . . the implication of the *Bob Jones* decision extends to *any* organization claiming exempt status under [§] 501(c)(3) and to *any* activity violating a clear public policy."[176] But to what

173. Mike Allen, *Bob Jones University Lifts Ban on Campus Interracial Dating*, WASH. POST, Mar. 4, 2000, at A8, http://www.highbeam.com/doc/1P2-512583.html.

174. *Id.*

175. Upton, *supra* note 18, at 804 n.44; *see also* Virginia Davis Nordin & William Lloyd Turner, *Tax Exempt Status of Private Schools:* Wright, Green, *and* Bob Jones, 35 EDUC. L. REP. 329, 348 (1986) ("All educational institutions should be granted tax exemptions, without reference to their discriminatory admissions policies. Discriminatory schools would then be prosecuted under the Civil Rights Act of 1964, rather than through the indirect and ineffective means of removing their tax exemptions." (footnote omitted)); Barry, *supra* note 166, at 163–65 (comparing the effectiveness of Bob Jones University's revocation with the potential revocation of the Boy Scouts of America's exempt status).

176. I.R.S. Gen. Couns. Mem. 39,792 (June 30, 1989), *available at* 1989 WL 592760, at *3 (emphasis added).

extent would the judicial system defer to IRS determinations of public policy?

The Court's decision in *Bob Jones* to accept that the IRS had been delegated the power to determine public policy was complicated by another decision the following year that shifted the amount of deference given to the agency's statutory interpretations: *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*[177] In *Chevron*—a case concerning the Environmental Protection Agency's interpretation of the Clean Air Act and its amendments—the Court concluded:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[178]

This analysis has been famously termed the "*Chevron* Two-Step,"[179] and shifts the focus away from a judicial interpretation of the statute, instead analyzing Congress' clarity and assuming that in the absence of clarity there is a broad delegation to the agency meant to administer the statute.[180] The addition of *Chevron* and its progeny to the judicial deference pantheon has certainly changed the dynamic in terms of how courts deal with agency interpretation, but some scholars classify this change as "more evolutionary than revolutionary."[181]

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177. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

178. *Id.* at 842–43 (footnotes omitted).

179. *See, e.g.*, Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L.REV. 1271, 1278 (2008).

180. *See id.* at 1278–79.

181. *E.g.*, *id.* at 1278 (internal quotation marks omitted); *see also* 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.1, at 109 (3d ed. 1994) (listing a line of cases that date back to the start of the last century dealing with deference to agency pronouncements); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 736 (2002) (explaining that for decades before the Court's decision in *Chevron*, courts gave deference to agency interpretations of law); Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 284 (1986) ("[*Chevron*] was evolutionary because it applied and refined a long line of Supreme Court precedent reminding lower federal courts of their obligation to defer to an agency's reasonable construction of any statutes administered by that agency."); Russell L.

Because the scope of *Chevron* is sweepingly broad, scholars and courts have tried to cabin its meaning. Even the Supreme Court, in a line of cases following *Chevron*, has wrestled with the issue of when *Chevron* applies. Before *Chevron*, in the case of *Skidmore v. Swift & Co*, the Court reviewed an interpretive rule.[182] Because the Administrator in *Skidmore* had considerable experience and expertise in the area of law at issue, the Court decided that his interpretation should be taken into account along with the Court's interpretation.[183] The Court stated:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[184]

Therefore, after *Chevron* there were conceivably two tracks of judicial deference that courts could give to rules applying statutory interpretation depending on the type of rule at issue. For legislative rules constructed according to the rubric of the APA, and using either formal trial-type procedures or more informal notice-and-comment procedures, there was *Chevron* deference; and for informal interpretive rules that did not use these procedures, there was *Skidmore* deference. *Christensen v. Harris County*, a decision from 2000 that considered an opinion letter adopted by the Department of Labor, confirmed this hypothesis when the Court concluded that items which "lack the force of law—do not warrant *Chevron*-style deference."[185] Interpretive regulations only deepen the understanding of a prior regulation or statute; they do not themselves establish new rights or duties and thus lack the force of law. This seems to be the reason that interpretive rules are exempt from notice-and-comment procedures. Thus, interpretive regulations are entitled to only a *Skidmore*-level of deference based on their power to persuade a court.

Weaver, *Some Realism About* Chevron, 58 MO. L. REV. 129, 131 (1993) ("While these assessments may be supportable, my sense is that *Chevron*'s importance has been exaggerated.").

182. Skidmore v. Swift & Co., 323 U.S. 134, 138 (1944); *see* Chevron, 467 U.S. at 842–44. The lower court's error in *Chevron* was not defaulting to *Skidmore* deference and instead giving the agency interpretation no deference at all in concocting its own definition. *Chevron*, 467 U.S. at 844. Because agencies possess "more than ordinary knowledge" about a regulated area, there should be *some* deference given to their determinations. *Id.*

183. *Skidmore*, 323 U.S. at 137–38, 140.

184. *Id.* at 140.

185. Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000).

The Supreme Court continued to tinker with this distinction in *United States v. Mead Corporation*, where the Court asserted that although the tariff-classification ruling in that case did not deserve *Chevron* deference, it was not for "want of [notice-and-comment] procedure."[186] The tariff rulings were "far removed not only from [the] notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here."[187] This shift created an area where interpretive regulations, which did not receive notice-and-comment procedures, might still be accorded deference more generous than *Skidmore*. The Court attempted to clarify its position in *Barnhart v. Walton*, stating:

> [W]hether a court should give [*Chevron*] deference depends in significant part upon the interpretive method used and the nature of the question at issue. . . . In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens though which to view the legality of the Agency interpretation here at issue.[188]

Therefore, the mere use of notice-and-comment procedures should not be outcome determinative as to whether an interpretation deserves a certain level of deference.[189] It is critical to ascertain which tool an agency uses to craft an understanding of the law and line it up with the factors at play in *Barnhart* to determine what kind of deference it deserves.[190] In the case of

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186. United States v. Mead Corp., 533 U.S. 218, 231 (2001).

187. *Id.*

188. Barnhart v. Walton, 535 U.S. 212, 222 (2002).

189. *See* Hickman, *supra* note 35, at 257. Even though notice-and-comment procedures do not decide the deference issue:

> [W]hether a rule carries the force and effect of law is a question of great significance for rules that have a claim to being nonlegislative, both for determining whether the procedural requirements of notice-and-comment rulemaking apply after all and for deciding whether *Chevron* or *Skidmore* provides the appropriate standard for judicial review. Indeed judicial rhetoric regarding both questions is remarkably similar.

Id.

190. Beyond the scope of this Article there is different deference offered when an agency is interpreting its own regulations. *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945). There can also be a "step zero" analysis when it is unclear whether an agency has the ability to interpret the statute, or there is some other hurdle as to whether *Chevron* applies. *See* FDA v. Brown & Williamson Tobacco Co., 529 U.S. 120, 159–61 (2000); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 221, 221 n.160 (2006). In the instant case, the IRS has the authority to interpret the Internal Revenue Code and deserves at least the choice of *Chevron* and *Skidmore* in the deference debate.

the IRS interpreting the statutory constraints of § 501(c)(3), the agency uses two layers of tools. The first tool is a set of Treasury Regulations that interpret the term "charitable" in the statute to conform to a general legal understanding of the term.[191] The second tool is a Revenue Ruling that extends that general legal understanding to encompass public policy and enlarges that public policy to require that educational institutions do not discriminate based on race.[192] The IRS has not incorporated this Revenue Ruling into any other official type of promulgation.

A broader question in this area is whether *Chevron* deference applies in the tax context at all versus another type of more agency-specific deference. When dealing with the interpretation of the Tax Code, the Supreme Court stated in the 1979 case of *National Muffler Dealer's Association, Inc. v. United States* that when a statutory term has no well-defined meaning or common usage, the Court will defer to regulations that implement the congressional mandate in some reasonable manner.[193] The Court explained that "[i]n determining whether a particular regulation carries out the congressional mandate in a proper manner, [the Court] look[s] to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose."[194] While this might sound like *Chevron*-style deference on its face, the key distinction is that *National Muffler* deference involves a *court's* determination of whether the regulation is in harmony with the statute, whereas *Chevron* deference requires a court to defer to all permissible constructions made by the *agency* in light of statutory ambiguity. After *Chevron*, the Court encountered additional instances of the IRS's interpretive powers but did not consistently use either *Chevron* or *National Muffler* until 2011.[195] The Court then clarified that "[t]he principles underlying our decision in *Chevron* apply with full force in the tax context."[196]

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191. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii), (2) (as amended in 2012).

192. Rev. Rul. 71-447, 1971-2 C.B. 230.

193. Nat'l Muffler Dealer's Ass'n v. United States, 440 U.S. 472, 476 (1979) (quoting Helvering v. Reynolds Co., 306 U.S. 110, 114 (1939); United Stated v. Cartwright, 411 U.S. 546, 550 (1973)), *abrogated in part by* Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704 (2011).

194. *Id.* at 477.

195. *See Mayo Found. for Med. Educ. & Research*, 131 S. Ct. at 712. The Court also makes clear the difference between *National Muffler* and *Chevron* when dealing with ambiguity in a statute, noting that a *National Muffler* analysis might "view an agency's interpretation of a statute with heightened skepticism when it has not been consistent over time, when it was promulgated years after the relevant statute was enacted, or because of the way in which the regulation evolved." *Id.* (citing *Nat'l Muffler*, 440 U.S. at 477). A *Chevron* analysis "does not turn on such considerations," such as inconsistency, antiquity, or contemporaneity. *Id.*

196. *Id.* at 713.

If *Chevron* does apply in the tax context, is there a problem with the first step from *Chevron* and Congress' intentions? Congress considered and rejected the very interpretation of "charitable" that was adopted by the IRS and reified by the Court.[197] By 2000, the Court held that an agency would not ordinarily have regulatory authority in a matter where Congress had considered and expressly rejected legislation that would have granted that same authority.[198] However, the authority of the IRS to interpret the Tax Code is not at issue, and under *Chevron*, if there is ambiguity (not about interpretive authority but elsewhere in the statute), then agencies are given broad discretion.[199]

Revenue Rulings are promulgated without notice-and-comment procedures, and thus they fall into the gray area opened up by *Mead* and *Barnhart*.[200] Revenue Rulings should not be denied *Chevron* deference for lack of procedure, and there is some room in the *Chevron* pantheon for interpretive rules. In applying the factors from *Barnhart*, a Revenue Ruling determination of public policy would be interstitial in nature and fill the gap left open by the ambiguity in "charitable"; such a Revenue Ruling would help the IRS classify organizations for tax exemption, and there is no doubt that the IRS is a complex administration. The last factor—whether the agency has given the question careful consideration over a long period of time[201]— would be better argued in the context of a specific Revenue Ruling, but it does not seem like a terrifying hurdle. Lower courts have split on the issue of how much deference to afford to Revenue Rulings, and the courts' interpretations have been internally inconsistent.[202] After *Mayo*

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197. Brennen, *supra* note 8, at 187 n.87 ("In 1965, Congress attempted to pass a bill that would amend the Code 'to provide that an organization described in [§] 501(c)(3) . . . which engages in certain discriminatory practices shall be denied an exemption.' This bill failed to become law." (second alteration in original) (citation omitted)); *see also* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 90 & n.143 (1988) (citing H.R. 6342, 89th Cong. (1965), *as reprinted in* 111 CONG. REC. 5140 (1965)) (describing inconsistencies between congressional acquiescence to contradictory IRS interpretations).

198. Brennen, *supra* note 8, at 187–88 & n.88; *see also* FDA v. Brown & Williamson Tobacco Co., 529 U.S. 120, 155–56 (2000). In *Brown & Williamson*, Justice O'Connor described how Congress's consideration and rejection of several legislative proposals to grant FDA authority to regulate tobacco indicated that the FDA lacked such regulatory authority. *Brown & Williamson Tobacco Co.*, 529 U.S. at 155–56.

199. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

200. *See supra* note 186–92 and accompanying text.

201. Barnhart v. Walton, 535 U.S. 212, 222 (2002).

202. *See, e.g.*, Linda Galler, *Emerging Standards for Judicial Review of IRS Revenue Rulings*, 72 B.U. L. REV. 841, 842–43 (1992) (noting the different understandings of the majority and minority decisions); Dale F. Rubin, *Private Letter and Revenue Rulings: Remedy or Ruse?*, 28 N. KY. L. REV. 50, 50 (2000) (discussing the multitude of varying interpretations by courts); *see also* Canisius Coll. v. United States, 799 F.2d 18, 22 n.8 (2d Cir. 1986) ("It is to be noted that statutory interpretation as reflected in a revenue ruling does not have the force of law and is of

Foundation for Medical Education and Research v. United States, it is clear that Revenue Rulings must be accorded deference in the *Chevron* scheme and not an agency-specific context.[203] It would be necessary if litigation were pursued to argue for an appropriate level of deference under *Chevron*.

The IRS could always decide to memorialize its determination on the public-policy issue in the context of a Treasury Regulation promulgated under either its general or specific authority. In so doing, the regulation would be more than acceptable on *Chevron* grounds and would be deferred to as long as it was a permissible construction of the statute. However, should the IRS choose to advance its public policy expansion purely through a Revenue Ruling (which seems the most likely scenario since the Revenue Ruling that forbids racially discriminatory practices has still not been incorporated into a more formal setting), whether that Revenue Ruling receives *Chevron* deference determines whether the court may weigh its own interpretation against the agency's interpretation (as in *Skidmore*) or whether the court is isolated from an independent interpretation. The critical difference is the involvement of the judiciary in ascertaining the correctness of the IRS's interpretation of what is and what is not public policy. In order to see whether a court would be persuaded most particularly in the areas of gender and sexual orientation discrimination, it is necessary to analyze how an argument might be advanced that either kind of discrimination was against public policy.

VI. *BOB JONES* IN THE BIGGER PICTURE: EXPANDING DISCRIMINATION CLAIMS TO OTHER CATEGORIES

The Supreme Court's approval of the IRS's revocation of tax-exempt status for racially discriminatory religious schools suggests that revocation power could be extended to other discriminatory policies at similar institutions involving gender or sexual orientation. This is the logical and

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little aid in interpreting a tax statute."); Coverdale, *supra* note 24, at 84. Peculiarly, the Tax Court does not provide any deference to a Revenue Ruling, concluding that they are "simply the litigating position of the Commissioner, entitled to no more weight than the opinion of any lawyer." Coverdale, *supra* note 24, at 84. *But see* Progressive Corp. v. United States, 970 F.2d 188, 194 (6th Cir. 1992) ("This court has held that revenue rulings 'are entitled to great deference, and have been said to have the force of legal precedents unless unreasonable or inconsistent with the provisions of the Internal Revenue Code'" (quoting Amato v. W. Union Int'l, Inc., 773 F.2d 1402, 1411 (2d Cir. 1985) (internal quotation marks omitted))); Comm'r v. O. Liquidating Corp., 292 F.2d 225, 231 (3d Cir. 1961) ("It is well-settled that administrative interpretation of the Internal Revenue Service is entitled to great weight . . . .").

203. *See* Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 712–14 (2011).

natural extension of the majority's reasoning in *Bob Jones University v. United States*.

Extending the discrimination argument to the employment context—apart from the student context that was at issue in *Bob Jones*[204]—requires an analysis of some specific exceptions to discrimination by religious employers. Title VII, the employment-discrimination part of the Civil Rights Act of 1964, contains an exemption that covers religious employers for any decision not to employ individuals who do not subscribe to the tenets of the employer's religion.[205] The Supreme Court has interpreted this section very broadly, allowing its use no matter the employment position in question or the relevance of the religious beliefs to that position.[206]

If the Supreme Court were to consider schools like Bob Jones University, rightfully, as religious institutions, in addition to educational ones, they could fall under this exemption. The implications of this would be clear; if a woman was denied a position teaching a Bible class because a university felt that the Bible did not allow women to teach men in religious settings, the university could use this exemption and merely say that the woman did not agree with the proper religious beliefs, and therefore she was denied the job. Similarly, if a homosexual person applied for a staff or faculty position and was denied, such an exemption would be applied once the university could set out religious beliefs necessary to disqualify the candidate for disagreeing with such belief.

Furthermore, another Title VII religious exemption provision, termed the "religious control of education exemption,"[207] allows more specifically for religious preference in employment to an educational institution that "in whole or in substantial part [is] owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum . . . is directed toward the propagation of a particular religion."[208] "The exemption is unclear, however, about the meaning of the decisive terms—'substantial part,' 'supported,' 'controlled,' [and] 'managed.'"[209]

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204. *See* discussion *supra* Part IV.

205. *See* 42 U.S.C. § 2000e-1(a) (2012) ("This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion . . . .").

206. *See, e.g.*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 329–330 (1987) (upholding a Mormon Church's discrimination on the basis of religion in hiring janitorial staff).

207. Marjorie Reiley Maguire, Comment, *Having One's Cake and Eating It Too: Government Funding and Religious Exemptions for Religiously Affiliated Colleges and Universities*, 1989 WIS. L. REV. 1061, 1090 & n.147 (1989).

208. 42 U.S.C. § 2000e-2(e)(2) (1982) (current version at 42 U.S.C. § 2000e (2012)).

209. Maguire, *supra* note 207, at 1098.

There is also the judicially created "ministerial exception,"[210] which does not forbid all employment discrimination claims, but only those involving employees who would have a role in shaping, enunciating, or disseminating the doctrinal message of religious institutions.[211]

These exemptions for employment decisions based on religion would bar employment litigation and employment claims against private, religious universities. However, it is unclear if the employment exemptions would provide any relief for a university denied a *tax exemption* for engaging in the same discriminatory practice. The argument would not be about unfair employment or that such practices should stop, but rather that the university participating in such practices merely should not be tax exempt under § 501(c)(3).[212] Using the basic logic from *Bob Jones University v. United States*,[213] if the IRS were to issue a Revenue Ruling finding that private universities are engaging in certain discriminatory practices (e.g., against women or persons of a particular sexual orientation), that those practices are now considered contrary to fundamental public policy, and therefore they denied these institutions tax-exempt status, there would not be much room for opposing argument.[214]

The real question then stems from the ambiguity of the public-policy doctrine itself. What would it mean for a public policy to be "sufficiently established"? This section recounts the Court's analysis in *Bob Jones University v. United States* and compares it to the case that might be made for establishing national public policy in favor of eradicating discrimination involving gender and sexual orientation.

Before making the case for a public policy against discrimination in other areas, it is useful to note how such discrimination might be occurring in the context of private, religious universities. Two of the main issues affecting the lives of students are admissions and campus life.[215] Simply

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210. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 697 (2012).

211. *See* McClure v. Salvation Army, 460 F.2d 553, 560–61 (5th Cir. 1972). The ministerial exception was recently upheld by the Supreme Court and said to survive *Smith* for governmental interference with internal church decisions that affect the faith and mission of the church itself. *Hosanna-Tabor*, 132 S. Ct. at 706–07.

212. This idea extends to other claims that might be made in discrimination scenarios. Any exceptions in those areas of law do not really immunize a university in the setting of *Bob Jones University*. However, statutory exceptions might help make the case that religious exceptions are also part of the government's public policy regarding discrimination.

213. *See* discussion *supra* Part IV.

214. Except perhaps that the other statutory exemptions created a conflicted understanding of public policy that was not clear enough for the IRS to declare.

215. *See College Hopes and Worries Results*, PRINCETON REV., http://www.princetonreview.com/college-hopes-worries.aspx (last visited Aug. 24, 2014); Jessica

being admitted is the first hurdle to becoming part of a given school, and was of paramount importance in the *Bob Jones* case.[216] Other discriminatory practices might come to light in the offices that students are allowed to hold on campus or how clubs are allowed to form and function. The admissions process is a hotly debated issue, and universities are battling just how much they can factor in things like race in the process.[217]

Employment issues may also be prevalent—both in the areas of hiring and firing and the conferral of tenure.[218] Again, in cases of employment discrimination, it is not the individual employees that have a claim against the institution, but rather the IRS would have a reason to declare that such discrimination was wrong for all educational institutions and adjust the § 501(c)(3) categorization accordingly.

Moreover, the impact on a university based on the revocation of tax-exempt status would be the possible loss of funding. However, in the case of private, religiously-based universities it is unlikely that donors would be deterred by such a denial if the university chose to remain loyal to its religious beliefs.[219]

If the IRS were to state that it now found a public-policy problem with discrimination on the basis of gender or sexual orientation, there would be sufficient evidence of discrimination occurring at institutions across the United States. Using merely the representative case of Bob Jones University, the examples are plentiful. As recently as 2006, Bob Jones University's website contained a section that explained:

> Loyalty to Christ results in separated living. Dishonesty, lewdness, sensual behavior, adultery, homosexuality, sexual perversion of any kind, pornography, illegal use of drugs, and

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King, *The Facts of Campus Life*, COLLEGE XPRESS, http://www.collegexpress.com/articles-and-advice/student-life/articles/living-campus/facts-campus-life/ (last visited Aug. 24, 2014).

216. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 580–81 (1983).

217. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2415–18 (2013) (discussing the Court's three principal decisions addressing the use of race in the admissions process and examining how universities have attempted to use race as an admission factor in light of these cases).

218. *See* Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 394 (1994) ("Holy Savior School is a small interdenominational Christian elementary school. The school's charter states that it was founded to provide students with an education from an orthodox Christian perspective and to employ teachers and staff members to serve as role models of the Christian life for students and others in the community. Bob Smith and Frank Jones are both employees of the school. Smith teaches fifth and sixth grade social studies classes and Jones serves as the school's janitor. When school officials learn that Smith and Jones are living together in a homosexual relationship, they decide to terminate their employment because Smith and Jones 'are unrepentant sinners whose influence is harmful to our students and our community.'" (footnote omitted)).

219. *See* DALHOUSE, *supra* note 100, at 148–63.

> drunkenness all are clearly condemned by God's Word and prohibited here. Further, we believe that biblical principles preclude gambling, dancing, and the beverage use of alcohol.[220]

Homosexual students would not be welcome to attend Bob Jones University if their sexual orientation became known to the administration.[221] Discrimination against women is typically less blatant. Women are not permitted to teach religion classes or hold student positions of religious leadership where men are present or participating,[222] although the school website clearly states that "Bob Jones University does not discriminate on the basis of race, color, sex, age, national origin, protected disability or veteran status."[223] This again raises the question as to what level of investigation there might be into whether a particular institution is taking actions that do not comport with public policy; however, the initial inquiry is to what extent the IRS would choose to exercise its power to enforce public policy by revoking or denying tax benefits to institutions who choose to engage in such discrimination.

Claims of discrimination justified by sincerely held religious beliefs would not allow schools like Bob Jones University to hold tax-exempt status. In the original case, Bob Jones University made a plethora of arguments about its special nature as a *religious* educational institution.[224] When discussing religion and the Constitution, Laurence Tribe has noted:

> [W]e should speak . . . of a "floor" and a "ceiling" in connection with the Constitution's guarantees of religious freedom—the "floor" set by the free exercise clause, defining an area of individual liberty on which government may not encroach; and the "ceiling" set by the establishment clause, announcing a social

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220. *Student Expectations*, BOB JONES U., https://web.archive.org/web/20060423005849/http://www.bju.edu/prospective/expect/general.html (last visited Aug. 24, 2014) (accessed by searching for the original URL in the Internet Archive search engine).

221. *See id.*

222. *See* E-mail from Jonathan Pait, Public Relations, Bob Jones Univ., to author (May 1, 2006, 1:36 EST) (on file with author).

223. *Careers at BJU*, BOB JONES U., http://www.bju.edu/about/careers.php/; *see also 2012–2013 Undergraduate Catalog*, BOB JONES U. 14, http://www.bju.edu/academics/resources-support/catalogs/ug12.pdf (last visited Aug. 24, 2014) (restating the non-discrimination disclaimer). Additionally, the following disclaimer appears on Bob Jones University's website: "The jobs posted here are open to those who are in alignment with our charter, creed, mission statement, and general policies." *Careers at BJU*, *supra* note 223.

224. *See* Bob Jones Univ. v. United States, 468 F. Supp. 890, 895–900 (D.S.C. 1978), *rev'd*, 639 F.2d 147 (4th Cir. 1980), *aff'd*, 461 U.S. 574 (1983).

> structure in which civil and religious authority are to co-exist without interpenetration.[225]

Bob Jones University and any other religious institution would like to confine government action inside the box created by these clauses. Bob Jones University had claimed that it was prohibited from exercising religious freedoms because it had to choose between racial discrimination and tax-exempt status.[226] However, a unique feature of this type of policy is that it does not prohibit the discrimination itself, but only provides an incentive for the institution to change its ways.

This Article noted earlier that the *Bob Jones* decision came before the critical *Smith* decision,[227] which changed the nature of free-exercise claims.[228] "*Smith* declared [that] instances of overt religious discrimination . . . would still trigger" strict scrutiny, "[b]ut when a generally applicable [and neutral] policy merely created an incidental burden on religion," only the rational basis test would be used.[229] While the impact on the review of free-exercise claims was vast, it would seem that this revolution would mean little to the tax-exemption argument. The government's action in *Bob Jones* passed the strict scrutiny test,[230] so it seems reasonable that it should also be able to pass the much lower threshold of rational basis. If there were any tension inside the definition or application of public policy, the rational basis standard could be even more useful to the government's position. Should the change in understanding about public policy apply to all institutions across the board and only incidentally cover private, religious universities, the action of the IRS or government would only have to be rationally related to a legitimate state interest.[231] Any claim on the basis of an Establishment Clause violation should also be a nonstarter from a university's point of view. A new IRS policy would be similarly secular and neutral to religion, and furthermore Bob Jones University had not previously relied heavily on these arguments.[232]

The Court in *Bob Jones* decided that "eradicating racial discrimination" was a compelling state interest and a fundamental policy of

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225. Laurence H. Tribe, *Church and State in the Constitution, in* GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS, 31, 31–32 (Dean M. Kelley ed., 1982).

226. *See Bob Jones*, 461 U.S. at 602–03.

227. *See supra* note 142 and accompanying text.

228. *Bob Jones*, 461 U.S. at 604 n.30.

229. Forren, *supra* note 143, at 209 (emphasis omitted).

230. *Bob Jones*, 461 U.S. at 603–04.

231. It would absolutely seem to be this way too, absent some legislative history or clear intent that these universities were being singled out on the basis of religion.

232. *See Bob Jones*, 461 U.S. at 604 n.30.

the United States government.[233] However, the Court gave no real guidelines for what or how other public-policy arguments could be made in the future. The Court "did cite promulgations of the three branches of the United States federal government in gleaning a national policy against racial discrimination in education."[234] While the case seems clear-cut for racial discrimination, it is not always so clear. "[P]ublic policy on highly [emotionally] charged issues such as . . . sexuality may never be fully settled or free from controversy."[235]

The *Bob Jones* Court made it a point to go through the various executive declarations, legislation, and court decisions of the three branches of government in determining that there was clearly a strong national consensus to eradicate racial discrimination.[236] The Court pointed to judicial decisions such as *Brown v. Board*,[237] *Cooper v. Aaron*,[238] and *Norwood v. Harrison*;[239] legislative enactments such as Titles IV and VI of the Civil Rights Act of 1964,[240] The Voting Rights Act of 1965,[241] Title VIII of the Civil Rights Act of 1968,[242] the Emergency School Aid Act of 1972[243] and 1978;[244] and Executive Orders issued by Presidents Eisenhower,[245] Truman,[246] and Kennedy,[247] all as evidence of the three branches urging the eradication of racial discrimination.[248] However, in

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233. *See id.* at 604.

234. Buckles, *supra* note 58, at 409.

235. Lynn D. Lu, *Flunking the Methodology Test: A Flawed Tax-Exemption Standard for Educational Organizations That "Advocate[] a Particular Position or Viewpoint,"* 29 N.Y.U. REV. L. & SOC. CHANGE 377, 424 (2004).

236. *See Bob Jones*, 461 U.S. at 592–95.

237. *Id.* at 593 (citing Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) (holding that racial discrimination in public education was unconstitutional)).

238. *Id.* (citing Cooper v. Aaron, 358 U.S. 1, 19 (1958) (stating that segregation based on race in public schools is unconstitutional)).

239. *Id.* at 593–94 (citing Norwood v. Harrison, 413 U.S. 455, 468–69 (1973)). "Racial discrimination in state-operated schools is barred by the Constitution and '[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.'" *Norwood*, 413 U.S. at 465 (alteration in original).

240. *Bob Jones*, 461 U.S. at 594 (citing Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241).

241. *Id.* (citing Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437).

242. *Id.* (citing Civil Rights Act of 1968, tit. VIII, Pub. L. No. 90-284, 82 Stat. 81).

243. *Id.* (citing Emergency School Aid Act, Pub. L. No. 92-318, 86 Stat. 354 (1972)).

244. *Id.* (citing Emergency School Aid Act, Pub. L. No. 95-561, 92 Stat. 2252 (1978)).

245. *Id.* (citing Exec. Order No. 10,730, 3 C.F.R. 389 (1954–1958) (authorizing use of military force to ensure school desegregation)).

246. *Id.* (Exec. Order No. 9,980, 3 C.F.R. 720 (1943–1948) (abolishing segregation in the armed forces)).

247. *Id.* at 594–95 (Exec. Order No. 11,063, 3 C.F.R. 652 (1958–1963) (establishing the President's Committee on Equal Employment Opportunity)).

248. *Id.* at 593.

looking at gender and sexual orientation discrimination through this searching inquiry into the three branches of government that occurred in *Bob Jones*, the case for making a similar public-policy argument gets more difficult.

In the case against gender discrimination, there is a fair amount of evidence from the three branches that could support such a policy. In the past century, Congress has enacted numerous pieces of legislation prohibiting gender discrimination. Title IX of the Education Amendments Act of 1972 states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving [f]ederal financial assistance."[249] Additionally, Title VII of the Civil Rights Act of 1964 provides rights and forms of relief for claims of gender discrimination in the course of employment.[250] There is also evidence of Congress working to eradicate sex-based discrimination particularly in educational institutions.[251] For example, in *Roberts v. United States Jaycees*, the Supreme Court provided its view on the substantial government interest in eradicating discrimination against female citizens.[252] Gender discrimination has a long and similar history to racial discrimination,[253] and it would not be difficult for the government to identify policies that contradict this compelling state interest in private, religious universities.

There are also numerous executive orders indicating the Executive Branch's policy against gender discrimination. Executive Order 11,478 was issued to prohibit discrimination in federal employment on the basis of "race, color, religion, sex, or national origin."[254] Executive Order 11,246, issued by President Lyndon Johnson, established requirements for non-

249. Education Amendments of 1972, tit. IX, § 901(a), Pub. L. No. 92-318, 86 Stat. 235, 373 (codified as amended 20 U.S.C. § 1681 (2012)). It has been extensively argued whether tax-exempt status counts as federal financial assistance. John M. Spratt Jr., *Federal Tax Exemption For Private Segregated Schools: The Crumbling Foundation*, 12 WM. & MARY L. REV. 1, 7–9 (1970). Even if it did not, however, the argument here would still stand as proof that Congress is against discrimination on the basis of gender.

250. Civil Rights Act of 1964, tit. VII, Pub. L. No. 88-352, 78 Stat. 241.

251. Dorothy E. Murphy, Comment, *Title IX: An Alternative Remedy for Sex-Based Employment Discrimination for the Academic Employee?*, 55 ST. JOHN'S L. REV. 329, 329 (1981).

252. Roberts v. U.S. Jaycees, 468 U.S. 609, 610 (1984) ("Assuring women equal access to the goods, privileges, and advantages of a place of public accommodation clearly furthers compelling state interests.").

253. *See id.* at 625–26 ("That stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.").

254. Exec. Order No. 11,478, 3 C.F.R. 446 (1970).

discriminatory practices in hiring and employment on the part of U.S. government contractors.[255]

Finally, in the Judicial Branch, cases such as *Reed v. Reed*, *Frontiero v. Richardson*, and *J.E.B. v. Alabama* emphasize many of the similarities between the historical deprivation of the legal rights of women and racial minorities. In *Reed*, the Supreme Court applied for the first time a higher level of scrutiny, rather than rational basis review, when evaluating a claim of sex discrimination brought under the Equal Protection Clause.[256] The plurality opinion in *Frontiero* advocated for the application of strict scrutiny, rather than intermediate scrutiny, to gender classifications because "sex, like race and national origin, is an immutable characteristic" and "classifications based upon sex . . . are inherently suspect."[257] And in *J.E.B.*, the Court noted that it "consistently has subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of 'archaic and overbroad' generalizations about gender."[258] The Court recognized a long history of persecution women faced in society and noted the growing trend toward recognizing the need to eradicate the invidious discrimination based on gender.[259] These cases note the long-standing discrimination based on gender and, in conjunction with legislative enactments and executive orders regarding gender discrimination, could stand for the proposition that eradicating discrimination on the basis of sex is a clear public policy of the United States.

A potential issue arising from these cases, however, is the notion that although the Court found that similarities exist between race and gender discrimination, the Court also has held that gender discrimination claims are afforded a lower level of constitutional scrutiny than racial discrimination under the Equal Protection Clause.[260] The *Bob Jones* decision by no means makes this kind of a consideration dispositive, but if a court is allowed a

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255. Exec. Order No. 11,246, 3 C.F.R. 167 (1966).

256. Reed v. Reed, 404 U.S. 71, 75–76 (1971) ("A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" (quoting F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920))).

257. Frontiero v. Richardson, 411 U.S. 677, 686, 688 (1973) (plurality opinion).

258. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 135 (1994) (quoting Schlesinger v. Ballard, 419 U.S. 498, 506–07 (1975)); *see also id.* at 129 ("We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality.").

259. *See id.* at 136.

260. *See id.* at 135–36 (holding that classifications based on gender are subject to intermediate scrutiny under the Equal Protection Clause).

role in weighing out the pieces that add up to federal public policy, the level of scrutiny is a factor that might be taken into account.

As to sexual orientation discrimination, there is some evidence from the Legislature of an emerging public policy. In 2010, Congress passed the Don't Ask, Don't Tell Repeal Act of 2010, which established a process for ending the "Don't Ask, Don't Tell" policy that had prohibited gays, lesbians, and bisexuals from serving openly in the United States Armed Forces.[261] It must be noted, however, that although Congress voted to repeal the Don't Ask, Don't Tell policy, Congress declined to go as far as to enact a policy of non-discrimination on the basis of sexual orientation.[262] Thus, the national policy in this area remains hazy at best on the congressional front.

The Executive Branch has issued executive orders concerning government employment and training programs that include prohibitions against discrimination based on sexual orientation, although they are less protective than similar laws prohibiting gender and race discrimination.[263] In 1998, President Clinton issued Executive Order 13,087, which amended President Johnson's order prohibiting discrimination of certain classes of citizens in federal employment by adding sexual orientation to the list.[264] In 2000, President Clinton issued another executive order prohibiting discrimination based on sexual orientation, this time related to federally conducted education and training programs.[265] In 2009, President Obama issued a memorandum on "Federal Benefits and Non-Discrimination," which encouraged the federal government to provide limited benefits to domestic partners of federal employees.[266] President Obama is also set to

261. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

262. *See id. See generally* Military Readiness Enhancement Act of 2009, H.R. 1283, 111th Cong. (2009) (proposing to repeal the Don't Ask, Don't Tell policy and replace it with a policy of non-discrimination based on sexual orientation).

263. *See generally* Proclamation No. 9136, 79 Fed. Reg. 32,427 (May 30, 2014) (declaring June 2014 as LGBT Pride Month); Proclamation No. 8989, 78 Fed. Reg. 33,957 (May 31, 2013) (declaring June 2013 as LGBT Pride Month); Proclamation No. 8834, 3 C.F.R. 84 (2013) (declaring June 2012 as LGBT Pride Month); Proclamation No. 8685, 76 Fed. Reg. 32,853 (May 31, 2011) (declaring June 2011 as LGBT Pride Month); Proclamation No. 8529, 3 C.F.R. 62 (2011) (declaring June 2010 as LGBT Pride Month); Proclamation No. 8387, 74 Fed. Reg. 27,677 (June 9, 2009) (declaring June 2009 as LGBT Pride Month); Proclamation No. 7316, 3 C.F.R. 92 (2001) (declaring June 2000 as LGBT Pride Month); Proclamation No. 7203, 3 C.F.R. 50 (2000) (declaring June 1999 as LGBT Pride Month); Proclamation No. 7187, 64 Fed. Reg. 22,777 (Apr. 22, 1999) (urging Congress to pass the Hate Crimes Prevention Act of 1999 to strengthen laws against hate crimes based on sexual orientation).

264. Exec. Order No. 13,087, 3 C.F.R. 191 (1999).

265. Exec. Order No. 13,160, 3 C.F.R. 279 (2001).

266. *See* Memorandum from President Barack Obama for the Heads of Exec. Dep'ts and Agencies, Federal Benefits and Non-Discrimination (June 17, 2009),

make a new Executive Order, which would prevent federal contractors from discriminating against employees "on the basis of sexual orientation or gender identity."[267]

The Judicial Branch has also taken up the issue of sexual orientation discrimination in recent years, invalidating state and federal legislation that discriminated on the basis of sexual orientation. In *Lawrence v. Texas*, the Supreme Court held that the Due Process Clause protects the right to engage in private sexual activity.[268] In *United States v. Windsor*, the Court held that the Defense of Marriage Act's definition of marriage was "unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment."[269]

The case law, legislative activity, and executive orders surrounding the issue of sexual orientation discrimination suggest a growing trend of a federal public policy against such discrimination. However, it would be hard to justify that this evidence is equal to the evidence relied upon by the court in *Bob Jones* or the IRS in its Revenue Ruling for that case. It would not yet seem that eradicating sexual orientation discrimination is as compelling of a government interest to satisfy strict scrutiny as eradicating racial discrimination was. However, given the rubric of judicial deference, it is not necessary that the IRS use a Revenue Ruling or other measure to prove that strict scrutiny is satisfied (i.e., that there is an appropriate compelling state interest). The IRS does not even have to prove, as was the case in *Bob Jones*, that there is *no doubt* of a federal public policy in the area. Under *Chevron* and its progeny, the IRS must at most persuade the court that the revocation of tax-exempt status for institutions that engage in sexual orientation discrimination is a permissible construction of § 501(c)(3).

VII. CONCLUSION

One critic of the public-policy doctrine wrote the following: "The [public-policy] doctrine, which can be applied to deny or revoke a charitable organization's federal income tax exemption, is undefined, manipulative, constitutionally suspect, and inconsistent with the norm of

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http://www.whitehouse.gov/the-press-office/fact-sheet-presidential-memorandum-federal-benefits-and-non-discrimination.

267. Matthew Hoye, *Obama Order Would Ban Contractor Bias Based on Sexual Orientation*, CNN POL. (June 16, 2014, 4:39 PM ET), http://politicalticker.blogs.cnn.com/2014/06/16/obama-order-would-ban-contractor-bias-based-on-sexual-orientation/.

268. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

269. United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).

diversity within the charitable, nonprofit sector. Nonetheless, to abandon the doctrine entirely is a mistake."[270] The Supreme Court in *Bob Jones* crafted the doctrine out of common-law concerns and the actions of the IRS: The IRS could now legally determine, consistent with public policy, who could be tax exempt under § 501(c)(3).[271] This doctrine has been established, but not tested, as it could be with discrimination on the basis of gender or sexual orientation.

Although private, religious universities may be able to claim a plethora of exemptions to litigation, this is an area in which the government can still freely target any practices it finds to be discriminatory.[272] Free-exercise claims do not hold weight when an institution may still discriminate and not receive a government benefit. Discrimination issues have a neutral, secular basis applicable to all institutions and would not offend the Establishment Clause. And as the law of judicial deference now clearly extends *Chevron* and its progeny to all tax decisions, the IRS may renounce discrimination easily through an informal regulation, or slightly more tenuously through an interpretive Revenue Ruling. With the cases of gender and sexual orientation discrimination having grounding in all three branches of government, it may not take much to persuade a court even if the IRS decision was relegated to *Skidmore* deference. Through the clear-cut case of racial discrimination in *Bob Jones* and the ever-growing deference to agency interpretations since *Chevron*, the Supreme Court has made the IRS rife with power. The power itself may still be latent inside of the agency, but it could be legally and viably used at any moment.

Instead of abandoning the public-policy doctrine entirely, it makes more sense to leave the finer points of what qualifies as a public policy and the weighing of interests to Congress, as opposed to leaving it to complete agency discretion. The concerns of Justices Powell and Rehnquist will be well founded if the IRS chooses to use tax-exempt status as a weapon instead of a tool to collect revenue. *Chevron* cautions that if Congress is clear about a matter, then the agency must follow the will of Congress. The solution to this unbounded power is to make the statute clear about to what extent "charitable" includes public policy and to what extent the IRS may determine or declare public policy in assigning tax-exempt status to institutions. What is clear is that the agency does not have to limit its power

270. Buckles, *supra* note 58, at 477–78.

271. *See* discussion *supra* Part IV.

272. More broadly, any practices the IRS finds to violate public policy could be the source of a Revenue Ruling. Discrimination is an easier case to model after the original argumentation in *Bob Jones* itself, but the IRS could make similar arguments for protection of the environment and determine every organization that is not committed to environmental sustainability has also run afoul of established national federal policy and ought to be denied tax-exempt status.

in this area and the judiciary cannot deny the exercise of this power as long as it is permissible, or at most, persuasive. As it stands, if a Revenue Ruling were given proper time and thought, then a quick run through of applicable law from each branch of government, no matter how brief, should be enough to allow the IRS to revoke tax-exempt status. The IRS indeed has the power to destroy universities or other organizations that are dependent on their tax-exempt status as a source of revenue. Whether that power should be used or restrained and used only when democratic processes may tease out the full measure of national public policy, remains an exercise in which only Congress may engage.

LIMITED SCOPE NOT LIMITED COMPETENCE: SKILLS NEEDED TO PROVIDE INCREASED ACCESS TO JUSTICE THROUGH UNBUNDLED LEGAL SERVICES IN DOMESTIC-RELATIONS MATTERS

MICHELE N. STRUFFOLINO*

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* Associate Professor of Law, Nova Southeastern University Shepard Broad Law Center. I would like to thank Professor Charlene Smith, Professor Kathy Cerminara, Professor Kathryn Webber, and the Faculty Development Committee for their support, suggestions, and assistance. I would also like to thank Ryan McGlynn and James Smith for their research assistance and technical assistance. Thanks to Steven, Nicole, Nassar, Lennox, and Charlotte for your ongoing support.

I. INTRODUCTION

Providing competent limited representation in family matters requires both family law experience and an understanding of the appropriate use of limited representation. It is only then that the use of limited representation in family matters furthers access to justice. This Article ties together the following two components of providing access to justice in family matters: (1) the availability of some form of legal representation, and (2) representation by competent family law litigators. Competence is required of all attorneys and is generally determined by the test provided in Rule 1.1 of the Model Rules of Professional Conduct (Model Rules).[1] Competence requires not only skill and knowledge but also some level of investigation and diligence.[2] It requires knowing what representation best suits the needs of the client and a careful assessment of whether the attorney can provide these services. And as we are reminded by the Model Rules, providing limited representation does not extinguish the requirement to provide competent representation. Satisfying these basic requirements is the key to the successful use of limited representation in family matters.

Although limited representation is nothing new in other areas of the law, the expansion of the use of limited representation involving litigation

1. *See infra* Part II.A.
2. *See infra* Part II.A.

is a relatively new idea. Sparked by the crisis caused by increasing numbers of pro se litigants in family courts across the nation, the American Bar Association (ABA) responded with a change in the ethical rules to more specifically allow the use of limited representation in matters involving litigation.[3] In addition, the ABA encouraged jurisdictions to adopt procedural rules to address concerns of private attorneys considering offering limited representation. Almost all states have adopted changes to their procedural rules to accomplish this goal.[4] Because these rules are relatively new and practically untested in the family law area, concerns about possible ethical rule violations or malpractice claims may deter attorneys from providing family law litigants in need with this valuable form of limited assistance.

It has been slightly over a decade since the ABA took the first step and changed the Model Rules to encourage the use of limited representation in litigation. Although many articles have been written regarding its use—praising or criticizing its effectiveness—little empirical data has been compiled.[5] There remains little concrete evidence, if any, showing that the use of limited representation has increased access to justice in our family courts—one of the courts most in need of assistance with pro se litigants. While this information would provide a valuable resource for assessing the effectiveness of offering limited representation as well as an examination of how scarce resources can best be allocated, this lack of data should not preclude an analysis based on what is already known about effective legal representation and client needs.

First, this Article will discuss the competency requirements found both in the ethical rules and in the traditional expectations of the family law attorney. Next, this Article will define the phrase "limited representation" and will track its use as a means of providing access to justice in family courts. This will include a discussion of the ABA's role in encouraging changes and the jurisdictional response. After analyzing competency requirements and the rules regarding limited representation, this Article will demonstrate that it is only when attorneys possess experience in family law matters and understand the need to stay within the rules governing limited representation that increased access to justice can be accomplished. Here,

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3. *See infra* Part III.B.

4. D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 904–05 (2013).

5. *Id.* at 905–06 (citing 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, 2124–25 (2012) (suggesting that one reason for the marginal effect representation has had is that pro se litigants have greater access to the issues)).

both the complex nature of family law and the lessons learned from the use of limited representation in civil cases other than family matters will be examined. Finally, this Article will give suggestions for increasing the number of experienced family law attorneys who can provide competent limited representation to further the goal of increasing access to justice in family matters.

II. COMPETENCE AND THE FAMILY LAW ATTORNEY

Providing competent representation in family matters starts with adhering to the basic competency rule.[6] The competency rule, however, also requires compliance with other ethical and procedural rules and a familiarity with the specialized area of domestic-relations law. In addition, because domestic-relations matters often present intense emotional and complex financial problems, domestic-relations attorneys must have strong client management skills and be able to identify issues outside the traditional family law realm.[7] In the past, family law matters were typically in the hands of a "generalist."[8] Today, however, family law attorneys are expected to be specialists.[9]

A. Model Rule 1.1

Model Rule 1.1 provides the standard for all attorneys: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[10] This is not a random assignment of a rule number. The Model Rules start with the competency rule because it provides the umbrella under which all other ethical rules can

6. Model Rule 1.1 governs all forms of representation. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2013).

7. *See* Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 U. MISS.-KAN. CITY L. REV. 965, 968 (2007) (noting that the role of the family law attorney requires an understanding of complex legal issues in areas of bankruptcy, tort liability, taxation, and other areas of the law); *see also* Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitations Decisions*, 54 JUV. & FAM. CT. J. 11, 11–12 (2003) (discussing the judges within a family-law matter when the underlying relationships are abusive or feature high-intensity conflict).

8. Andrew S. Grossman, *Avoiding Legal Malpractice in Family Law Cases: The Dangers of Not Engaging in Financial Discovery*, 33 FAM. L.Q. 361, 370 (1999).

9. *Id.* at 368–70 ("[A]n attorney who holds himself out as a specialist will be deemed a specialist, regardless of whether he actually possesses superior skill, knowledge, experience, or expertise . . . .").

10. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2013).

be understood.[11] The term "skill," when used to determine competency, is defined as a "special form of competence which is not part of the ordinary equipment of the reasonable man, but which is the result of acquired learning, and aptitude developed by special training and experience."[12] Determining whether an attorney has the required knowledge and skill to handle a particular matter includes an examination of the "complexity and specialized nature" of the case and the lawyer's "general experience" in the area of the law involved.[13] A lawyer is expected to recognize when, even with "preparation and study," the client's interest will be better served by not taking the case and by referring the client to an attorney with "competence in the field in question."[14] When determining issues within a case, an attorney must be competent to handle an "inquiry into and analysis of the factual and legal elements of the problem."[15] Thus, the competency requirement begins during the initial intake and continues until the representation is complete.[16]

B. *Knowledge and Skill Necessary for Competent Representation in Family Matters*

Over the past fifty years, the changing nature of family law, and the practice of law in general, increased the skills and knowledge a practitioner must have to be considered a competent family law attorney.[17] The family law practice today is "more complex, more specialized, more interdisciplinary, and more expensive, with greater risks for sanction and liability."[18] Today's family law practice, however, also provides a "greater opportunit[y] for financial reward" because of the increasing need for assistance with these sensitive and complex matters.[19] What was once a

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11. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY 89 (2012–2013 ed. 2012) ("It is no accident that the first Model Rule requires competence, for the drafters of the Model Rules believed that the first rule of legal ethics is competence.").

12. Grossman, *supra* note 8, at 364.

13. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 1 (2013).

14. *See id.*

15. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 5 (2013).

16. *See* Michele N. Struffolino, *Taking Limited Representation to the Limits: The Efficacy of Using Unbundled Legal Services in Domestic-Relations Matters Involving Litigation*, 2 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 166, 220 (2012) ("The timing of the inquiry is complicated by this determination, which usually occurs, and should occur, during the initial intake.").

17. *See* Barbara Glesner Fines, *Fifty Years of Family Law Practice–The Evolving Role of the Family Law Attorney*, 24 J. AM. ACAD. MATRIMONIAL LAW. 391, 405 (2012).

18. *Id.* at 391–92.

19. *Id.*

term that focused on the relationship between a husband and wife, the term "family" is defined very differently today.[20] Changes in social attitudes, economically driven changes in gender roles, and scientific advancement have led to great diversity in family formation.[21] As a result, the family law practice, which once focused primarily on the dissolution of marriage, now typically includes representing separating unmarried partners, grandparents, and other extended family members.[22]

The issues involved in family law matters also became more specialized and more complex. Even though the emergence of "no fault" divorce simplified the traditional divorce action, child custody and financial issues have expanded in number and complexity.[23] Today, child custody issues are often determined by social science concepts,[24] and joint custody presumptions present logistically and emotionally complicated co-parenting issues.[25] The economic issues involved in family matters today no longer include only a determination of support[26] or the division of the marital home as the primary family asset. Rather, a divorce or separation today often requires the division of intangible personal property, such as "complex financial investments" and pensions.[27] What constitutes property is now defined broadly by family courts, with some jurisdictions including "goodwill" associated with a business and even a professional degree in the definition.[28] To adequately advise clients, family law attorneys must have knowledge of many other areas of state and federal law,[29] such as estate

20. *See id.* at 392–94; *see also* Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 384 (2008) ("Dynamic changes . . . occurred in the composition of the American family as the number of divorces grew, unwed fathers won parental rights, and more couples, heterosexual and same sex, chose to live together and have children without getting married.").

21. Fines, *supra* note 17, at 393–95. ("[M]edical science is developing assisted reproductive technologies faster than the laws can keep pace.").

22. *Id.* at 404 ("[T]oday a family law attorney may be called on to resolve disputes over ownership of property between unmarried couples, represent a grandparent in a guardianship for her grandchild, or bring an action to determine parentage.").

23. *Id.* at 397–98.

24. *Id.* at 398.

25. *See id.* at 399.

26. Because the division of property was traditionally determined by property law, and most property was held in the husband's name, property distribution would typically require little analysis. The only remaining financial issue was support. *Id.*

27. *Id.* at 399–400.

28. J. Thomas Oldham, *Changes in the Economic Consequences of Divorces, 1958–2008*, 42 FAM. L.Q. 419, 430 (2008).

29. *See* Elrod & Dale, *supra* note 20, at 382–83. While it was once an area of law governed almost exclusively by state and local law, family law matters now often include issues involving federal statutory and constitutional law, and often involve national and international issues. *Id.*

planning, bankruptcy, and tax law.[30] Because of the increasing complexity of parenting and financial issues, family law attorneys must often rely on social science or financial experts.[31]

Further complicating today's family law practice is that these sensitive family issues are decided by judges who enjoy great statutory discretion and whose decisions are given great deference.[32] As a result, every case is truly different: case law on the same issue can vary greatly, making it more difficult to predict outcomes.[33] On a more local level, the outcome of a similar issue can vary from judge to judge within the same courthouse and even with the same judge on a different day.[34] Strong client management skills are necessary to properly educate and advise clients regarding the unpredictability of, and resulting increased cost associated with, litigating family matters.[35] Litigants who cannot afford to hire a skilled family law practitioner will likely become another pro se litigant in an already stressed family court system.[36]

Because of the sensitive financial and highly emotional issues often involved in domestic-relations matters, attorneys are often faced with ethical dilemmas. A skilled domestic-relations attorney can identify red flags and deal with them early on.[37] Attorneys cannot ethically assist clients in making misrepresentations or committing fraud.[38] An attorney also cannot "fail to disclose a material fact" if to do so would be assisting the client in committing fraud.[39] Clients, for example, may raise unsubstantiated accusations about the other side, or they may seek to withhold financial information.[40] A client's desire to not do anything at all can also raise ethical issues for family law attorneys, and attorneys must be

30. *See* Fines & Madsen, *supra* note 7, at 968; *see also* Fines, *supra* note 17, at 400.

31. *See* Fines, *supra* note 17, at 398–400.

32. Struffolino, *supra* note 16, at 177; *see also* Fines & Madsen, *supra* note 7, at 967. "A discretionary standard of review is allowed in family law cases due to the intermingling of psychology and the law within domestic-relations matters." Struffolino, *supra* note 16, at 177 n.26; *see also* People *ex rel.* E.C., 47 P.3d 707, 709 (Colo. App. 2002) (stating that in a post-termination of parental rights proceeding, a trial court's findings and conclusions will not be disturbed on review if the record supports them).

33. Struffolino, *supra* note 16, at 177.

34. *See id.* at 177 n.26 (citing Fines & Madsen, *supra* note 7, at 967).

35. *See id.* at 177–78.

36. *See* Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 378–384 (2005) (suggesting that not having legal representation is generally perceived negatively and results in inefficiency).

37. Dignity Health v. Seare (*In re* Seare), 493 B.R. 158, 189 (Bankr. D. Nev. 2013).

38. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2013).

39. Alan C. Eidsness & Lisa T. Spencer, *Confronting Ethical Issues in Practice: The Trial Lawyer's Dilemma*, 45 FAM. L.Q. 21, 22 (2011) (quoting MODEL RULES OF PROF'L CONDUCT R. 4.1(b) (2003)).

40. *See, e.g.*, *id.* at 22–23.

careful not to assist a client in delaying proceedings or assist the client in efforts to keep the other side from obtaining a justified outcome.[41] Once these ethical dilemmas are identified, strong client management skills are necessary to explain to the client that he or she is pursuing a dangerous course of action, and the attorney must also convince the client that full disclosure is in the client's best interest.[42] The attorney must also be able to identify when, despite best efforts, the client is unlikely to follow counsel's advice, and the attorney must seek to end the representation.[43] If litigation has begun, this is often no easy task.[44]

The difficulties and dilemmas associated with a domestic-relations practice do not disappear, nor should they be less of a concern, when offering only limited representation. In fact, it is because of the complex and highly emotional nature of family law matters that limited representation requires the services of a competent and experienced family law litigator.

III. AN OLD DOG AND A NEW TRICK: LIMITED REPRESENTATION AS A TOOL TO INCREASE ACCESS TO JUSTICE

The basic idea behind limited representation is that some legal representation is better than none.[45] Offering litigants who could not otherwise afford full representation the opportunity to hire an attorney for only some of the tasks or issues is better than proceeding pro se for the entire case.[46] This alternative is especially attractive to litigants of low- and moderate-income, attorneys facing dwindling numbers of paying clients, and family courts faced with an influx of unrepresented litigants slowing

41. *See id.* at 28 (discussing possible ethical violations for an attorney who complies with a client's request to delay proceedings while the client is receiving temporary spousal support which is set to terminate after entry of the judgment or decree).

42. *See id.* at 23.

43. *Id.* at 25 ("[A] lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law." (quoting MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. 2 (2003))).

44. *See id.* at 23–27.

45. Hon. Judith L. Kreeger, *To Bundle or Unbundle? That Is the Question*, 40 FAM. CT. REV. 87, 89 (2002).

46. *See* Molly M. Jennings & D. James Greiner, *The Evolution of Unbundling in Litigation Matters: Three Case Studies and a Literature Review*, 89 DENV. U. L. REV. 825, 831–32 (2012); *see also* Alicia M. Farley, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563, 566 (2007) ("[L]imited scope representation provides promise for increasing access to justice for low-income Americans . . . .").

down the wheels of justice.[47] With the ABA taking the lead, a long-used alternative to full representation in matters not involving litigation was expanded to meet the needs of those involved in, or about to be involved in, litigation.

A. Limited Scope Representation

Limited representation is also known as "unbundled legal services" or "discrete task representation."[48] Unlike traditional full-service representation, where the attorney is responsible for utilizing all means to obtain the client's stated goal, the attorney's responsibilities are limited to those chosen by the client.[49] Therefore, the bundle of tasks typically associated with full representation is "unbundl[ed]."[50] For example, rather than hiring an attorney in a divorce action with the ultimate goal of securing a judgment that resolves all issues, the client may hire the attorney to obtain only one objective, such as child support.[51] The client may also hire the attorney to perform only one task, such as drafting the divorce petition.[52] At the heart of limited representation is the agreement between the client and the attorney.[53] It is through this agreement that the client can maintain control over the attorney's responsibilities, thus enabling the client to control the cost of representation.[54] The ability to control the cost of the representation is often cited as the most valuable attribute associated with limited representation.[55]

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47. *See* Struffolino, *supra* note 16, at 205–06 (arguing that pro se litigants present challenges to court clerks and judges by expecting substantial assistance with—or leniency when applying—procedural requirements).

48. Forrest S. Mosten, *Collaborative Law Practice: An Unbundled Approach to Informed Client Decision Making*, 2008 J. DISP. RESOL. 163, 163 (2008).

49. *Id.* at 165.

50. Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 423 (1994).

51. This is known as horizontal unbundling. Forrest S. Mosten, *Unbundling Legal Services Today—And Predictions for the Future*, 35 FAM. ADVOC. 14, 15 (2012).

52. This is known as vertical unbundling. *Id.* at 14.

53. *See* Mosten, *supra* note 50, at 423–26.

54. *See id.* at 425; *see also* Kasey W. Kincaid & Kimberly J. Walker, *Managing Litigation Costs: The Client Cannot Start Too Soon*, 41 DRAKE L. REV. 67, 68 (1992) (focusing on the client's point of view regarding the managing of legal expenses for litigation, beginning as early as the selection process).

55. *See* MODEST MEANS TASK FORCE, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE, A.B.A. 3–4 (2003), (inferring that clients may wish to limit representation because they think that services are too costly).

Limited representation is not a new concept in matters not involving litigation.[56] It could provide the means to final settlement of family matters through mediation or collaboration.[57] Domestic-relations attorneys routinely limit the scope of their services to review a mediated divorce agreement without being obliged to advocate for a better resolution or to do further investigation.[58] Even before the movement to encourage private attorneys to offer limited representation in matters involving litigation, legal aid attorneys were taking advantage of this option to provide some legal services to those in need.[59] The private bar, however, was reluctant to follow.[60] Because of complex procedural and evidentiary rules associated with litigation, limited representation in matters involving ongoing court involvement was typically viewed as not being an option by private attorneys.[61] It was not until family courts across the country began to feel the effects of the pro se phenomenon[62] that limited representation was seen as an option in contested domestic-relations matters.[63]

B. The Pro Se Phenomenon Triggers Efforts to Expand the Use of Limited Representation as a Mechanism to Increase Access to Justice

Although it was common for litigants to proceed pro se in state trial courts, until two decades ago, litigants in family law matters were typically represented.[64] Today, the opposite is true in family court, where "pro se is

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56. *Id.* at 5. Tasks or objectives associated with one corporate matter are commonly divided between in-house counsel and private counsel. *See id.* at 5–6 ("The corporate client may reduce the overall legal costs by having in-house counsel oversee a project and perform many of the tasks, while retaining outside specialists, such as tax, real estate, or corporate finance lawyers, to provide specific advice on specific questions.").

57. Mosten, *supra* note 51, at 15–16.

58. *See, e.g.*, Lerner v. Laufer, 819 A.2d 471, 482–83 (N.J. Super. Ct. App. Div. 2003).

59. Jennings & Greiner, *supra* note 46, at 826.

60. *Id.* at 827.

61. Struffolino, *supra* note 16, at 190–91; *see also* Rochelle Klempner, *Unbundled Legal Services in New York State Litigated Matters: A Proposal to Test the Efficacy Through Law School Clinics*, 30 N.Y.U. REV. L. & SOC. CHANGE 653, 654 (2006) (espousing that limited scope representation has not been widely used in litigation); Raymond P. Micklewright, *Discrete Task Representation a/k/a Unbundled Legal Services*, 29 COLO. LAW. 5, 6 (2000) ("[I]n litigation matters, lawyers historically have provided full[-]service representation because of the complexity of the procedural rules, as well as the rules of evidence, at trial.").

62. *See* Struffolino, *supra* note 16, at 195 (citing Swank, *supra* note 36, at 374 (defining the rise in pro se litigants as the "the pro se phenomenon")).

63. *Id.*

64. A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS, 4 (Nov. 2009), http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/prose_white_paper.authcheckdam.pdf.

no longer a matter of growth, but rather a status at a saturated level."[65] The percentage of pro se litigants in family matters has been reported to be as high as ninety percent.[66] While financial reasons are often cited as the cause of this increase, other emotional and societal factors contributed as well.[67] The availability of no-fault divorce in the 1970s sparked an increase in divorce rates.[68] Shortly after that, an increase in self-help resources and the rising cost of legal representation made self-representation a viable choice.[69] With the average cost of legal representation being over $295 per hour and the average cost of a divorce being $20,000 and as high as $150,000 for a contested case involving trial,[70] it was not just the "poor" who could no longer afford an attorney.[71] Middle-class individuals also could no longer afford to pay for legal representation, especially in matters

65. *Id.* (emphasis omitted) (citing John M. Greacen, *Self Represented Litigants and Court and Legal Services Responses to Their Needs: What We Know*, CAL. CTS. 7, http://www.courts.ca.gov/partners/documents/SRLwhatweknow.pdf (last visited July 4, 2014)).

66. Swank, *supra* note 36, at 376 (finding that even those who hire an attorney often face an unrepresented opponent).

67. Struffolino, *supra* note 16, at 195 (citing Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 1016 n.188 (2007) ("[T]he increase in pro se litigation can be attributed to a variety of financial, societal, and psychological factors.")); *see also* Howard M. Rubin, *The Civil Pro Se Litigant v. the Legal System*, 20 LOY. U. CHI. L.J. 999, 999 (1989) (highlighting that because of a lack of legal aid in rural areas, residents of these areas may have no choice but to litigate alone); Swank, *supra* note 36, at 378–79 (listing a variety of reasons as to why people proceed pro se, such as "an anti-lawyer sentiment," noneconomic reasons, and "a mistrust of the legal system").

68. Struffolino, *supra* note 16, at 198–99; Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases*, 12 J.L. & FAM. STUD. 57, 62–63 (2010); *see also* Ray D. Madoff, *Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution*, 76 S. CAL. L. REV. 161, 166 (2002) (arguing that the passage of no-fault divorce laws has caused more divorce and more instances of mediation). *But see* Lisa Milot, Note, *Restitching the American Marital Quilt: Untangling Marriage from the Nuclear Family*, 87 VA. L. REV. 701, 706 (2001) ("One text reports succinctly that divorce rates 'dramatically accelerated upward' in the 1960s and 1970s while most of the shift to no-fault divorce laws occurred in the early 1970s and 1980s, '*after* the largest increases in divorce rates had already occurred.'" (quoting IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 221 (3d ed. 1998))).

69. *See* Mosten, *supra* note 50, at 423 (discussing the divorce litigant's use of self-help in the divorce process); Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIMONIAL LAW. 193, 195 (2008) (discussing the use of online forms to aid pro se divorce litigants in the legal process).

70. Struffolino, *supra* note 16, at 200; *see also* Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 443 (2009) (pointing to high legal fees as a reason for litigants to proceed pro se); Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1541 (2005) ("[A]n uncontested divorce that does not go to court will cost around $16,500, whereas a contested divorce that proceeds to trial could cost more than $150,000." (quoting Amy C. Henderson, Comment, *Meaningful Access to the Courts?: Assessing Self-Represented Litigants' Ability to Obtain a Fair, Inexpensive Divorce in Missouri's Court System*, 72 U. MISS.-KAN. CITY L. REV. 571, 573 (2003) (internal quotation marks omitted))).

71. Struffolino, *supra* note 16, at 199–200.

involving ongoing litigation.[72] Those who typically would qualify for some form of free legal assistance were hit with the effects of a drastic reduction in funding for legal aid services and a shortage of attorneys willing to offer pro bono assistance.[73]

In the wake of the financial crisis over the past decade, matters involving litigation have increased; on the top of the list of cases that increased in number are domestic-relations cases.[74] The number of pro se litigants also increased.[75] The increase in pro se litigants and the decrease in available free legal services threatened to cripple an already stressed legal system.[76] Pro se litigants who showed up in family courts expected substantial assistance from judges, clerks, and other court personnel.[77] Most importantly, the lack of representation had a negative impact on case outcomes. A 2010 ABA survey reported that 62% of the responding judges reported that outcomes were worse for pro se litigants.[78] With the ABA taking the lead, states responded with changes to both ethical and procedural rules. The changes were meant to encourage private attorneys to offer limited representation by alleviating some of the concerns and addressing some of the misconceptions associated with the limited representation.

1. The ABA Response

The ABA effort to encourage and expand the use of limited scope representation in litigation came in a two-pronged approach. First, the 2000 Ethics Commission recommended a change to Model Rule 1.2(c) "to more clearly permit, but also more specifically regulate" limited scope

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72. *Id.* at 200 (citing Sande L. Buhai, *Access to Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 979 (2009)); *see also* John L. Kane, Jr., *Debunking Unbundling*, 29 COLO. LAW. 15, 15 (2000) ("[L]awyers continue to increase the gap between cost and value of services. Not only have the poor been left behind . . . they are being joined in alarming numbers by . . . the middle class.").

73. Struffolino, *supra* note 16, at 201–02.

74. Richard W. Painter, *Pro Se Litigation in Times of Financial Hardship—A Legal Crisis and Its Solutions*, 45 FAM. L.Q. 45, 45 (2011) (reporting that 49% of the responding judges in a 2010 ABA nationwide survey of state trial judges on the topic of pro se litigation mentioned an increase in domestic-relations cases).

75. *Id.* at 46 (reporting that 60% of the responding judges in a 2010 ABA nationwide survey of state trial judges on the topic of pro se litigation stated that fewer litigants were being represented by counsel).

76. *See* Struffolino, *supra* note 16, at 198–208.

77. Landsman, *supra* note 70, at 451 (citing JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS 53 (1998)).

78. Painter, *supra* note 74, at 46.

representation.[79] This change was adopted in 2002.[80] Not long after that, an ABA task force issued the *Handbook on Limited Scope Legal Assistance* as a "practical guide," providing advice to attorneys on how to incorporate the use of limited representation into their practice.[81] These two initial steps—meant to encourage the use of limited scope representation—were presented as a way to improve outcomes for low- and moderate-income individuals who, because they could not afford full representation, were forced to navigate the court system unrepresented.[82] For the task force, it was an issue of fairness: "The process often is not fair for those who cannot afford to pay lawyers to represent them in litigation. They include *most* low[-] and moderate-income families and individuals; that is, the *majority* of the people in our nation!"[83]

a. Model Rule 1.2(c)

Compliance with the ethical rule allowing the use of limited representation in litigation is best accomplished with the involvement of an experienced family law attorney. When the Ethics Commission's recommendations were adopted in 2002, Model Rule 1.2(c) was amended to read: "A lawyer may limit the *scope* of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."[84] Prior to this change, the rule stated that "[a] lawyer may limit the *objective* of the representation if the client *consents after consultation*."[85] By replacing the word *objective* with the word *scope*, the Model Rules expanded the use of limited representation to allow not only the ability to limit the goals of the representation but also to permit limiting

79. A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 8 (emphasis omitted).

80. *See supra* Part III.B.

81. *See* MODEST MEANS TASK FORCE, *supra* note 55, at 1.

82. ETHICS 2000 COMM'N, A.B.A. MODEL RULE 1.2: REPORTER'S EXPLANATION OF CHANGES, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule12rem.html (last visited July 4, 2014); *see also* A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 3; MODEST MEANS TASK FORCE, *supra* note 55, at 1; Struffolino, *supra* note 16, at 215.

83. MODEST MEANS TASK FORCE, *supra* note 55, at 3.

84. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2013) (emphasis added).

85. A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 8 (emphasis added) (quoting MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (1998)). The "objectives" of the representation are to be determined by the client, while the means of accomplishing the objectives are to be carried out by the attorney after consultation with the client. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2013).

the means or tasks to carry out the goal.[86] This expansion is clarified in the comments to the amended rule:

> A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.[87]

In addition to expanding the definition of limited representation to encourage its use in litigation, the changed wording of Rule 1.2(c) also provided a means to "more specially regulate" the use of unbundling by requiring the limitation be both reasonable under the circumstances and based upon the client's informed consent.[88] The foundation for understanding these requirements is the competency rule.

The duty to provide competent representation is not excused when providing limited representation; it is, however, "a factor to be considered when determining the legal knowledge, skill, thoroughness[,] and preparation reasonably necessary for the representation."[89] Even when the scope is limited, the attorney has a duty to investigate the facts and assess the possible legal issues that may arise.[90] Through communication with the client, the attorney must not only investigate the facts as they relate to the client's objectives but also identify any red flags, as well as other areas that are likely beyond the client's knowledge, outside the client's current concern, or otherwise indicate that the use of limited representation would be inappropriate.[91] Effective communication during the initial consultation is therefore essential to assessing the appropriateness of providing limited

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86. *See* Struffolino, *supra* note 16, at 215–16 (citing MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2002)).

87. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 6 (2013).

88. A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 8; MODEL RULES OF PROF'L CONDUCT R 1.2'cmt. 7 (2013) ("Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances.").

89. MODEL RULES OF PROF'L CONDUCT R 1.2 cmt. 7 (2013).

90. Dignity Health v. Seare (*In re* Seare), 493 B.R. 158, 188 (Bankr. D. Nev. 2013) (citing Struffolino, *supra* note 16, at 218); *see also* Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915, 917 (1998) ("The codes allow lawyers and clients to limit the scope of representation by agreement, but not to the extent of limiting 'competence' . . . ." (footnotes omitted)).

91. *In re* Seare, 493 B.R. at 189 (quoting State Bar of Cal. Comm. on Prof'l Responsibility & Conduct, *An Ethics Primer on Limited Scope Legal Representation*, ETHICS HOTLINER 1–2 (2004), http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=_gb8teBEN0s%3D&tabid=834); *see also* Nichols v. Keller, 19 Cal. Rptr. 2d 601, 610 (Ct. App. 1993).

representation or, as is often the case, providing an opportunity to work with the client to redefine the client's objectives based upon a better understanding of the legal issues and the advantages and disadvantages of limited representation as a means to attaining the objectives.[92] For this reason, the initial interview should be as extensive as an interview conducted when offering full representation.[93]

It is through this inquiry that the attorney can assess whether limiting the scope of the representation is reasonable under the circumstances.[94] Experienced family law attorneys possess the skills to conduct this assessment. Factors to consider when determining whether the limitation is reasonable include the complexity of the issues involved, the time required to address the issues, and whether other resources are available to assist the client.[95] Another important factor that should be assessed is the client's ability to handle the rest of the case—that part of the case in which the client will continue to proceed pro se—on her own.[96] If the decision to proceed with limited representation is later challenged, the reasonableness of the limitation is governed by the circumstances that existed at the time of the agreement, which was most likely during the initial consultation.[97] Because complex legal issues and high emotion are often present in family matters, the circumstances that exist at the time of the initial consultation are often difficult to navigate.[98]

A competent and experienced family law attorney is also in the best position to satisfy the second requirement of Model Rule 1.2(c): obtaining the client's informed consent.[99] The need for regular attorney–client communication was a recurring theme in the changes to the ethical rules

92. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 2 (2013); *see also In re* Seare, 493 B.R. at 190 ("The attorney bears the burden of failing to ascertain the client's objectives . . . or failing to shape the[se] objectives to conform to the remedies available under law."); MODEST MEANS TASK FORCE, *supra* note 55, at 95.

93. MODEST MEANS TASK FORCE, *supra* note 55, at 95.

94. *See* MODEL RULES OF PROF'L CONDUCT R. 1.0(h) (2013) ("[The term r]easonable . . . [,] when used in relation to conduct by a lawyer[,] denotes the conduct of a reasonably prudent and competent lawyer.").

95. Struffolino, *supra* note 16, at 221 (citing Farley, *supra* note 46, at 574); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 7 (2013); MODEST MEANS TASK FORCE, *supra* note 55, at 63 (noting that "the importance of the interests at stake [and] the complexity of the matter" are, among other things, some considerations that should be taken into account when determining whether limited assistance is appropriate).

96. Struffolino, *supra* note 16, at 222 (citing MODEST MEANS TASK FORCE, *supra* note 55, at 59) (explaining the basic characteristics a successful pro se litigant possesses, such as the absence of mental disorders and the ability to fill out basic court forms).

97. *Id.* at 225.

98. *See supra* Part II.

99. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2013).

recommended by the Ethics 2000 Commission.[100] In furtherance of this goal—and as recommended by the Commission[101]—the phrase "informed consent" in Model Rule 1.0 is defined as an "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[102] There are three steps to obtaining informed consent to support a limited representation agreement: (1) the attorney must obtain sufficient information from the client to determine the client's goals and assess whether offering limited scope representation can further those goals; (2) information regarding the benefits and risks of limited representation must be communicated to the client; and (3) the attorney must determine whether the consent given is valid.[103]

Identifying a clear understanding of the client's objectives is essential to obtaining informed consent.[104] Eliciting information from the client during the initial interview to gain a clear understanding of the client's needs and desires is often difficult, even for the most experienced interviewer.[105] Clients seeking legal assistance in family matters are often stressed and may either not understand, or not be able to articulate, their legal issues and goals.[106] Once the client's objectives are identified, the client must be provided with adequate information on which to base an informed decision concerning whether to limit the scope of representation.[107] Most importantly, a discussion about whether the scope of

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100. COMM'N ON EVALUATION OF THE RULES OF PROF'L CONDUCT, A.B.A., REPORT AND RECOMMENDATIONS ON AMENDMENTS TO THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 3 (2001), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_hod_082001.authcheckdam.pdf.

101. *Id.*

102. MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2013).

103. *See* Struffolino, *supra* note 16, at 225, 227–28.

104. *See* Dignity Health v. Seare (*In re* Seare), 493 B.R. 158, 220 (Bankr. D. Nev. 2013).

105. Struffolino, *supra* note 16, at 229 (citing Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 79 (1979)); *see also* M. SUE TALIA, A CLIENT'S GUIDE TO LIMITED LEGAL SERVICES: A SIMPLE AND PRACTICAL GUIDE FOR FAMILY LAW LITIGANTS 38 (1997) (noting that clear and thorough communication during the initial interview, although difficult, will save numerous ambiguities regarding each parties' legal responsibilities); Buhai, *supra* note 72, at 989 (recognizing that clients may believe they have a simple issue easily handled by unbundled legal services, only later to discover the complexity and need for further assistance).

106. Spiegel, *supra* note 105, at 109.

107. Struffolino, *supra* note 16, at 230 (quoting MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 6 (2002)); *see also id.* at n.283 ("Even reciting back the facts and explaining the circumstances learned by the attorney from the client may be necessary because, although the attorney has no obligation to inform the client of facts or circumstances already known to the client, [the attorney] . . . 'assumes the risk that the client . . . is inadequately informed.'"); Colo.

the representation sought will achieve, or at least advance, the client's overall objective should occur.[108] The client should also be informed of other alternatives available for attaining the goals. For example, the benefits and costs of full representation, as opposed to limited representation, should be explained to the client.[109] Another alternative that should be disclosed is the existence of any pro bono or free legal services programs available to assist the client.[110] The adequate disclosure of information also includes an obligation to advise the client of any other "foreseeable collateral problems" that are related to, or that may arise out of, the issues presented.[111] This includes informing the client of existing legal rights that arise out of the facts obtained from the client.[112]

A valid consent is one that is voluntarily given.[113] Consent is voluntary when it is based on this information-sharing process and an indication that

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Bar Ass'n Ethics Comm., Formal Op. 101 (1998) ("[C]onsult or consultation denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."), http://www.cobar.org/static/comms/ethics/fo/fo_101.htm (last visited Dec. 17, 2013); L.A. Cnty. Bar Ass'n Prof'l Responsibility & Ethics Comm., Formal Op. 502 (1999), http://www.lacba.org/showpage.cfm?pageid=431 ("The attorney has a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of retention.").

108. *See In re* Seare, 493 B.R. at 220; *see also infra* Part IV.B.2.

109. Struffolino, *supra* note 16, at 230–31; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 6 (2002) ("Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation . . . [and] the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives.").

110. Limited representation should not be offered if other services are available to the client for no cost. *See* Struffolino, *supra* note 16, at 228–30; Farley, *supra* note 46, at 574 (indicating that an attorney should first assess the merits of the case and then the client's capacity for pro se assistance before choosing to unbundle services).

111. *In re* Seare, 493 B.R. at 200; Struffolino, *supra* note 16, at 232 (citing *Report of the Special Committee on Limited Scope Representation*, MO. SUP. CT. & MO. B. ASS'N 3 (2007), https://www.courts.mo.gov/file.jsp?id=5847); *accord* L.A. Cnty. Bar Ass'n Prof'l Responsibility & Ethics Comm., Formal Op. 502 ("The attorney has a duty to . . . inform the client that the limitations on the representation create the possible need to obtain additional advice, including advice on issues collateral to the representation.").

112. *See* Nichols v. Keller, 19 Cal. Rptr. 2d 601, 608 (Ct. App. 1993). When an attorney's retention is expressly limited, that attorney may nevertheless have "a duty to alert the client to legal problems which are reasonably apparent" that fall outside the limited scope of representation. *Id.* The *Nichols* court found that the attorney who signed an application for adjudication of a workers' compensation claim had "a duty of care to advise on available remedies, including third-party actions." *Id.* at 610.

113. *See* Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367, 386 (2008) ("[A]ccepting as voluntary only the choices made by litigants aware of their options and the advantages and disadvantages of those options.").

the client fully understands the information provided.[114] The challenge here is determining whether the client fully understands all the risks and alternative options when dealing with a family crisis, or when the client feels that she simply has no other choice but to accept less than full representation.[115]

b. The ABA Handbook on Limited Scope Representation Encourages Unbundling in Litigation

Changing the wording of Rule 1.2(c) was just one step toward expanding the use of limited representation into matters involving litigation. In addition, the ABA published a report written by the Modest Means Task Force of the ABA Section of Litigation titled, *Handbook on Limited Scope Legal Assistance* (the Handbook).[116] The Handbook was presented as a practical guide for lawyers, judges, and those involved in the legal system in an effort to encourage the use of limited representation as a means to increase access to justice for those who would, because of financial limitations, otherwise proceed pro se or not at all.[117] The Handbook focuses on encouraging the use of limited representation in litigation, and specifically promotes the use of such services to assist the "striking" number of pro se litigants in domestic-relations matters.[118] The Handbook suggests that assisting litigants in the preparation of pleadings in uncontested domestic-relations matters that require court approval or the actual drafting of motions or memoranda on contested issues are appropriate ways to provide limited assistance.[119] The Handbook provides models for offering limited representation as a means for providing both out-of-court assistance and limited litigation assistance to those who cannot afford full representation (or do not want it).[120] The Handbook explores the ethical issues involved in providing limited scope representation and follows this discussion with detailed suggestions for avoiding common ethical traps, such as violating competency rules, failing to carefully check for conflicts, and inappropriately communicating with the opposition.[121]

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114. Thomas G. Wilkinson Jr., *Representing Clients in Limited-Scope Engagements*, PA. LAW, Mar.–Apr. 2012 at 50, 51.

115. *See* Engler, *supra* note 113, at 386; *see also* Rachel Brill & Rochelle Sparko, *Limited Legal Services and Conflicts of Interest: Unbundling in the Public Interest*, 16 GEO. J. LEGAL ETHICS 553, 567 (2003) (stating that sometimes people have no choice other than representing themselves because they simply cannot afford full legal services).

116. MODEST MEANS TASK FORCE, *supra* note 55.

117. *Id.* at 1.

118. *Id.* at 8.

119. *Id.* at 29–30.

120. *E.g.*, *id.* at 33.

121. *Id.* at 64–70.

Even though the Handbook discusses the few jurisdictions that provide a procedural framework for allowing limited representation, it ends with specific recommendations on how states can expand the use of limited representation to serve the needs of low- and moderate-income litigants.[122] These recommendations encouraged state courts to take the lead by creating a task force to study and make recommendations on how to best use such services to meet the growing number of pro se litigants.[123] The task force recognized that although the ethical rules were amended to clarify that the use of limited representation in litigation is permitted, lawyers still may have had reservations about how to provide such services. The Handbook, therefore, encouraged states to review and revise their procedural rules to reassure attorneys that the use of limited representation in litigation was appropriate and to provide a procedural framework for providing limited services.[124]

2. *Changes to Procedural Rules Address Attorney Skepticism*

Even though amended Model Rule 1.2(c) was adopted in many jurisdictions,[125] the change did not provide a framework for providing limited representation to clients involved in litigation. Existing court procedural rules, which presumed that any appearance on behalf of a litigant was full representation requiring court approval before withdrawal from the case, did not encourage the use of limited representation.[126] Even though a limited-appearance fee agreement could be carefully negotiated to allow the client to pay for one or a few tasks, attorneys could not count on the scope of this agreement being recognized by the court.[127] If the agreement with the client were not honored by the court, attorneys could find themselves providing full representation for limited representation fees.[128] For limited representation to increase access to justice by assisting pro se litigants involved in litigation, a procedural framework was needed

122. *See id.* at 140–49.

123. *Id.* at 140–41; *see infra* Part V.C.

124. MODEST MEANS TASK FORCE, *supra* note 55, at 141.

125. A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 8.

126. Jennings & Greiner, *supra* note 46, at 834 ("While some organizations had well-established relationships with judges who allowed limited scope representation and withdrawal, mainstreaming of unbundling depended on firmer assurances." (footnote omitted)).

127. *See supra* Part III.B.

128. *See* Jennings & Greiner, *supra* note 46, at 833–34 (stating that courts interpret unbundled service agreements differently, and it is uncertain whether courts recognize these arrangements and allow for a lawyer's withdrawal after the performance of limited representation).

to address these concerns.[129] As a result, many states amended or added to their procedural rules to provide guidelines for appearing in a limited capacity by keeping the representation limited and withdrawing once the tasks identified in the retainer agreements were accomplished. In 2009, the ABA's Standing Committee on the Delivery of Legal Services issued a publication outlining the steps that some states had already taken to amend their rules to accommodate the use of limited representation in litigation.[130] The goal of the white paper was to encourage policymakers in other jurisdictions to amend or formulate similar rules to encourage attorneys to offer limited scope representation to serve the needs of those who would otherwise proceed into the court system pro se.[131]

a. Limited Representation Appearance

The threshold questions to ask when assisting clients involved in, or about to be involved in, litigation is whether providing limited representation requires disclosure to the court and, if so, how should this information be disclosed. Assisting pro se litigants with document preparation is a common unbundled legal service performed by both private attorneys and legal aid providers.[132] When these documents or pleadings are submitted to the court, a practice known as "ghostwriting,"[133] the pleadings may be subject to Rule 11 of the Federal Rules of Civil Procedure[134] (or the state counterpart), and other procedural requirements. Federal courts, for the most part, have used Rule 11 to discourage, if not completely prohibit, ghostwriting in federal cases.[135] Rule 11 does not expressly prohibit ghostwriting, but it presumes any party receiving legal assistance is

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129. *See id.* at 832 ("[P]roponents have suggested that unbundling constitutes a response to the pro se litigation crisis that has afflicted the adjudicatory systems of state courts, as well as state and federal administrative agencies, for some time.").

130. A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 4.

131. *See id.* at 1, 4.

132. *See id.* at 14.

133. Jessie M. Brown, *Ghostwriting and the* Erie *Doctrine: Why Federalism Calls for Respecting States' Ethical Treatment of Ghostwriting*, 2013 J. PROF. LAW. 217, 220 (2013) ("[G]hostwriting occurs when attorneys provide limited services to persons in litigation without appearing as full representatives.").

134. *Id.* at 229. Rule 11 states in pertinent part:

> Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

FED. R. CIV. P. 11(a).

135. Brown, *supra* note 133, at 229–30.

receiving full representation.[136] An attorney providing legal assistance in preparing documents filed in court must sign the documents and otherwise comply with Rule 11.[137] State courts, however, have been more accepting of the practice.[138] States have balanced Rule 11's concern for candor against the needs of pro se litigants by developing procedural mechanisms to provide such services.[139] First, some states have distinguished between assistance with mere document preparation and more substantial assistance, requiring disclosure only for the latter.[140] Second, states that require disclosure either protect candor requirements by simply requiring the document or pleading state that it was prepared with the assistance of counsel,[141] or by requiring the attorney to sign the document and provide identifying and contact information.[142] Both federal and state courts are consistent, however, in requiring an appearance, limited or full, when something more than mere document preparation is being provided.[143]

When an appearance is necessary, the procedural rules in almost all states were amended to assist attorneys willing to provide limited assistance to pro se litigants involved in litigation.[144] While traditional appearance procedures advance the smooth administration of matters pending before the court, allowing a lawyer to file a limited scope representation appearance also accomplishes this goal by minimizing the disruption to court proceedings caused by pro se litigants.[145] As with disclosure requirements, the methods for appearing in a limited representation capacity

136. *See id.* at 230.

137. *Id.* at 248 ("The plain meaning of Rule 11 gives two options for the signing requirement: attorneys sign documents for represented parties and unrepresented parties sign documents themselves. Rule 11 does not address the possibility of attorney assistance short of full representation." (footnote omitted)).

138. *Id.* at 231.

139. *See id.* at 225.

140. Tennessee allows ghostwriting but requires disclosure when there is substantial assistance. *Id.* (citing Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Op. 2007-F-153 (2007)). Colorado permits ghostwriting for minor document preparation but requires disclosure for anything more. *Id.* (citing COLO. RULES OF PROF'L CONDUCT R. 1.2 (2013); COLO. R. CIV. P. 11(b)).

141. Brown, *supra* note 133, at 227. States find that a litigant has an unfair advantage if attorneys "effectively represented a litigant but used the pro se status to obtain judicial leniency." *Id.* at 232–33. Brown also notes that Massachusetts requires anonymous disclosure for document preparation. *Id.* at 225.

142. *See id.* at 236.

143. *See id.* at 224–26.

144. *See Court Rules*, A.B.A., http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/court_rules.html (last visited July 4, 2014) (providing a list of all the states that have adopted a provision dealing with limited scope representation).

145. A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 18–19.

vary from state-to-state. Nevada appears to be the most lenient, allowing an attorney to simply announce the limited representation at the beginning of the hearing.[146] Most states, however, require written notice identifying the nature of the limitation.[147] Many family courts require the use of court-approved forms that detail the matters in which the litigant is represented.[148] These detailed forms provide clarity regarding the tasks or issues the attorney will handle, and they provide clarity for the court and the opponent, or the opponent's attorney, concerning service and communication issues.[149] Although these procedures allow attorneys to enter a matter on a limited basis, attorneys are usually more concerned with being able to exit when the limited objectives or tasks are accomplished.

b. Staying Limited

Once a limited scope appearance has been entered, becoming involved in matters or tasks outside those noticed in the appearance can result in the court finding that the scope or representation is expanded to full representation.[150] Attorneys face two challenges to keeping within the scope of the representation. The first challenge is overcoming the inherent unpredictability of litigation, especially in family matters.[151] It is nearly impossible to predict at the outset what issues will arise while accomplishing the tasks identified in the limited scope appearance.[152] Pretrial motions are plentiful in family matters, and it is not uncommon for seemingly uncontested issues to become the subject of an emergency motion or an issue requiring an expedited hearing.[153] An attorney who has entered only a limited scope appearance must be careful not to file any pleading or become involved in advocating for the client in any matter not covered by the limited scope appearance.[154] An attorney faced with a new

146. *Id.* at 16 (quoting NEV. 8TH J. DIST. CT. R. 5.28) (requiring a lawyer to indicate they are providing limited representation "in the first paragraph of the first paper or pleading filed on behalf of the client").

147. *Id.* at 19 (citing N.M. Rules of Prof'l Conduct R. 16-303(E) (2009) ("In all proceedings where a lawyer appears for a client in a limited manner, that lawyer shall disclose to the tribunal the scope of representation.")).

148. *Id.*; *see also id.* at B-11 (giving an example of a "Notice of Limited Scope Representation" form).

149. *See id.* at 19.

150. *E.g.*, *id.* at 20; *see, e.g.*, N.H. R. FAM. DIV. 1.19(a) ("An attorney who has filed a limited appearance and who later files a pleading or motion outside the scope of the limited representation shall be deemed to have amended the limited appearance to extend to such filing.").

151. *See* Fines & Madsen, *supra* note 7, at 966–67; Dalton et al., *supra* note 7, at 11.

152. *Limited Assistance Representation (Unbundling) Training Materials*, MASS. PROB. & FAM. CT. 3–5 (2009) (on file with the South Texas Law Review).

153. *Id.* at 28.

154. *See, e.g.*, N.H. R. FAM. DIV. 1.19(A).

issue must either renegotiate the limited scope fee agreement, seek to amend the scope of the original appearance filed with the court, or firmly and clearly decline involvement.[155]

The second challenge attorney's face is that courts are not necessarily bound by the limited scope contract.[156] Judges are concerned with the overall administration of justice. They strive to manage the docket, are concerned about the interest of all parties involved, and the "public perception" of the litigation process.[157] Even when an attorney stays carefully within the scope of a limited representation appearance, the more extensive the scope and the closer in time the representation continues to the actual trial, the more likely the court will order continued involvement after all limited representation contract obligations have been satisfied.[158]

c. Withdrawing From Limited Scope Representation

Because filing an appearance or any pleading in a matter pending before a tribunal is considered a general appearance—which requires leave of court to withdraw before the completion of the case[159]—jurisdictions that specifically amended their rules to allow for a limited-scope-representation appearance were forced to also promulgate or amend existing rules to allow attorneys to withdraw once the limited tasks or objectives were accomplished.[160] The main reason for seeking limited representation is to limit the cost of legal assistance to those tasks specifically bargained for; this process only works in litigation if the courts recognize the contractual rights of the attorney to withdraw once the attorney's contractual obligations are satisfied.[161] As with other procedural rules regarding limited representation, the procedural rules concerning withdrawal vary from state-to-state, and range from requiring no court involvement to requiring actual judicial oversight.[162] On one end of the continuum are those states that

155. *See Limited Assistance Representation (Unbundling) Training Materials*, *supra* note 152, at 5–6.

156. Sharp v. Sharp, No. 02-74, 2006 WL 3088067, at *10 (Va. Cir. Ct. Oct. 26, 2006) ("[An] attorney's agreement with his client is not binding upon the court where counsel seeks to represent such client before the court.").

157. *See id.* at *9.

158. *See, e.g.*, *id.*

159. *Id.* at *8–9.

160. *See* A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 19.

161. *See Limited Assistance Representation (Unbundling) Training Materials*, *supra* note 152, at 2.

162. *See* A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 19, 23–25 (citing NEV. 8TH J. DIST. CT. R. 5.28) (permitting lawyers to "merely appear" on behalf of a client pursuant to a limited scope agreement and provide notice of the limitation at the beginning of the hearing); *see also* UTAH R. CIV. P. 75(b) ("[T]he attorney shall file a Notice of

adopted a "de facto" approach.[163] Maine, for example, presumes the representation has ended once the limited scope tasks have been accomplished.[164] Similarly, the Wyoming rule states that "[a]n attorney who has entered a limited entry of appearance shall be deemed to have withdrawn when the attorney has fulfilled the duties of the limited entry of appearance."[165] This type of de facto approach expedites the withdrawal process and best protects the limited scope retainer agreement.[166]

Other jurisdictions involve minimal court oversight by simply requiring that the attorney file a "notice of completion" of the limited scope representation with service to the client and other involved parties.[167] The withdrawal is then entered without the need for court approval.[168]

Some states, however, not only require filing a notice of withdrawal but also allow time to contest the end of representation. This approach opens the door to litigation on the issue and increases the chance for involvement beyond that agreed to between the attorney and client.[169] The rule regulating withdrawal of limited scope representation in family matters in California, for example, requires the attorney to serve the client with an application to be relieved as counsel, stating that the scope of the representation is complete.[170] The attorney must also serve a blank objection form along with the application.[171] Even when no objection is filed and the court issues an order allowing the withdrawal, the attorney must serve the client with a court order giving the client another opportunity to object to the withdrawal.[172] If an objection is made, a hearing

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Limited Appearance . . . . The Notice shall specifically describe the purpose and scope of the appearance and state that the party remains responsible for all matters not specifically described in the Notice.").

163. A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 23 (emphasis omitted); *e.g.*, ME. R. CIV. P. 89(a).

164. *See* ME. R. CIV. P. 89(a).

165. WYO. DIST. CT. UNIF. R. 102(c).

166. *See* A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 21.

167. *Id.* at 23; *e.g.*, FLA. FAM. L.R. PROC. 12.040(c)(1); IOWA R. CIV. P. 1.404(4); WASH. CIV. R. CT. LTD. J. 70.1(b); WASH. SUPER. CT. CIV. R. 70.1(b).

168. A.B.A STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 23; *see, e.g.*, FLA. FAM. L.R. PROC. 12.040(c)(1); IOWA R. CIV. P. 1.404(4); WASH. CIV. R. CT. LTD. J. 70.1(b); WASH. SUPER. CT. CIV. R. 70.1(b).

169. *See* A.B.A STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 25; *see also* ARIZ. R. FAM. L. PROC. 9(B)(2)(b) (providing that if the client does not sign the notice of withdrawal form, the attorney must file a motion stating that the tasks outlined in the limited scope notice are completed; furthermore, the other parties have ten days after service to file an objection to the motion, and if an objection is filed, a hearing may be scheduled).

170. A.B.A STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 25.

171. *Id.*

172. *Id.*

is scheduled.[173] This approach protects the limited scope representation agreement the least, but it may best protect the client from the inappropriate use of unbundled services.[174] As a result of the efforts of the ABA and state courts, a procedural framework for providing limited scope representation in matters involving litigation exists in almost all state court systems.[175]

IV. ACCOMPLISHING THE GOAL OF PROVIDING INCREASED ACCESS TO JUSTICE IN FAMILY MATTERS THROUGH COMPETENT LIMITED REPRESENTATION

The decision to provide limited representation in family matters requires more than just knowledge of the rules that govern the use of these services. As explained, the availability of limited representation does not replace the requirement to provide competent representation.[176] Although the effectiveness of limited representation as a tool for improving access to justice in domestic-relations cases remains unclear, there are lessons to be learned from discussing how such services have been viewed in other civil-litigation areas and what weaknesses or problems have been exposed.

Because providing services that are reasonably necessary to assist a client achieve reasonable objectives is essential to providing competent representation, limited representation cannot be used to exclude these necessary services. If the services excluded are reasonably necessary to attain the client's objectives, competent representation cannot be provided, "regardless of how knowledgeable, skilled, thorough, and prepared the lawyer may be."[177] Likewise, services cannot be excluded in an effort to limit responsibility for not having the skill and knowledge required to perform the essential services: "[A] lawyer may not so limit the scope of the lawyer's representation as to avoid the obligation to provide meaningful legal advice, nor the responsibility for the consequences of negligent action."[178] Basic competency when providing limited services begins with the understanding that even if the client is demanding less, to do so may not

173. *Id.*; *see, e.g.*, CAL. R. CT. 3.36(g); CAL. R. CT. 5.425(e)(4); CAL. R. CT. 5.71 (repealed 2013).

174. *See* A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 25 (discussing safeguards available to clients subjected to the inappropriate use of unbundled services).

175. *See generally Court Rules*, *supra* note 144 (providing examples of state-court rules related to limited scope of representation).

176. Dignity Health v. Seare (*In re* Seare), 493 B.R. 158, 187–88 (Bankr. D. Nev. 2013).

177. *Id.* at 189 (citing NEV. RULES OF PROF'L CONDUCT R. 1.1 (2011)); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2013).

178. MODEST MEANS TASK FORCE, *supra* note 55, at 93–94 (quoting Colo. Bar Ass'n Ethics Comm., Formal Op. 101 (1998) (considering unbundled legal services)).

be in the client's best interest;[179] moreover, it may result in sanctions or other court-ordered punishment, or rise to the level of malpractice and bar discipline.[180]

A. Domestic Relations Is Not an Area to Wander Into

Despite the challenges inherent in handling domestic-relations matters, a financial incentive to provide some assistance in this area exists.[181] Accompanying the changes in family dynamics and family law was an increasing demand for representation.[182] Because of the growing need for assistance with family matters,[183] more attorneys are being drawn into the family law arena.[184] General practice attorneys often include domestic relations as a practice area, believing it can supply a steady source of clientele and income. "Many attorneys believe that family law is a bread and butter practice that they can fall back upon when other practice areas decrease."[185] Although family law litigants may benefit from the availability of lower fees associated with more competition,[186] this benefit must be balanced against the harm that can be caused by attorneys who wander into the family courts lacking the skills and knowledge necessary to practice in today's complex and specialized family law atmosphere. "[A]ttorneys who believe they can 'pick up a divorce or two' underestimate the skills and knowledge required for effective family law practice, with the result that family law practice today represents one of the fields of practice with the highest rates of disciplinary complaints and malpractice actions."[187] This concern is heightened when a client who is already experiencing financial instability seeks only limited representation in order to prevent the cost of litigation from further reducing already dwindling financial resources.[188]

Unbundled legal services can provide an attractive opportunity to attorneys who lack family law expertise to earn fees without finding themselves "in over their heads"—that is, doing more than they are qualified for or more than they agreed to in the contract. Representing a

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179. *See id.*
180. *See* Part IV.A.
181. *See* Fines, *supra* note 17, at 405.
182. *Id.* at 403–04.
183. *See id.* at 405 ("Domestic relations and juvenile caseloads together make up sixteen percent of all non-traffic state court trial cases.").
184. *Id.* at 404–05.
185. *Id.* at 405.
186. *See id.*
187. *Id.*
188. *See* Grossman, *supra* note 8, at 362.

client behind the scenes without the need to file an appearance, or in some jurisdictions to even disclose the assistance, may alleviate the concern of being dragged into litigation.[189] The ability to file a limited representation appearance on a simple issue can be seen as protection against being dragged into more complicated matters. The limited, yet clear, message provided by the courts on the use of limited representation for clients involved in litigation is that the attorney's obligations extend beyond the ethical and procedural rules and beyond the agreement between the attorney and the client.[190]

B. Lessons to Learn From Outside the Family Law Arena

Although little empirical data are available that assess whether limited representation is achieving the goal of providing increased access to justice in the family court,[191] a review of how other courts have analyzed the use of limited representation in other areas involving litigation provides valuable guidance for those considering the use of limited representation to assist litigants achieve their legal objectives.[192] The three examples discussed next involve complex legal matters concerning important and sensitive financial and personal issues. Three themes are consistent: (1) the importance of the initial consultation in ascertaining the client's goals and appropriateness of limited representation; (2) the need for the involvement of experienced attorneys; and (3) the need to discourage attorneys from offering this alternative form of representation for any reason other than to attain or further client objectives.

1. A Federal Court Warns: Competence Is the First Domino[193]

Although the idea of unbundled legal services in federal cases was initially met with skepticism, the use of limited representation has been gaining approval in some federal court proceedings.[194] Attorneys who provide unbundled services by excluding representation in adversarial proceedings, however, still face a high burden when trying to show compliance with competency and other rules.[195] A recent bankruptcy court decision provides a warning for attorneys seeking to stay out of the

189. *See infra* Part V.A–B.
190. *See infra* Part V.A–B.
191. *See* Jennings & Greiner, *supra* note 46, at 826.
192. *See infra* Part IV.B.1–3.
193. Dignity Health v. Seare (*In re* Seare), 493 B.R. 158, 220 (Bankr. D. Nev. 2013).
194. *Id.* at 183.
195. *See id.* at 183–85; *see also In re* Egwim, 291 B.R. 559, 580–81 (Bankr. N.D. Ga. 2003); *In re* Castorena, 270 B.R. 504, 529 (Bankr. D. Idaho 2001).

courtroom when contracting to provide limited representation.[196] In *In re Seare*, the debtors' attorney was sanctioned for violating several ethical rules and provisions of the Bankruptcy Code by providing a one-size-fits-all approach to assisting debtors.[197] In addition to issuing sanctions against the debtors' attorney, the court ordered that the opinion be published with the goal of deterring other attorneys from inappropriately limiting services in the future.[198]

Using the relevant local competency rule[199] as the foundation, the court provided an in-depth analysis of errors made to support its determination that sanctions were appropriate. The court determined that the attorney excluded representation in adversarial proceedings as a means to accomplish his own objectives rather than his clients' objectives.[200] The debtors sought legal assistance after having been served with a wage garnishment issued in connection with a judgment against the husband-debtor.[201] The judgment was based on a finding that the husband-debtor had committed a "fraud upon the court"[202] by providing false information in a discrimination claim against his employer, a health foundation.[203] The debtors sought the assistance of the bankruptcy attorney with the primary goal of permanently stopping the wage garnishment.[204] At the initial consultation, the debtors signed a nineteen-page, boilerplate retainer agreement.[205] How the initial consultation was actually conducted and the level of involvement, if any, of the attorney was a disputed issue, and one that was central to the court's determination that the attorney had not provided competent representation from day one.[206] At the show-cause hearing, the attorney admitted that he did not personally review the limited representation retainer agreement with the clients, and he could not even provide evidence supporting his one-size-fits-all approach of having a paralegal review the agreements with the client.[207] In fact, the debtors testified that they were put in a room, alone, to go over and sign the

196. *See In re* Seare, 493 B.R. at 227–28.
197. *Id.* at 227.
198. *See id.* at 224–27.
199. NEV. RULES OF PROF'L CONDUCT R. 1.1 (2013); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2013).
200. *In re* Seare, 493 B.R. at 223–24.
201. *Id.* at 171.
202. *Id.* Note that a judgment based on fraud is generally not dischargeable in bankruptcy. 11 U.S.C. § 523 (2012).
203. *In re* Seare, 493 B.R. at 171.
204. *Id.*
205. *Id.* at 172.
206. *Id.* at 179.
207. *Id.* at 204.

nineteen-page retainer agreement.[208] The boilerplate retainer agreement recited a flat fee for a Chapter 7 case.[209] The fee agreement separated the basic services covered by the flat fee and those that would require additional fees.[210] Both matters involving allegations of fraud and those involving adversarial proceedings were listed under services that would require additional fees.[211] The agreement also listed fraud as "DEBTS THAT DO NOT GO AWAY."[212]

Although the attorney was provided with some information during the initial client intake about the lawsuit that resulted in the wage garnishment,[213] a Chapter 7 bankruptcy petition was filed and the representation proceeded within the limits of the retainer agreement.[214] Even after opposing counsel stated at the meeting of creditors that he would seek to enforce the wage garnishment and announced the intention to pursue adversarial proceedings, the effect of these events on the limits of the representation were never reviewed with the clients.[215] As promised, an adversarial complaint was filed shortly before all other debts were discharged; however, the debtors did not learn that the debt justifying the wage garnishment survived bankruptcy until after they received notice of the discharge of all other debts.[216] The attorney's response to the debtors when they questioned the status of the wage garnishment was particularly troubling to the debtors and the bankruptcy court judge.[217] The debtors were not only informed or "reminded" that a debt based on fraud was not dischargeable, but they also learned for the first time that the attorney had a settlement discussion with counsel seeking to enforce the wage garnishment before the adversarial action was filed.[218] The attorney then informed the clients, relying on the executed retainer agreement, that he would not represent them in the adversarial proceeding.[219] As a result, not only was the debtors' primary objective of permanently stopping the wage

208. *Id.* at 172.
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.* at 171–72 & n.6. How much information the clients provided to the attorney during the initial consultation was also disputed. *Id.*
214. *Id.* at 173.
215. *Id.*
216. *Id.*
217. *Id.* at 173–74.
218. *Id.*
219. *Id.* at 174.

garnishment not attained, but the clients were also forced to proceed pro se into an adversarial action in federal bankruptcy court.[220]

The judge began the analysis by discussing the importance of attorneys' fiduciary duties and responsibilities, and that these duties transcend mere technical compliance with contract provisions and rules: "Lawyers are not plumbers. . . . [They] are professionals that owe fiduciary duties to their individual clients, and must continue to represent them even if initially rosy predictions turn sour."[221] The problem in this case, however, was not just what happened after the limited representation began; the problem was created at the time of the initial consultation, or even before the initial consultation, because of the one-size-fits-all approach the attorney took to each bankruptcy case.[222]

The attorney's "first failure—the root cause of his other failings—was to not define the goals of the representation" with respect to these specific clients.[223] This failure was the result of a lack of communication with the clients at the initial intake.[224] The attorney either mistakenly assumed that the obligation underlying the wage garnishment was a medical bill because it was owed to a health services organization, or he negligently assumed the debt was dischargeable and failed to put the clients' objective of eliminating the garnishment before his desire to collect a fee.[225] If the desire for the fee was placed above the needs of the clients, the attorney violated his fiduciary duties and did not provide competent representation.[226] The court reasoned: "[A]ttorneys are professionals. Individuals place their financial lives, and more, in their attorney's hands. Attorneys have ethical obligations to their client regardless of the economic pressures which might exist."[227] If the attorney simply misunderstood the clients' objectives or the facts, the attorney still violated his ethical obligations because "[i]f the attorney and the client have different understandings of the goals of representation, viewed objectively, then the lawyer has not fulfilled the duty of competence."[228]

Once the lack of competency knocked over the "first domino,"[229] other ethical violations were almost certain to occur.[230] Because the retainer

220. *Id.*
221. *Id.* at 181–82.
222. *Id.* at 190, 227.
223. *Id.* at 190.
224. *Id.*
225. *Id.* at 190–91.
226. *See id.* at 227.
227. *Id.* at 182 (alteration in original) (quoting *In re* Castorena, 270 B.R. 504, 530–31 (Bankr. D. Idaho 2001)).
228. *Id.* at 190.
229. *Id.* at 220.

agreement did not provide for services that would assist the clients in obtaining their primary goal, providing limited representation was neither reasonable nor based on informed consent; thus, the limited representation retainer agreement could not comply with Model Rule 1.2(c).[231] Viewing the reasonableness of the services at the time of the retainer agreement,[232] the attorney could not have reasonably concluded that the services contracted for, which excluded an almost inevitable adversarial proceeding, would be useful in assisting the clients in attaining their objective.[233] Due to the complex legal nature of bankruptcy proceedings, which include issues governed by both federal and state law and involve "a complicated array of forms and . . . decisions," the attorney faced a high burden to show that the limitation was reasonable.[234] The attorney could not meet this burden.[235] Likewise, the attorney was unable show that both requirements for obtaining valid informed consent were met.[236] First, by failing to adequately investigate the nature of the debt associated with the wage garnishment (or worse, simply ignoring it), the attorney could not have communicated the necessary information to exclude adversarial proceedings from the representation's scope in a manner consistent with informed consent.[237] Because the nature of the clients' problem was of high emotional and financial importance, the attorney could not simply rely on a boilerplate agreement to communicate the most relevant and crucial information for the clients to understand.[238] Second, because the attorney could not show that the clients were adequately informed of the risks associated with excluding adversarial proceedings, he could not show that the clients understood these risks.[239] The boilerplate agreement was again viewed with skepticism: "[I]nitialing and signing [the attorney's] *contract of adhesion* . . . did not sufficiently demonstrate that the [d]ebtors understood the import of proceeding without representation in adversary proceedings."[240] Without this understanding, any consent given by the clients was not valid.[241] *In re Seare* thus provides important lessons on what not to do for attorneys

230. *See id.*
231. *Id.* at 188–89; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.2 (2013).
232. *See supra* Part III.B.
233. *See In re* Seare, 493 B.R. at 191–92; *see supra* Part IV.B.1.
234. *See In re* Seare, 493 B.R. at 195.
235. *Id.* at 196.
236. *Id.* at 203–04.
237. *See id.* at 203.
238. *See id.* at 194–95.
239. *Id.* at 203–04.
240. *Id.* at 204 (emphasis added).
241. *Id.* at 203.

practicing in potentially lucrative, yet complicated, areas of the law who are considering the use of limited representation.

2. *Limited Representation Does Not Mean Partial Representation*

As seen in *In re Seare*, limited representation creates an attractive opportunity for attorneys to capitalize on offering services to those of limited means during tough economic times.[242] State-court judges are faced with an increasing number of pro se litigants defending themselves against creditors in state courts, and their experiences can offer some insight into the problems associated with litigants receiving some attorney assistance behind the scenes while proceeding in court on their own. Two trial court decisions from Rhode Island remind attorneys that limited representation cannot be used to carry out tasks that could not have been ethically or legally done when providing full representation, and that judges are not limited by the ethical rules when assessing attorney misconduct.[243] "[L]imited representation does not equate to partial representation."[244]

Rhode Island courts have held that "ghostwriting" as a means of providing limited representation, violated Rule 11 and ethical rules.[245] Much has been written about the efficacy of allowing ghostwriting to assist litigants in state and federal court, but the focus here is on the important lessons that can be learned from the reasoning in two decisions involving legal services provided by the same debt settlement company.[246]

In *HSBC Bank Nevada, N.A. v. Cournoyer*, the court held that even though the attorney's actions preceded the holding in the second case—that using limited representation as a justification for ghostwriting was improper— the attorney should have known that her actions violated clear, established rules.[247] As a result of the judge's colloquy when approving a settlement agreement between a creditor bank and the debtor who appeared pro se, the judge discovered the debt settlement company's involvement.[248] Particularly troubling to the court was the involvement of an attorney who prepared all of the debtor's pleadings, including an answer with three defenses, an objection to the motion for summary judgment, and a seven-

242. *See supra* Part IV.B.1.

243. *See* HSBC Bank Nev., N.A. v. Cournoyer, C.A. No. PC–11–0194, at 3–4 (R.I. Super. Ct. Jan. 17, 2013), http://www.courts.ri.gov/Courts/SuperiorCourt/DecisionsOrders/decisions/11-0194.pdf; Card v. Pichette, C.A. No. PC 2011-2911, at 10 (R.I. Super. Ct. July 26, 2012), http://www.courts.ri.gov/Courts/SuperiorCourt/DecisionsOrders/decisions/11-2911.pdf.

244. *Pichette*, at 11.

245. *Id.* at 1; *see also* R.I. SUPER. CT. R. CIV. P. 11.

246. *See Cournoyer*, at 3–4; *Pichette*, at 2.

247. *Cournoyer*, at 27.

248. *Id.* at 2–4.

page memorandum supporting the objection.[249] All of the pleadings were signed by the debtor pro se.[250] At the settlement hearing, the debtor informed the judge that he believed he was represented by counsel even though he had never met his attorney.[251] He added that he was surprised that his attorney was not present in court.[252] At a show-cause hearing in which the attorney was ordered to address whether her actions violated Rule 11 of the Rhode Island Rules of Civil Procedure,[253] the attorney argued that she was providing limited representation as allowed by Rhode Island Supreme Court Rules of Professional Conduct (Rhode Island Rules) Rule 1.2(c), and that she acted in accordance with the "mainstream consensus" that there is "no obligation to disclose . . . ghostwriting activities."[254] In addition, she argued that she spoke to bar counsel prior to her involvement, and that "she had expressly got[ten] his blessing . . . in order to be able to assist these people."[255] Finally, she argued that even if offering such services violated the Rhode Island Rules, she should not be sanctioned because, at the time she provided the services, there was no known prohibition against "ghostwriting."[256]

Relying on the court's equitable powers and inherent authority to impose sanctions to protect the integrity of the court system against fraud and deceitful actions, the judge exercised this power to punish the attorney and to deter future attorney misconduct.[257] This power was in addition to, and not subject to, the attorney disciplinary board process. "Whether a practice is permitted in the abstract by the [Rhode Island Rules],

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249. *Id.* at 2–3.
250. *Id.* at 2.
251. *Id.* at 3.
252. *Id.*
253. R.I. SUPER. CT. R. CIV. P. 11. Rule 11 states in pertinent part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, any appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Id.
254. *Cournoyer*, at 6–7.
255. *Id.* at 4 (alterations in original) (internal quotation marks omitted).
256. *Id.* at 7.
257. *Id.* at 13, 27.

enforcement of which may fall outside the scope of this [c]ourt's authority, has no bearing on whether that practice as applied in an actual litigation setting violates Rule 11 of the Rules of Civil Procedure."[258] Indicating that limited representation may be a valuable tool in some cases, the court distinguished the attorney's conduct from that of attorneys using limited representation to offer pro bono services to assist those in need.[259] The attorney was associated with an industry that managed billions of dollars of consumer debt for profit.[260] The judge noted that debtors are often harmed, rather than helped, by such services.[261] The court held that even if ghostwriting was permitted by the Rhode Island Rules, the court still had authority to assess the appropriateness of its use under the court's procedural rules.[262]

The court started its assessment by examining the limited scope retainer agreement itself and found that the attorney did not specifically exclude the obligation for the attorney to attend court hearings.[263] In fact, the agreement listed attending hearings as a service that may be provided "at [the] attorney's discretion."[264] Citing the obligation to provide competent representation even when providing limited representation, the court found that this provision likely violated both Rhode Island Rule 1.2(c) and the competency rule because it was unreasonable.[265] The court reasoned that it was unlikely that Rhode Island Rule 1.2(c) could be read to condone a limited representation agreement that allows the attorney to determine, at her discretion, whether counsel would attend court hearings.[266] Such a reading would not be consistent with the attorney's duty to provide competent representation.[267]

The domino effect articulated by the federal bankruptcy court in *In re Seare* occurred here as well.[268] Even though the court's inherent power to sanction attorneys for procedural-rule violations was viewed independent of the rule of professional conduct—and thus the court need not follow the

258. *Id.* at 13–14.
259. *See id.* at 7.
260. *Id.* at 8.
261. *Id.* In fact, the debtor in the case discussed here eventually filed for bankruptcy. *Id.* at 19, 24.
262. *Id.* at 13.
263. *Id.* at 15.
264. *Id.* at 14.
265. *Id.* at 14–15.
266. *Id.* at 14.
267. *Id.* at 15.
268. Dignity Health v. Seare (*In re* Seare), 493 B.R. 158, 220 (Bankr. D. Nev. 2013).

mainstream by allowing ghostwriting—violations of the ethical rules further supported Rule 11 sanctions.[269]

Once the client's goals were not clearly defined and the services contracted for were not narrowly tailored to attain those goals, the violation of other rules was certain to follow.[270] Because of the leniency given to pro se litigants in court proceedings and the unfair advantage these litigants gain when they submit pleadings prepared by undisclosed counsel,[271] failing to disclose the attorney's involvement was seen as a misrepresentation to the court that was prejudicial to the overall administration of justice and therefore violated Rhode Island Rule 8.4(c).[272] Further, the failure to disclose substantial assistance was viewed as a violation of the duty of candor toward the tribunal as required by Rhode Island Rule 3.3(c).[273] Specifically, the attorney violated Rhode Island Rule 3.3 by failing to disclose her involvement and making a "conscious misrepresentation" to the court by instructing the client to appear pro se, thus being dishonest with the court.[274] In addition, the significant delay in addressing the client's debt issues caused by a one-size-fits-all debt collection practice was seen as a violation of Rhode Island Rule 3.2's duty to "expedite litigation consistent with the interest of the client."[275]

The court found that even though the ABA endorsed ghostwriting activities, this was an unsettled area of law in state courts and certainly one that had not been addressed by Rhode Island state courts at the time the attorney provided these services to the client and other litigants.[276] The court found, therefore, that the attorney had "fair warning" that offering these services was inappropriate.[277] The court reasoned that Rule 11 was not new, and even the ethical rule governing the use of limited representation did not excuse compliance with all other ethical rules.[278] Monetary sanctions were ordered.[279]

While the attorney in *Cournoyer* was sanctioned for the use of ghostwriting as a form of limited representation, even absent a clear prohibition by the state court or disciplinary board, the holding in the

269. *See Cournoyer*, at 15.
270. *See id.* at 14.
271. *Id.* at 17. This is an issue addressed in several court decisions and other scholarly articles, but not the focus here.
272. *Id.* at 20–21; *see also* R.I. RULES OF PROF'L CONDUCT R. 8.4(c) (2013).
273. *Cournoyer*, at 20; *see also* R.I. RULES OF PROF'L CONDUCT R. 3.3(c) (2013).
274. *Cournoyer*, at 24.
275. *Id.* at 19; R.I. RULES OF PROF'L CONDUCT R. 3.2 (2013).
276. *Cournoyer*, at 24–25.
277. *Id.* at 25–26.
278. *Id.* at 26–27.
279. *Id.* at 27.

second case, *Card v. Pichette*,[280] provided clear notice to attorneys within the state that the failure to disclose substantial assistance given to litigants who appear pro se violates Rule 11, as well as the ethical rules.[281] The defendant in *Pichette* was receiving assistance from the same debt settlement company involved in *Cournoyer*.[282] In *Pichette*, counsel for the plaintiff, the creditor, informed the court that despite the fact that the defendant appeared pro se and signed all pleadings pro se, an attorney prepared all of the defendant's pleadings.[283]

Pichette reinforces the lesson that limited representation cannot further the goal of providing increased access to justice unless the client's needs and the goals of the representation are clearly identified at the outset.[284] The scope of the representation must be carefully tailored to attain the client's goals, not those of the attorney.[285] In *Pichette*, at a hearing to determine whether the attorney providing the assistance violated ethical and procedural rules, the attorney admitted to preparing the pleadings in this case as well as several other cases then pending in state court.[286] The pleadings filed in all of these cases were "virtually identical."[287] The defendant testified that the only contact between the defendant and the attorney was a telephone conversation prior to the hearing before the court.[288] When questioned by the judge, the defendant acknowledged that he did not understand many of the defenses or claims included in the pleadings.[289] This indicated that not only were the pleadings prepared by counsel (rather than the defendant), but the defendant was also not involved in the process or the decision-making regarding how the case would proceed.[290]

The court distinguished limited representation from partial representation.[291] While services to clients can be reduced to serve specific,

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280. Card v. Pichette, C.A. No. PC 2011-2911 (R.I. Super. Ct. July 26, 2012), http://www.courts.ri.gov/Courts/SuperiorCourt/DecisionsOrders/decisions/11-2911.pdf. This decision was issued prior to the decision in *Cournoyer*, but was not binding on *Cournoyer* because the attorney's actions in *Cournoyer* preceded the *Pichette* decision. *Cournoyer*, at 9 n.5.

281. *Pichette* at 1.

282. *Id.* at 2; *Cournoyer*, at 3–4.

283. *Pichette*, at 2. These pleadings included an answer with affirmative defenses and counterclaims, an objection to a motion to dismiss, and a memorandum of law. *Id.*

284. *See* MODEST MEANS TASK FORCE, *supra* note 55, at 26.

285. *See id.* at 57.

286. *Pichette*, at 3–4. The attorney was unable to state how many other cases he provided similar services for in the past. *Id.* at 4.

287. *Id.* at 4.

288. *Id.* at 6.

289. *Id.* at 6–7.

290. *See id.* at 11.

291. *Id.*

well-defined needs of a client, services essential to attaining a goal cannot be carved out of the bundle.[292] Because the pleadings and other documents filed with the court were inextricably woven together with the litigation, completely divorcing the two resulted in partial representation, not limited representation. "[Rhode Island] Rule 1.2(c) cannot be interpreted in such a way as to allow an attorney to provide . . . her client with a small piece of the legal puzzle and then walk away in anonymity."[293]

The court in *Pichette* also used the ethical rules to guide its analysis of whether the attorney's representation violated a procedural rule.[294] The court cited the duty of candor and the prohibition against making false misrepresentations to the court to justify sanctions.[295] Then, taking this justification one step further, the court indicated that the debt settlement company was exploiting the ability to use limited representation to gain an "unfair, tactical advantage" in court proceedings.[296]

The sanctions imposed in *Pichette* extended beyond Rule 11 sanctions against the individual attorney and the individual case involved.[297] The judge referred what appeared to be meritless counterclaims to the state disciplinary board to determine what, if any, disciplinary action should be imposed against the attorney and the debt settlement company.[298] The matter was also referred to the state attorney general's office to determine whether the actions of the debt settlement company and the out-of-state attorney were illegal.[299] The power of a judge overseeing a case cannot be underestimated, and a judge's duty to protect the administration of justice can be a valuable tool in both exposing and punishing the inappropriate use of limited representation.[300]

3. *A Massachusetts Study Involving Eviction Proceedings Provides Guidance for Assessing the Appropriate Use of Limited Representation*

The importance of a careful assessment of whether limited representation can assist clients in achieving positive outcomes, and the need for involvement of experienced counsel, is discussed in the findings of

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292. *See id.*
293. *Id.*
294. *Id.* at 9.
295. *Id.* at 10; *see also* R.I. RULES OF PROF'L CONDUCT R. 3.3 (2013); R.I. RULES OF PROF'S CONDUCT R. 8.4(c) (2013).
296. *Id.* at 16.
297. *See id.* at 16–17.
298. *Id.* at 17 n.18.
299. *Id.* at 18.
300. *See id.* at 16–17.

a study conducted in a Massachusetts district court involving litigants facing a summary eviction proceeding.[301] In this study, the authors conducted a randomized trial of carefully selected litigants organized into two groups.[302] The first group, the control group, received only limited or "unbundled" assistance.[303] Limited assistance was provided to this group through both informational sessions, such as reviewing the summary eviction process, and limited litigation assistance, such as help preparing pleadings or discovery requests.[304] The second group, the treated group, accepted an offer of full representation by a legal services attorney.[305] A comparison of the outcomes for the two groups showed an "extraordinary" difference in the positive effect of full representation, as opposed to only limited representation, on at least two tracked outcomes: (1) possession of the housing unit, and (2) the financial consequences associated with ligation.[306] Almost two-thirds of those who did not have full representation lost possession of their housing unit, while only approximately one-third of those with the traditional attorney-client relationship lost possession.[307] Likewise, those who were represented during the entire proceeding realized more positive financial outcomes, saving on average over nine months' rent, whereas the control group saved on average less than two months' rent.[308] Even though this study analyzed the differences in outcomes from those receiving only limited assistance and those receiving traditional full-service representation by legal aid providers at no cost, the suggested findings provide guidance for assessing the appropriateness of offering limited representation by private attorneys.[309] Specifically, the authors addressed two factors that are essential for the appropriate use of limited representation in family matters: (1) careful and in-depth screening to determine representation needs, and (2) the involvement of experienced and competent attorneys.[310]

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301. *See* Greiner et al., *supra* note 4, at 903.
302. *Id.*
303. *Id.*
304. *Id.* at 917–18.
305. *Id.* at 908.
306. *Id.* at 903, 937.
307. *Id.* at 936.
308. *Id.* at 936–37.
309. *See generally id.* at 936–48 (detailing several possible explanations for the results of the district court's study).
310. *See id.* at 937–38, 945–46.

a. Careful Screening to Rule Out the Need for Full Representation

The early face-to-face screening of potential participants to assess the need for full representation was seen as one potential reason for the higher incidence of positive outcomes in the treated group.[311] Each potential participant in the study was interviewed in person, with some interviews "lasting an hour or more."[312] These findings support the need to screen cases carefully in which the client seeks only limited services. The findings of the study further suggest important areas of inquiry and assessment in the initial intake.[313]

Careful screening can identify matters that involve complicated legal issues, which may indicate the need for full representation.[314] The authors identified matters involving complicated legal issues, such as those that implicate multiple sources of law, "including state statutes, state common law, state regulations, federal statutes, and federal regulations."[315] A complex legal issue was viewed as one involving "multiple provisions or doctrines within each source of law," and the need to introduce evidence from third parties.[316] As discussed above, family law matters often involve similarly complicated legal issues.[317]

Also part of the initial intake was the assessment of a client's ability to represent herself adequately in court while receiving only limited assistance outside the courtroom.[318] The inability to do so indicated the need for full representation because pro se litigants could not rely on judges in a busy court system to obtain the information needed "to reach a legally correct judgment."[319] Judges often rely on attorneys to educate them on the relevant facts and law, further increasing the likelihood of a positive outcome for litigants represented by counsel.[320] As discussed above, family courts, along with housing courts, are among the courts that have seen a dramatic increase in filings during these tough financial times.[321]

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311. *Id.* at 937.

312. *Id.* at 938. The authors "hypothesized" that the reason that legal representation had such a small effect on the outcome of a matter in a previous study was partially due "to a service provider's nonspecific and client-initiated intake system" and the uncertainty of assessing through a brief telephone conversation whether the outcome of a case could be altered by the offer of full representation. *Id.* at 937–38.

313. *Id.* at 938.

314. *Id.*

315. *Id.* at 942.

316. *Id.*

317. *See supra* Part IV.A.

318. Greiner et al., *supra* note 4, at 937.

319. *See id.* at 942–43.

320. *Id.* at 943.

321. *See supra* Part IV.A.

Careful screening should also include an assessment of what factual information and documentation will be necessary to obtain a positive outcome.[322] This study reinforces the importance of carefully assessing all possible claims and defenses when defining the attorney–client relationship.[323] The legal aid attorneys who provided full representation to the treated group conducted substantial pretrial factual investigations that would likely not have been conducted in a short client interview offered through limited assistance programs.[324] These pretrial factual investigations often unveiled the grounds for claims or defenses against the landlords that placed the litigants in a much better position to obtain a favorable outcome.[325] Basic competence when providing limited representation requires an investigation into the facts to determine what possible claims or defenses exist.[326] It is only when a potential client is informed of the existence of these possible legal issues that she can give informed consent to limit representation.[327]

b. Experience Makes a Difference

The findings of this study indicate that obtaining legal services provided by attorneys experienced in the applicable field of law will increase the likelihood of obtaining a favorable outcome.[328] The authors list their sixth possible explanation for the higher incidence of positive outcomes in the treated group as being the "Model of Service Delivery."[329] The attorneys who provided full representation in the study were specialists in poverty law, had up to thirty years' experience in litigating housing issues, and spent most of their time in courts that dealt with housing issues.[330] To explain the results of the study, the authors hypothesized that "specialists with long experience in an area of law . . . might produce better case outcomes for potential clients than nonspecialists or those with less experience."[331] Taking their analysis another step further, the authors questioned the propriety of private attorneys offering free legal services to litigants if the attorney providing the services has little or no experience in

322. *See* Greiner et al., *supra* note 4, at 944–45.
323. *See id.* at 945.
324. *Id.*
325. *See id.* For example, a pretrial investigation by the legal aid attorneys found errors in Section 8 income calculations, possible health department violations, and "cross-metering" or overcharging for utilities. *Id.* at 945 & n.136.
326. *See* MODEST MEANS TASK FORCE, *supra* note 55, at 94.
327. *See supra* Part III.B.
328. *See* Greiner et al., *supra* note 4, at 945–46.
329. *Id.* at 945.
330. *Id.* at 946.
331. *Id.* (footnote omitted).

the area.[332] The authors noted that these well-intentioned attorneys seeking to provide free assistance in an unfamiliar area of the law may better serve the goal of providing increased access to justice through donating funds to a legal aid program or to an attorney who can provide experienced and competent representation.[333] As these authors suggest, increased access to justice for litigants with family law issues who cannot afford full representation will not be accomplished by obtaining the limited services of a well-intentioned family law outsider who sees the opportunity to collect some fees without being dragged into complicated cases.[334]

V. INCREASING OPTIONS FOR LITIGANTS THROUGH LIMITED REPRESENTATION WITHOUT SACRIFICING OUTCOMES

The use of unbundled legal services in family law is here to stay.[335] Proponents of its use view limited representation as a necessary component of a family law practice, and its use is predicted to grow in the future.[336] Simply applying the definition of competency when assessing the appropriateness of the use of limited representation in family matters can further the goal of using such services to increase access to justice. If skill is defined as a trait acquired through training and experience, and judged by the complexity of the matter involved,[337] then a system-wide approach can be taken to ensure that those receiving limited representation in our family courts are being assisted by competent counsel, and that the representation is tailored to attain the client's objectives. This approach begins with a careful assessment of the current use of limited representation in family matters involving litigation and efforts to discourage its use when it is not furthering the goals and objectives of the litigants. At the same time, experienced family law attorneys should be encouraged to offer these services when appropriate. Finally, educating those interested in stepping into the family law arena about the realities of the family law practice and the appropriate use of limited representation can further the goal of using such services as a way to increase access to justice in family court.

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332. *Id.* at 946–47.
333. *Id.*
334. *See id.* at 946.
335. Mosten, *supra* note 51, at 16.
336. *Id.* at 15–16.
337. *See supra* Part II.A.

A. *Assessing the Appropriate Use of Limited Representation in Domestic-Relations Matters*

One lesson that can be learned from the examination of how limited representation has fared in other civil litigation areas is the important role the trial judge can play in assessing the appropriateness of the limited services being provided.[338] This assessment should occur both when a limited appearance form has been filed and when the use of substantial assistance behind the scene is discovered in court proceedings.[339] Federal and state judges have already sent a clear message that when pro se litigants are receiving substantial assistance from attorneys, the attorneys are not shielded by Model Rule 1.2(c) or its state counterpart.[340] Inexperienced attorneys and those seeking to use limited representation to further their own personal gain have, when questioned, been exposed—and sanctioned.[341] The use of sanctions for the inappropriate use of limited scope representation discourages inexperienced attorneys from offering services that do not advance client objectives.[342]

Family court judges have frequent contact with litigants. Even when settlement is reached, a judge must often approve the agreements.[343] As seen with other federal and state cases, the existence of substantial legal assistance behind the scenes is usually evident.[344] Once the use of limited assistance is identified and disclosed through a limited appearance or by asking questions of the pro se litigants, family law judges can, and should, use their power to assess whether its use is in accordance with the ethical and procedural rules and, most importantly, if it is in the overall best interest of the litigant.[345]

B. *Encouraging Experienced Litigators to Provide Services*

If efforts to assess the competency of those providing limited representation in family matters are successful, there may be a shortage of experienced litigators available to provide limited services when appropriate. Deterring inexperienced attorneys from providing these services may actually provide an incentive for experienced family law attorneys to fill the gap. Experienced family law attorneys may view the

338. *See supra* Part IV.B.
339. *See supra* Part III.B.2.c.
340. *See supra* Part IV.B.2.
341. *See supra* Part IV.B.2.
342. *See supra* Part IV.B.2.
343. *See* Lerner v. Laufer, 819 A.2d 471, 482–83 (N.J. Super. Ct. App. Div. 2003).
344. *See supra* Part IV.B.
345. *See supra* Part IV.B.

efforts to prevent inexperienced attorneys from providing limited representation as an acknowledgment of the importance of their profession and the high level of difficulty associated with their practice area.

When experienced and competent lawyers are involved, they should be allowed to control, along with their client, the scope of the representation.[346] Judges, regardless of the delay and frustration pro se litigants can cause to the docket, must abide by the court rules allowing an attorney to automatically withdrawal once the limited tasks are complete or the limited issues are resolved.[347]

Massachusetts has instituted a program in which family law attorneys who complete training in the use of limited representation become qualified and can then enjoy this hands-off approach.[348] The attorney becomes qualified as a Limited Assistance Representation Attorney by completing a self-training program for limited scope representation.[349] Once the attorney is deemed qualified, not only can she file a limited scope appearance but the attorney can also automatically withdraw once the limited services are completed by filing a notice of withdrawal of limited appearance.[350] If there is disagreement as to whether the limited representation is complete, the court "cannot intercede."[351] The information materials provided to courts, attorneys, and clients state that "[i]t is incumbent on an attorney to draft and execute a clear and unambiguous limited representation agreement . . . which specifically defines when the attorney will appear and withdraw. If the client and attorney disagree . . . they should resolve the matter pursuant to the terms of that agreement."[352] As an added incentive for completing the training, qualified attorneys are invited to add their name to the list of Limited Assistance Representation Attorneys maintained by the court and posted on the court's website.[353] This opportunity provides private attorneys with the ability to increase income by expanding their client base in their

346. *See* Jennings & Greiner, *supra* note 46, at 826–28.

347. *See id.* at 848.

348. *See In re: Limited Assistance Representation*, MASS. SUP. JUDICIAL CT. 1–2 (Apr. 10 2009), http://www.mass.gov/courts/docs/sjc/docs/rules/limited-assistance-representation-order1-04-09.pdf.

349. *Id.*

350. *Id.* at 2.

351. *Limited Assistance Representation (LAR) Frequently Asked Questions for Judges, Court Personnel and Attorneys*, BOS. MUN. CT. DEP'T 2, http://www.mass.gov/courts/docs/courts-and-judges/courts/boston-muncipal-court/lar-faq-judges-attorneys.pdf [hereinafter *LAR Frequently Asked Questions*] (last visited July 4, 2014).

352. *Id.*

353. *Instructions to Attorneys Completing Self Qualification*, COMMONWEALTH MASS. 1, https://web.archive.org/web/20140617130713/http://www.mass.gov/courts/docs/courts-and-judges/courts/probate-and-family-court/upc/documents/instructions-self-certification.pdf (last visited July 4, 2014).

area of expertise.[354] The Massachusetts Probate and Family Court Limited Assistance Representation program provides an example of how to encourage experienced attorneys to offer limited representation; the training materials provide an example of how to address those areas of concern identified by courts in other civil litigation areas.[355]

C. *Limited Scope Representation Training*

Attorneys providing limited representation and judges dealing with litigants receiving only limited assistance should be trained to ensure that its use is accomplishing the goal of increasing access to justice. The training materials for the Massachusetts Probate and Family Court Limited Assistance Representation program seek to accomplish this goal.[356] The self-training materials explicitly state that the ethical obligation to provide competent representation is not waived when providing limited assistance.[357] Additionally, attorneys are warned not to view limited representation as a means to gain family law experience. Indeed, the training materials instruct: "Work within your expertise. . . . Taking a case for the earning experience is unwise in limited representation. . . . It takes significant expertise in family law to . . . give good counsel and avoid liability."[358]

The training materials emphasize the importance of the intake process in determining whether limited assistance is appropriate.[359] The materials provide a detailed discussion of what should be covered in the initial intake and include sample intake forms.[360] The materials discourage the use of boilerplate agreements and encourage the use of fee agreements specifically tailored to the needs of each client.[361] In order to further discourage a one-size-fits-all approach, a list of "Best Practices" warns attorneys not to provide forms to a client without assisting or reviewing them with the client.[362]

Four sample discussions of intake interviews with possible ending scenarios are provided to exemplify the issues that may arise during the

354. *See id.* at 3.
355. *See LAR Frequently Asked Questions*, *supra* note 351, at 1.
356. *Limited Assistance Representation (Unbundling) Training Materials*, *supra* note 152, at 2.
357. *Id.* at 3.
358. *Id.* at 37.
359. *Id.* at 5.
360. *See id.* at 7, 50.
361. *See id.* at 4.
362. *Id.* at 36, 43–44.

initial interview.[363] The sample intake discussions include tips for avoiding the "unreasonable client" and identifying "litigation lifers," neither of whom are appropriate recipients of limited assistance.[364] The samples also present scenarios in which providing limited representation would be "unreasonable" because the client is unable to handle the balance of the tasks on her own,[365] and when the attorney will not be able to obtain the client's informed consent because of the client's inability to understand the risks associated with limited representation.[366] By providing incentives for experienced family law attorneys to be trained and involved in providing limited representation, those for whom these services are most appropriate can be provided access to justice.

D. Training for Future Lawyers

Neither the need for legal assistance with family law matters nor the financial barriers to full representation are likely to recede in the future. In addition, courts will probably continue to accept the appropriate use of limited representation and embrace it as a means of accomplishing the administration of justice. Because of this, law school students should be exposed to both the appropriate use of limited representation and the complex and changing nature of family law.[367] Limited representation, its related ethical and procedural rules, and necessary client management skills should be included as part of the law school curriculum.[368] The appropriate use of limited representation can be explained and explored as a means to address the system-wide concerns caused by the pro se phenomenon as well as the system-wide responsibility to increase access to justice to those in need.[369] At the same time, in addition to the traditional family law curricula, domestic-relations courses should identify family law as an area that requires an interdisciplinary approach—a broad base of legal knowledge that extends beyond traditional family law doctrine to interpersonal, interviewing, and client management skills.[370] Just as with mediation and collaborative lawyering, students interested in practicing in the family law area should graduate from law school with some exposure to the skills that

363. *Id.* at 7–15.
364. *Id.* at 14–15.
365. *See id.* at 15–17.
366. *Id.* at 29.
367. *See* J. Herbie DiFonzo & Mary E. O'Connell, *The Family Law Education Reform Project Final Report*, 44 FAM. CT. REV. 524, 525 (2006).
368. *See id.* at 535.
369. *See id.* at 534–35.
370. *See id.* at 545.

are central to offering limited representation.[371] By exploring the options for providing services to those who cannot afford full representation, students can be encouraged to enter the legal profession with a desire to work toward providing increased access to justice. Whether through individual efforts by providing pro bono assistance or limited representation, or through involvement in the policymaking process, future attorneys should view increased access to justice to those in need as an attainable reality.

VI. CONCLUSION

Limited scope representation is a valuable tool for providing services to those who cannot afford full representation but are not eligible for government assistance because most family law proceedings are civil cases.[372] These litigants, however, are entitled to expect the same quality of representation as those who can afford to contract for full representation. The use of limited representation will continue to expand in litigation and, as it does, its successes will be praised, and its failures will be exposed. Family law is an area in which litigants can be helped through the appropriate use of limited representation, but it is also an area in which litigants can be hurt when these services are inappropriate. For this reason, a system-wide approach is necessary to ensure that these services are only offered by competent and experienced family law attorneys.

371. *See id.* at 525.

372. *Cf.* Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (holding that a constitutional right to appointed counsel at public expense exists in serious criminal cases), *abrogated in part by* Scott v. Illinois, 440 U.S. 367 (1979).

DEPOSITORY TRUST COMPANY AND THE OMNIBUS PROXY: SHAREHOLDER VOTING IN THE ERA OF SHARE IMMOBILIZATION

I. INTRODUCTION

Both corporate law and securities law have long wrangled over the ownership interests and rights associated with equity interests in corporations, otherwise known as stock. While people typically think of a shareholder as the investor who actually pays to purchase stock, that is—legally speaking—a false impression. This problem stems from the fact that stock ownership carries with it numerous intangible interests of different natures; natures which may conflict with each other in different policy contexts. These various interests are simultaneously governed by corporate law—which regulates the management of corporations and the relationships between a corporation and its shareholders—and securities law—which regulates the clearance and settlement of securities transactions in the marketplace. Because stocks are traded as securities, they are governed by both sets of laws. However, corporate law and securities law are concerned with fundamentally different property interests inherent in shares, which have historically been inseparable.[1]

1. *See infra* Part III.

As capital markets evolved, the corporate structure itself evolved along with them. However, laws governing corporations and securities consistently struggled to keep up.[2] When the law tried to adapt, the attempts frequently resulted in the mistaken application of concepts that no longer fit the realities of the marketplace.[3] All too frequently these changes were piecemeal, focused on only one aspect of the law with no regard to the implications such changes would have on the rest of the legal structure.[4] These changes inevitably resulted in unintended consequences that required their own solutions.[5] In response to evolutions in the market, securities laws generally changed to encourage the further growth of securities trading.[6] However, such changes sometimes came at the expense of important corporate law concerns.[7]

That is exactly what happened following a paperwork crisis that struck New York in the last century.[8] By the late 1960s, the growth in trading volume on stock exchanges had made the transfer of physical certificates, and the required accompanying paperwork, unworkable.[9] Banks and brokerage firms failed en masse, as they were unable to clear the growing volume of transactions.[10] In an attempt to process all of the paperwork, the New York Stock Exchange (NYSE) was forced to close early every day, and eventually forced to close an extra day every week.[11]

Congress responded by working out a shortcut to immobilize shares in depositories and cut the substantial paperwork out of transactions with book-entry transfers.[12] However, state corporate laws failed to adapt to this new reality.[13] Consequently, the immobilization of shares severed the relationship between a corporation and its shareholders and created a

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2. *See infra* Part II.A.

3. *See, e.g.*, Jeanne L. Schroeder, *Is Article 8 Finally Ready This Time? The Radical Reform of Secured Lending on Wall Street*, 1994 COLUM. BUS. L. REV. 291, 303–08 (1994) (discussing how problematic it has been applying the physical metaphor of holding property to securities trading in modern practice).

4. *See id.* at 311–12 ("[T]he drafters [of the 1977 Amendments] thought they could change the conveyancing regime merely by changing the form of the evidentiary token. They did not stop and reexamine the other presumptions underlying the statutory schema.").

5. David C. Donald, *Heart of Darkness: The Problem at the Core of the U.S. Proxy System and its Solution*, 6 VA. L. & BUS. REV. 41, 62 (2011).

6. *See, e.g.*, Bryn R. Vaaler, *Revised Article 8 of the Mississippi UCC: Dealing Directly with Indirect Holding*, 66 MISS. L.J. 249, 254–60 (1996).

7. *See* Donald, *supra* note 5, at 59.

8. *See id.* at 50.

9. *See id.* at 50–54.

10. *Id.* at 53.

11. *Id.* at 52.

12. *Id.* at 54.

13. *See infra* Part III.A.

fundamental gap between federal and state corporate laws regarding who actually owns stock.[14]

In the modern indirect holding system, there are two types of shareholders: beneficial owners and record owners. Beneficial owners are the actual investors who purchase shares and have a financial stake in a corporation, while record owners are the parties that are actually legally recognized as shareholders.[15] Share transfers today occur through book-entry transactions at a central depository that do not require registering transfers with issuing corporations, and the depository is registered on the issuing corporation's books for all the shares held in the depository.[16] Federal law recognizes this modern indirect holding system, and the Securities and Exchange Commission (SEC) has promulgated rules to encourage the involvement of beneficial owners.[17] However, these rules are inefficient, confusing, and often serve to compound the problems they attempt to solve.[18]

State law has failed to adapt to the modern indirect holding system and the realities of the securities industry.[19] Unlike federal corporate law, which recognizes beneficial owners and attempts to reconnect them with the corporations they own, state corporate law only recognizes parties registered with an issuing corporation as its shareholders, which today is typically the central depository that holds most of the publicly traded shares in America.[20] There is a legal gap between the issuing corporation and its beneficial owners. This gap significantly impacts the exercise of shareholder rights—most importantly voting rights—and threatens to disenfranchise shareholders and destroy the integrity of the corporate voting process.[21] Until now, this gap has been solved with an improvised bridge known as the omnibus proxy, which allows the depository to pass on voting authority through the indirect holding system to the ultimate beneficial owners.[22]

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14. *See* Donald, *supra* note 5, at 62.

15. *See id.*

16. *See infra* Part II.A.

17. *See, e.g.*, ALAN L. BELLER & JANET L. FISHER, COUNCIL OF INSTITUTIONAL INVESTORS, THE OBO/NOBO DISTINCTION IN BENEFICIAL OWNERSHIP: IMPLICATIONS FOR SHAREOWNER COMMUNICATIONS AND VOTING 9–10 (2010) (discussing the SEC's attempt to include beneficial owners via changes to communication rules).

18. *See, e.g.*, *id.* at 11.

19. *See* Donald, *supra* note 5, at 61–62 (noting that both state corporate law and state commercial law continue to treat the party registered with the issuer as the shareholder).

20. *See infra* Part II.B.

21. *See infra* Part IV.B.

22. *See infra* Part IV.A.

Remarkably, there are no federal or state laws or regulations governing the issuance of the omnibus proxy, and there is significant confusion regarding how it operates.[23] Yet, the entire shareholder voting system designed for publicly traded corporations depends on the issuance of the omnibus proxy.[24] When this improvised bridge fails, its failure may destroy the rights of beneficial owners of stock and threaten the very integrity of the corporate form.[25] It has failed before and is likely to fail again.[26] This Comment will analyze the importance of the omnibus proxy and, with a look to the historical reasons supporting applicable law, demonstrate why the omnibus proxy should not be required for shareholders to vote.

Part II of this Comment begins by discussing the evolution of the modern indirect holding system. It analyzes how the modern indirect holding system operates and discusses the policy concerns supporting share immobilization. It will then explain how this immobilization resulted in the discrepancy between state and federal law's treatment of beneficial owners.

Part III turns to the rights inherent in stock ownership, distinguishing between the rights derived from treatment of stock as a membership interest in a corporation and those derived from treatment of stock as a transferable security. Part III will begin with an analysis of the historical foundations of these rights. It will then focus on how the evolution of both corporate law and securities law, while attempting to evolve along with changing market realities, has separated corporations from their shareholders by severing the beneficial owners from the rights incident to share ownership.

Part IV will return to today's conflict regarding ownership and discuss the complicated proxy system that the SEC has implemented in its attempt to reconcile the conflict and reconnect corporations with their shareholders. This Comment will analyze *Kurz v. Holbrook*[27] to demonstrate how the omnibus proxy can fail and the ramifications of that failure. The chancellor in *Kurz* found an ingeniously simple workaround; however, his ruling was eventually overturned on other grounds.[28] Nevertheless, the case illustrates the dangers posed by the failure to obtain the omnibus proxy and helps explain why the omnibus proxy is an unnecessary formality.

Finally, in Part V—drawing on analysis and discussion from above—this Comment will argue why the omnibus proxy should be seen as legally

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23. *See* Kurz v. Holbrook, 989 A.2d 140, 148 (Del. Ch. 2010), *aff'd in part, rev'd in part sub nom.* Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377 (Del. 2010).

24. *See infra* Part IV.A.

25. *See Kurz*, 989 A.2d at 161.

26. *See infra* Part IV.A.

27. 989 A.2d 140, (Del. Ch. 2010), *aff'd in part, rev'd in part sub nom.* Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377 (Del. 2010).

28. *See* discussion *infra* Part IV.B.

irrelevant. It will explore two different arguments that reach this conclusion: one that advances our understanding of record ownership to enable the rule to serve, rather than inhibit, the goal it is meant to serve; and one that recognizes an inherent agency relationship between the depository and its participants that does not require the execution of a written proxy.

II. THE MODERN INDIRECT HOLDING SYSTEM

A. Evolution of Indirect Holding

Traditionally, stock ownership was demonstrated by possession of a physical certificate, and delivery of that certificate was required to evidence a change in ownership.[29] From the time of the first corporations up through the 1960s, physical delivery of certificates remained a requirement to transfer ownership.[30] Securities firms processed transfers through the manual work of clerks, using as many as "thirty-three different forms for a single security transfer,"[31] and messengers were required to run around New York City carrying checks and stock certificates back and forth between brokers.[32] As trading volume surged, brokers lagged behind at settling transactions, resulting in "enormous backups in deliveries."[33] In 1968, the NYSE was forced to close every Wednesday, in addition to closing early on other trading days, to allow traders to "reconcile their paperwork."[34] During this period, over 100 brokerage firms went bankrupt or were bought out.[35]

In response, Congress amended the Securities Exchange Act of 1934 (Exchange Act) to adopt a policy immobilizing share certificates,[36] which was deemed necessary to facilitate the clearing and settlement of the ever-

29. Vaaler, *supra* note 6, at 254.

30. Schroeder, *supra* note 3, at 310.

31. Donald, *supra* note 5, at 50.

32. Teresa Carnell & James J. Hanks, Jr., *Shareholder Voting and Proxy Solicitation: The Fundamentals*, 37 MD. B.J., Feb. 2004, at 23, 26. In addition, registered shares had to be surrendered to the issuing corporation or its transfer agent for registration. Marcel Kahan & Edward Rock, *The Hanging Chads of Corporate Voting*, 96 GEO. L.J. 1227, 1237 n.48 (2008) (quoting U.C.C. art. 8, prefatory note I.A. (2005)).

33. Donald, *supra* note 5, at 50. The paperwork crisis had reached the point that "[s]tock certificates and related documents were piled 'halfway to the ceiling' in some offices." Suellen M. Wolfe, *Escheat and the Concept of Apportionment: A Bright Line Test to Slice a Shadow*, 27 ARIZ. ST. L.J. 173, 181 n.49 (1995) (quoting SEC. & EXCH. COMM'N, STUDY OF UNSAFE AND UNSOUND PRACTICES OF BROKERS AND DEALERS, H.R. DOC. NO. 92-231, at 219 n.1 (1971)).

34. Emily I. Osiecki, Comment, Alabama By-Products Corp. v. Cede & Co.: *Shareholder Protection Through Strict Statutory Construction*, 22 DEL. J. CORP. L. 221, 224 n.24 (1997).

35. Donald, *supra* note 5, at 51.

36. *Id.* at 54.

growing volume of securities trading.[37] Today, shares of publicly owned corporations are typically held in "street name" through custodians such as banks or brokers.[38] These banks and brokers, in turn, hold the shares in accounts at the Depository Trust Company (DTC),[39] "the world's largest securities depository."[40]

Since DTC physically possesses the certificates, shares of publicly traded companies are generally registered with a corporation in the name of "Cede & Co.," the nominee name used by DTC.[41] Transfers between depository participants are accomplished via book entry.[42] Participants that "engage[] in multiple transactions in the same securities in a trading day will report only the net change in their ownership to . . . DTC."[43] This process is known as netting and is considered a major advantage of the custodial system, as banks and brokers that engage in multiple transactions in the same securities need only report their net change in ownership to DTC at the end of the day.[44]

However, due to the netting of transactions, a share held by DTC is not traceable to a particular beneficial owner.[45] DTC holds all of a bank's or broker's shares "in fungible bulk,"[46] and only the bank's or broker's records indicate who owns which shares.[47] When an investor buys or sells shares through a participant bank or broker, DTC simply "shift[s] shares by book entry from the selling custodian bank's account to the acquiring custodian's account."[48] This means that an unlimited number of trades of an issuer's

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37. Kahan & Rock, *supra* note 32, at 1237; *see also* 15 U.S.C. § 78q-1 (1976) ("The prompt and accurate clearance and settlement of securities transactions . . . are necessary for the protection of investors and persons facilitating transactions by and acting on behalf of investors.") (current version at 15 U.S.C. § 78q-1 (2012)).

38. Kahan & Rock, *supra* note 32, at 1237. "Street name" ownership refers to the use of a nominee to hold legal title to shares on behalf of the beneficial owners. J. Robert Brown, Jr., *The Shareholder Communication Rules and the Securities and Exchange Commission: An Exercise in Regulatory Utility or Futility?*, 13 J. CORP. L. 683, 687–88 (1988).

39. Kahan & Rock, *supra* note 32, at 1237.

40. Charles W. Mooney, Jr., *Beyond Negotiability: A New Model for Transfer and Pledge of Interests in Securities Controlled by Intermediaries*, 12 CARDOZO L. REV. 305, 317 n.23 (1990).

41. *Id.* at 319 n.34. "Cede" is short for "certificate depository." Donald, *supra* note 5, at 46 (emphasis omitted).

42. Brown, *supra* note 38, at 722.

43. Apache Corp. v. Chevedden, 696 F. Supp. 2d 723, 726 (S.D. Tex. 2010).

44. *Id.*

45. Vaaler, *supra* note 6, at 297; *see also* Russell A. Hakes, *UCC Article 8: Will the Indirect Holding of Securities Survive the Light of Day?*, 35 LOY. L.A. L. REV. 661, 711 (2002) (explaining the netting process and noting that tracing specific assets through the netting process "is extremely difficult, if not impossible").

46. Kahan & Rock, *supra* note 32, at 1239–40.

47. *Id.*

48. *Id.* at 1239.

shares can be made between DTC participants without changing the party registered with the issuer; Cede & Co. will remain registered on the issuer's stockholder list as long as DTC still stores the certificates.[49]

DTC is a subsidiary of the Depository Trust and Clearing Corporation (DTCC).[50] In 2009, DTCC and its subsidiaries held almost $34 trillion in securities and processed an average of over 90 million transactions a day.[51] Though there used to be as many as four depositories, DTC is the only depository in the United States today.[52] As a whole, the DTCC system is estimated to hold more than 99% of depository-eligible securities traded on United States capital markets.[53] It is now "wholly possible that a listed company will have only one registered shareholder, 'Cede & Co.'"[54]

Without the immobilization of shares, the volume of trading we see today would be impossible.[55] However, the depository system that was adopted creates a "discrepancy between ownership of the share itself (economic or beneficial ownership) and the legal status as shareholder (registered stockholder)."[56] This is problematic because it is the beneficial owners who have the appropriate incentives to make corporate decisions.[57] Because shareholders are the residual claimants, they are the ones who "receive most of the marginal gains and incur most of the marginal costs" from the success or failure of the corporation.[58] Non-beneficial holders lack the optimal incentives to exercise discretionary authority.[59]

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49. Donald, *supra* note 5, at 61.

50. *Id.* at 59.

51. *Id.* at 60–61.

52. Kurz v. Holbrook, 989 A.2d 140, 166 (Del. Ch. 2010), *aff'd in part, rev'd in part sub nom.* Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377 (Del. 2010). "While major, regional exchanges had previously maintained their own depositories, in the 1990s DTC and its affiliate, the National Securities Clearing Corporation, assumed the activities of the depositories for the regional exchanges." Carnell & Hanks, *supra* note 32, at 26.

53. Donald, *supra* note 5, at 60.

54. *Id.* at 62. Today, more than eighty percent of all shares of public companies are held in street name. Notice of Filing of Proposed Rule Change Amending NYSE Rules 451 and 465, and the Related Provisions of Section 402.10 of the NYSE Listed Company Manual, Exchange Act Release No. 34-68936, 2013 WL 603321 (Feb. 15, 2013).

55. Kahan & Rock, *supra* note 32, at 1238. DTCC processed, on average, 92.3 million transactions every business day and settled over $1.48 *quadrillion* in transactions in 2009. Donald, *supra* note 5, at 60–61.

56. Donald, *supra* note 5, at 62.

57. *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 68 (paperback ed. 1996). While Judge Easterbrook and Professor Fischel do not differentiate between beneficial owners and record owners when discussing shareholders, their focus is clearly on beneficial owners as it is they who have a financial stake in the success or failure of a company. *See id.*

58. *Id.*

59. *See id.* at 67–70.

B. *Conflict Between State and Federal Law*

Following the implementation of the custodial system, federal regulations were issued that defined a "record holder" of shares as "any broker, dealer, voting trustee, bank, association or other entity that exercises fiduciary powers which holds securities of record in nominee name or otherwise or as a participant in a clearing agency registered pursuant to § 17A of the [Exchange] Act."[60] These regulations defined "entity that exercises fiduciary powers" to specifically exclude clearing agencies registered pursuant to § 17A of the Exchange Act.[61] DTC is a clearing agency registered with the SEC pursuant to § 17A,[62] so it cannot be considered a record holder under federal law. It is the banks and brokers whose shares are held in their accounts at DTC and who are considered the record holders under federal law.[63]

However, corporations are formed and their internal operations are governed pursuant to state law.[64] Like federal law, the rights incident to share ownership belong to the record holder under state law as well.[65] However, unlike federal law, which recognizes intermediary banks and brokers as record holders, state law recognizes the party registered with the corporation on its stockholder list as the record holder.[66] Since DTC is listed on a company's stockholder list (through its nominee Cede & Co.) for any shares held in its depository, state law recognizes DTC as the record owner.[67] As the record owner under state law, DTC is the legally recognized shareholder,[68] but DTC is merely a custodian and lacks discretionary authority to exercise any shareholder rights.[69]

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60. 17 C.F.R. § 240.14a-1(i) (2013).

61. *Id.* § 240.14a-1(c).

62. MMI Invs., L.L.C. v. E. Co., 701 A.2d 50, 61 (Conn. Super. Ct. 1996).

63. *See* Brown, *supra* note 38, at 753 (noting that the definition of record holder includes depository participants).

64. Donald, *supra* note 5, at 61.

65. *See id.* ("Under state corporation law, a shareholder is defined as someone who is registered on the stockholders list, not a person who has title to shares." (footnote omitted)).

66. *Id.*; *see also* DEL. CODE ANN. tit. 8, § 219(c) (West 1974 & Supp. 2011) (providing that the stock ledger shall be the only evidence of stockholders entitled to vote).

67. *See* Donald, *supra* note 5, at 61.

68. *Id.*

69. *See* Kurz v. Holbrook, 989 A.2d 140, 161 (Del. Ch. 2010), *aff'd in part, rev'd in part sub nom.* Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377 (Del. 2010) ("Because DTC lacks discretionary voting authority over the shares it holds, DTC inevitably passes on its voting authority . . . ."); *see also Rules, By-laws and Organization Certificate of the Depository Trade Company*, DEPOSITORY TRUST CO. 45–49 (June 2013), http://www.dtcc.com/~/media/Files/Downloads/legal/rules/dtc_rules.pdf (providing a mechanism to pass on shareholder rights to participants).

In an effort to adapt to modern securities practices, share immobilization separated beneficial owners of shares from their rights as shareholders. The SEC adopted regulations to facilitate shareholder communications and allow shareholders to vote,[70] but it did not fully satisfy this goal. The SEC did not address how or when DTC would be required to transfer voting rights to the beneficial owners. There remained a gap that would prevent shareholders from voting, which both federal and state laws and regulations failed to address.[71] As a result, the DTC omnibus proxy was created.[72] However, the DTC omnibus proxy remains an improvised and unstable bridge linking federal securities law and state corporate law.

III. SHAREHOLDER RIGHTS

Before progressing further, it is necessary to address an important question: What exactly does a shareholder own? The implications of the conflict between state and federal law will not be clear without a better understanding of the rights inherent in stock ownership. Corporate law and securities law are difficult to disentangle when applied to stock ownership; however, the rights incident to stock ownership can generally be divided into two categories: rights as members of the corporation, and rights as holders of negotiable securities.

A. Rights as Corporate Members

Historically, an equity ownership interest in a corporation was a non-negotiable membership right.[73] An early understanding of this membership right viewed it as "a fraction of all the rights and duties of the stockholders composing the corporation."[74] This fractional interest can be viewed to comprise all the rights that shareholders hold arising from their relationship with the corporation.[75] These include the rights to vote, to inspect corporate

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70. *See infra* Part IV.A.

71. *See Kurz*, 989 A.2d at 170 ("There does not appear to be any federal statute or regulation, any listing standard, or any state statute or decision calling for the issuance of the DTC omnibus proxy.").

72. *Id.* The circumstances surrounding the creation of the omnibus proxy are unclear. The chancellor in *Kurz* speculated that "someone must have recognized that a mechanism was needed to ensure the transfer of DTC's voting authority to the participant members." *Id.*

73. Egon Guttman, *Transfer of Securities: State and Federal Interaction*, 12 CARDOZO L. REV. 437, 443 (1990).

74. Samuel Williston, *History of the Law of Business Corporations Before 1800* (pt. 2), 2 HARV. L. REV. 149, 149 (1888).

75. *See id.* at 149–50.

books and records, and to demand an appraisal;[76] the right to receive dividends;[77] the right to issue shareholder proposals;[78] and the right to bring a derivative action.[79] Although the separation of beneficial and legal ownership implicates the exercise of all of these rights, this Comment focuses on voting rights.

The right to vote is "a shareholder's main legal channel to exercise control" over a corporation and is thus "essential to corporate law."[80] The Delaware Court of Chancery has recognized that "[t]he shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests."[81] This is because the shareholder vote "legiti[mize]s the exercise of power" by directors and managers over property that they do not own themselves.[82] The shareholder franchise protects the corporation and gives it value.[83] While shareholders can also influence management by selling their stock,[84] that is not an action of internal corporate governance and thus is less vital for the protection of shareholders' interests.[85]

In the original English corporations, each shareholder of a corporation was entitled to one vote.[86] However, it soon became customary for corporate charters to provide votes in proportion to the number of shares held[87]—what is frequently known today as the "one share, one vote" standard.[88] This standard is "based on the principle of apportioning voting power commensurate with the investment risk taken by the common stockholders as residual owners."[89] Only shareholders with voting power proportionate to their investment risk have the proper incentives to make

76. *See* Henry T. C. Hu & Bernard Black, *Equity and Debt Decoupling and Empty Voting II: Importance and Extensions*, 156 U. PA. L. REV. 625, 722 (2008).

77. Donald, *supra* note 5, at 86.

78. *See* 17 C.F.R. § 240.14a-8 (2013).

79. *See* Ala. By-Products Corp. v. Cede & Co., 657 A.2d 254, 265 (Del. 1995) (noting that the authority of a shareholder to bring derivative suits stems from the financial interest in the corporation and the resulting "incentive to obtain legal redress for the benefit of the corporation").

80. Donald, *supra* note 5, at 43–44.

81. Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988).

82. *Id.*

83. Lord v. Equitable Life Assur. Soc'y of U.S., 87 N.E. 443, 448 (N.Y. 1909).

84. *See Blasius Indus., Inc.*, 564 A.2d at 658–59.

85. *See id.* at 660.

86. Williston, *supra* note 74, at 156.

87. *Id.* at 156–57.

88. Manning Gilbert Warren III, *One Share, One Vote: A Perception of Legitimacy*, 14 J. CORP. L. 89, 91 (1988).

89. *Id.*

corporate decisions,[90] so the shareholder vote is crucial to ensuring that managers act in the best interests of the corporation.[91]

The common law did not permit voting by proxy absent an express authorization by a corporate charter or bylaw.[92] Shareholders had a duty to attend shareholder meetings and vote in person.[93] This requirement was based on the theory that every stockholder was "entitled to have the benefit of the judgment of every other stockholder."[94] However, as the size of corporations increased, this requirement became impractical, and proxies became an acceptable substitute for attendance.[95] This was not a legal rejection of the purposes underlying the shareholder meeting, but a recognition that modern practices made the common-law prohibition unworkable.[96] The use of proxies became necessary for corporations to meet quorum requirements,[97] and eventually the proxy process became the primary method for shareholders to vote, "often rendering the annual meeting a formality."[98]

Dating back to some of the earliest corporations, it was customary to include in the corporate charter a requirement that transfers of stock must be entered into the corporate books before title could pass.[99] Under the original concept of stock ownership as a membership right,[100] the registration of stock on an issuer's books did not merely provide evidence of a shareholder's rights—it established those rights.[101] A corporation was viewed as "the custodian of its shares, a responsibility that it held in trust for the protection" of its shareholders, and could be held liable for mistakenly transferring a shareholder's shares to another.[102]

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90. *See* EASTERBROOK & FISCHEL, *supra* note 57, at 68.

91. *See id.*

92. *See* Taylor v. Griswold, 14 N.J.L. 222, 231 (N.J. 1834).

93. *Id.* at 232.

94. Mackin v. Nicollet Hotel, Inc., 25 F.2d 783, 786 (8th Cir. 1928).

95. Brown, *supra* note 38, at 695–96.

96. *See Mackin*, 25 F.2d at 786 ("The old theory . . . has necessarily been rendered obsolete because of our modern business being conducted by large corporations with thousands of stockholders located in all parts of the country.").

97. Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 VAND. L. REV. 1129, 1135 (1993).

98. Brown, *supra* note 38, at 696.

99. *See* Williston, *supra* note 74, at 155.

100. *See* discussion *supra* Part III.A.

101. Kenneth B. Davis, Jr., *Pledged Stock and the Mystique of Record Ownership*, 1992 WIS. L. REV. 997, 998–99 (1992).

102. *Id.* at 999.

This rule fell out of fashion, and courts in America adopted the rule that title to stock passed upon transfer to the assignee.[103] Common law considered voting rights to be incident to ownership, and the right to vote was understood to follow the title when title was passed.[104] However, this rule only applied as between the assignor and assignee.[105] Even when an assignee had gained title to shares, the issuing corporation was not required to regard the assignee as the owner of those shares until the assignee registered the transfer with the corporation.[106] Thus, a beneficial owner could gain the right to vote by purchasing shares without gaining the actual power to vote until registering the transfer with the issuing corporation.[107] The requirement that a transfer be registered with the corporation functioned as a recording system.[108]

There were both legal and practical justifications for this rule. It has been argued that a corporation is analogous to a set of contracts.[109] There is no privity of contract between an unrecorded assignee and a corporation.[110] If the basis of shareholder rights rests in contract, even if it is a type of contract unique to the corporate relationship, it stands to reason that someone who is not in privity with the corporation and its other shareholders has no legal right to exercise the rights derived from the underlying corporate contract.[111] A contract between an unrecorded assignee and a corporation would only arise upon registration with the corporation, and only then would the rights that stem from the contract arise.[112]

As a practical matter, the registration requirement provided a necessary evidentiary rule that allowed a corporation to determine whom it would regard as shareholders without undue difficulty.[113] This is important because corporations must know who their shareholders are for the purposes of distributing dividends as well as providing notice of, and

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103. *See, e.g.*, State *ex rel.* Cooke v. N.Y.-Mexican Oil Co., 122 A. 55, 58 (Del. Super. Ct. 1923).

104. Dennistoun v. Davis, 229 N.W. 353, 355 (Minn. 1930).

105. *In re* Giant Portland Cement Co., 21 A.2d 697, 701 (Del. Ch. 1941).

106. *Id.* This common-law rule was eventually codified into state corporate statutes. *See, e.g.*, *id.*

107. Davis, *supra* note 101, at 1024.

108. James Steven Rogers, *Negotiability as a System of Title Recognition*, 48 OHIO ST. L.J. 197, 214–15 (1987).

109. EASTERBROOK & FISCHEL, *supra* note 57, at 14.

110. *In re Giant Portland Cement Co.*, 21 A.2d at 701.

111. *See id.*

112. *Id.*

113. *Id.* at 701–02.

allowing votes at, meetings.[114] State laws require corporations to provide shareholders with notice of any meetings in which shareholders are required or permitted to vote,[115] and permit corporations to "fix a record date" for determining the shareholders who are entitled to receive notice and vote.[116] The reliance on record ownership gave issuers a safe harbor that protected them from liability for failing to either provide notice of meetings to unknown shareholders or recognize their votes.[117]

The original Model Business Corporation Act focused on identifying who is entitled to vote in corporate elections.[118] As the Uniform Commercial Code (UCC) was revised to reflect reality more accurately,[119] the Revised Model Business Corporation Act (Revised Act) was adopted, which resulted in an unmistakable parallelism between them.[120] Instead of focusing on who is entitled to cast a vote, the focus shifted to "identifying whose vote the corporation is entitled to accept."[121] The Revised Act also added provisions allowing companies to "adopt procedures designed to permit beneficial owners to vote."[122] However, these provisions do not grant beneficial owners any new voting powers; rather, they provide issuing corporations with greater defenses against legal challenges by expanding a corporation's flexibility in determining whose votes they are entitled to accept.[123]

B. Rights as Security Holders

Recall that shareholder rights were historically considered non-negotiable membership rights.[124] In cases of lost or stolen certificates, courts in the United States allowed owners to assert their title against a subsequent holder, even if the subsequent holder was a bona fide

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114. Donald, *supra* note 5, at 62. State law requires that corporations provide shareholders with written notice in advance of any meeting where shareholders "are required or permitted to take any action." *See, e.g.*, DEL. CODE ANN. tit. 8, § 222(a) (West 1974 & Supp. 2011).

115. *See, e.g.*, DEL. CODE ANN. tit. 8, § 222(a).

116. *See id.* § 213(a).

117. *See* Davis, *supra* note 101, at 999–1000.

118. *Id.* at 1053.

119. *See* discussion *infra* Part III.B.

120. Davis, *supra* note 101, at 1053.

121. *Id.* at 1053–54.

122. J. ROBERT BROWN, JR., THE REGULATION OF CORPORATE DISCLOSURE § 15.03[2] (3d ed. 2014).

123. *See* Davis, *supra* note 101, at 1053–54, 1059.

124. Guttman, *supra* note 73, at 443. The concept of negotiability allows a purchaser to take what they purchase "free from any [potential] adverse claims." James S. Rogers, *An Essay on Horseless Carriages and Paperless Negotiable Instruments: Some Lessons from the Article 8 Revision*, 31 IDAHO L. REV. 689, 695 (1995).

purchaser.[125] As trading expanded, market participants pushed to make shares negotiable, and the Uniform Stock Transfer Act was passed in 1910.[126] As a result, shareholder rights were reified into stock certificates, integrating the intangible rights inherent in stock into the physical paper itself.[127] The primary benefit of negotiable certificates was increased liquidity, which made stock more valuable and desirable as an investment.[128] This was the result of two perks of negotiability: purchasers evaluating stock did not need to inquire into potential adverse claims, nor did they need to investigate title.[129] Instead, they were able to rely on the stock certificate itself and the information contained on it.[130]

The rise in the volume of trading that led to the paper crisis and the subsequent immobilization of shares posed problems for the application of the negotiability doctrine to the transfer of stock.[131] Negotiability rests on the physical delivery of a stock certificate.[132] The original version of the UCC's Article 8 (Original Article 8) was based on this system of physical delivery.[133] It did not address how property interests were transferred to purchasers who acquired through intermediaries that held securities in fungible bulk.[134]

Following the immobilization of shares, Article 8 was amended (Amended Article 8) in 1978 to provide for the transfer of paperless uncertificated securities.[135] However, like Original Article 8, Amended Article 8 was based on the presumption that the "paradigm of property interests" was the actual physical possession of an object.[136] The drafters of Amended Article 8 established an elaborate structure analogous to physical delivery in which "uncertificated securities [were] fictively delivered

125. *See* Knox v. Eden Musee Americain Co., 42 N.E. 988, 992–93 (N.Y. 1896); *see also* James Steven Rogers, *Negotiability, Property, and Identity*, 12 CARDOZO L. REV. 471, 477–78 (1990) ("In some respects, stock certificates were treated no differently than ordinary goods, as, for example, in the rule that the owner of property who has not entrusted possession to the wrongdoer can recover it even from a bona fide purchaser.").

126. Guttman, *supra* note 73, at 443 & n.35.

127. *Id.* at 443. Reification refers to the merger of the obligations of the instrument's issuer into the instrument itself. Mooney, *supra* note 40, at 398 n.332.

128. Ronald J. Mann, *Searching for Negotiability in Payment and Credit Systems*, 44 UCLA L. REV. 951, 957–58 (1997) (noting that negotiability decreases transaction costs). "At least in commercial contexts, an asset that is easy to sell normally is more valuable than an otherwise similar asset that is hard to sell." *Id.* at 957.

129. *See id.* at 959–60.

130. *Id.* at 960.

131. *See* Rogers, *supra* note 125, at 480.

132. *Id.*

133. U.C.C. art. 8, prefatory note I.A. (2005).

134. Mooney, *supra* note 40, at 331.

135. Rogers, *supra* note 124, at 690.

136. Schroeder, *supra* note 3, at 303.

through acts designed to parallel, and be directly analogous to, the physical delivery of security certificates."[137] This required expanding "two simple traditional modes of transfer . . . into sixteen alternate" legal methods.[138]

However, once the practice of physical delivery is abandoned, the entire concept of delivery "becomes a metaphysical absurdity."[139] The drafters of Amended Article 8, believing that individual shares could remain identifiable and traceable through multiple tiers of intermediaries, mistakenly "analyze[d] the relationship[s] among financial intermediaries" and investors in the context of "agency and bailment principles."[140] They were fixated on analogizing the new reality to possession of a physical certificate and lost sight of the property interests a physical certificate was meant to embody: "They conflated the property right in the *res* with the *res* itself; conflated the intangible *res* . . . with the tangible token evidencing the *res* . . . ; and conflated physical custody of the token with both beneficial and record ownership of the underlying *res*."[141]

This is somewhat understandable since agency and bailment principles had traditionally worked in dealing with the relationship between shareholders and intermediaries. When a beneficial owner purchased stock through an intermediary, the intermediary held the stock for the owner in street name, but the stock was considered to be owned by the beneficial owner.[142] The broker was considered the owner's agent and owed the owner duties to carry out the customer's instructions and to act in the customer's best interests.[143] While a beneficial owner who owned in nominee name through an intermediary assumed the risk of not being the record owner as

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137. *Id.* at 313; *see also* U.C.C. art. 8, prefatory note I.B. (2005) ("[A]mendments primarily took the form of adding parallel provisions dealing with uncertificated securities . . . .").

138. Schroeder, *supra* note 3, at 314. See U.C.C. art. 8, prefatory note IV.B.3 for a detailed analysis of the complexity in Amended Article 8's treatment of uncertificated securities.

139. Rogers, *supra* note 125, at 480.

140. Schroeder, *supra* note 3, at 328–29; *see also* Hakes, *supra* note 45, at 679 ("The rules in [Amended Article 8] governing transfers and pledges were unduly complex because they tried to cover the relationships existing in the indirect holding system using direct holding concepts." (footnote omitted)).

141. Schroeder, *supra* note 3, at 311.

142. *See, e.g.*, Weiss v. Dempsey-Tegeler & Co., 443 S.W.2d 934, 935 (Tex. Civ. App.—Amarillo 1969, writ ref'd n.r.e.); *see also In re* Ellis' Estate, 6 A.2d 602, 612 (Del. Super. Ct. & Orphans' Ct. 1939) (noting that the relationship between the securities broker and customer is one of agency, bailment, or trust, and that when holding securities for a customer a broker has no right to use the securities as his own).

143. *See* Restatement of Agency § 1 cmt. d (1933) ("An agent may be one who, to distinguish him from a servant in determining the liability of the principal, is called an independent contractor. Thus, the attorney at law, the broker, the factor, the auctioneer, and other similar persons employed either for a single transaction or for a series of transactions are agents, although, as to their physical activities, they are independent contractors.").

against the corporation,[144] the intermediary record owner was typically considered a trustee or fiduciary of the beneficial owner.[145] The unrecorded beneficial owner's right against the corporation was inchoate until her ownership was recorded with the corporation,[146] but the intermediary could be held liable to the beneficial owner for failure to vote according to the owner's instructions, or for voting against the owner's interests.[147] Thus, the law treated stock held by a bank or broker intermediary on a customer's behalf as constructively owned by the customer.[148]

This system preserved a beneficial owner's property interest in shares that were represented by identifiable certificates. However, with the immobilization of stock certificates, the concepts of agency and bailment could not easily be applied to "the complex set of relationships which [had] developed between the participants [and intermediaries] in the various tiers of the securities industry."[149] Amended Article 8's treatment of securities as analogous to physical property was "inadequate and unworkable."[150]

As a result, Article 8 was amended a third time (Revised Article 8), making it "the first article of the [UCC] to reach the third generation."[151] The goal of Revised Article 8 was to "better reflect the commercial reality of how the market . . . operates and to provide . . . sufficient flexibility" to adapt to market developments.[152] Under Revised Article 8, investors who purchase shares held in street name merely own a "securities entitlement" in a "pro rata interest in all like securities" held by their intermediary.[153] This is a fundamentally different interest than the traditional property interests the old laws reflected.[154] Under Revised Article 8, a beneficial owner who holds shares through an intermediary can become an entitlement holder the moment the bank or broker indicates on its books that the customer has bought shares, even if the bank or broker has not actually acquired the shares yet.[155] This security entitlement will give the beneficial owner a

144. *See* Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 668 (Del. Ch. 1988).

145. *See* Salt Dome Oil Corp. v. Schenck, 41 A.2d 583, 585 (Del. 1945).

146. *Id.*

147. *See, e.g.*, Witham v. Cohen, 28 S.E. 505, 506 (Ga. 1897). Early judicial opinions considered such acts to be an invasion of the beneficial owner's legal rights, amounting to a tort affecting the owner's property right in the shares. *E.g.*, *id.*

148. Schroeder, *supra* note 3, at 306. Amended Article 8 explicitly stated that a person who purchased a security through an intermediary was the owner of that security. *Id.* at 329.

149. *Id.* at 329–30.

150. Mooney, *supra* note 40, at 313.

151. Rogers, *supra* note 124, at 690.

152. Vaaler, *supra* note 6, at 271 (footnote omitted).

153. Kahan & Rock, *supra* note 32, at 1242.

154. *See* Hakes, *supra* note 45, at 692 n.162 (noting that the rights included in a securities entitlement are merely rights against the securities intermediary to enforce its obligations).

155. Kahan & Rock, *supra* note 32, at 1242.

superior claim against the broker's general creditors.[156] However, it is not an ownership interest in specific shares as the old laws envisioned; it is "best characterized as a bundle of rights against the intermediary."[157] It is not even an interest in "the fungible bulk of securities" held at DTC, but merely an interest in the beneficial owner's account with the intermediary.[158]

Thus, Revised Article 8 now recognizes that securities today are generally held in fungible bulk; however, "it loses determinacy with respect to the key shareholder rights in corporate law."[159] Under Revised Article 8, beneficial owners that hold shares through intermediaries no longer have an actual property interest in specific shares.[160] Their interest is more comparable to a creditor's interest against a debtor, except a securities entitlement is given higher priority than the typical unsecured claim.[161] But if beneficial owners no longer have a legal interest in distinguishable shares, how can they exercise the right to vote, which has traditionally been tied to distinguishable shares, and which remains necessary to support the corporate form?

IV. RECONCILING THE CONFLICT

A. The SEC Proxy System and the Omnibus Proxy

In today's custodial ownership system, the actual investors who purchase shares of corporations and have the financial interest in the shares are no longer legally considered shareholders.[162] As a result, "[i]ssuers no longer know who owns [the shares]" and corporations have been cut off from their investors.[163] With the effective destruction of the stockholder list, issuers do not know where to send information and "invitations to annual meetings," nor can they determine who is entitled to vote and receive dividends, and shareholders are cut off from each other such that they cannot effectively organize to exercise their rights.[164]

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156. *Id.*

157. *See* Mooney, *supra* note 40, at 310.

158. *Id.* at 310–11 (noting that a securities entitlement is an interest in the customer's account, not in the securities that underlie the account).

159. Kahan & Rock, *supra* note 32, at 1242–43. This can lead to problems such as overvoting and empty voting; however, discussions of these problems are beyond the scope of this Comment.

160. Schroeder, *supra* note 3, at 373.

161. *See id.* (comparing checking accounts, which are unsecured debt obligations banks owe to their depositors, to the new concept of a securities entitlement).

162. Donald, *supra* note 5, at 46.

163. *Id.*

164. *Id.* at 62.

When Congress amended the Exchange Act to immobilize shares, it was well aware of the problems it would cause and directed the SEC to study what steps could be taken to facilitate shareholder communications.[165] A number of problems arose. In 1975, banks held nearly 80% of the shares that were held in street name, and the SEC "had no regulatory authority over banks."[166] The SEC considered rules that required intermediary brokers to disclose shareholder information to issuers so that issuers could communicate directly with beneficial owners,[167] but that posed problems for brokers.[168] Allowing direct communication also raised concerns about state law.[169] Since only record holders can vote under state law, only record holders can execute proxies.[170] "Allowing issuers to mail proxy cards directly to street name owners would be of little value if the recipient had no authority to vote the shares."[171]

The SEC settled on a complex and inefficient "pass-it-along" approach that did not satisfy anyone.[172] Today's voting process for street name holders is a complex web of federal, state, and stock exchange requirements.[173] Before the process actually begins, federal regulations require any issuer whose shares are held at DTC to contact the depository and request a list of participant banks and brokers who hold its shares.[174]

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165. Brown, *supra* note 38, at 721.

166. *Id.* at 725.

167. *See* Donald, *supra* note 5, at 63.

168. *See* Brown, *supra* note 38, at 725.

> [W]hile everyone might agree that beneficial owners ought to be brought into the proxy process, less unanimity existed on the best method of doing so. It might seem intuitively obvious that brokers should be required to identify beneficial owners and disclose a list of names to issuers, thereby allowing issuers to communicate with beneficial owners directly. Brokers, however, had little sympathy for such a system. The system not only imposed additional paperwork, but also raised the possibility of competitive harm, particularly if issuers circulated the lists to other brokers. Providing lists also threatened to deprive brokers of a source of income. Under exchange rules, brokers received reimbursement from issuers for the cost of forwarding materials, reimbursement that could amount to a significant source of income. Last, direct communication arguably enhanced enforcement risks by making a broker's obligations and, concomitantly, violations, more readily apparent.

Id.

169. *Id.*

170. *Id.*

171. *Id.* Ironically, the system adopted still provides for passing information to the beneficial holders without expressly providing them with proxy authority as well. *See infra* note 192 and accompanying text.

172. *See* Donald, *supra* note 5, at 47.

173. Brown, *supra* note 38, at 745.

174. *See* 17 C.F.R. § 240.14a-13 n.1 (2013) ("If the registrant's list of security holders indicates that some of its securities are registered in the name of a clearing agency registered pursuant to Section 17A of the Act (e.g., 'Cede & Co.,' nominee for the Depository Trust Company), the registrant shall make appropriate inquiry of the clearing agency and thereafter of

Issuers are then required to send search cards to these banks and brokers to ascertain the number of beneficial owners who hold through them, as well as the "number of proxies, proxy statements, and annual reports to be printed."[175] "[S]earch card[s] must be sent whether an issuer is soliciting proxies, seeking consents in lieu of a meeting, or mailing information statements."[176] Once an issuer's inquiry has been received, federal rules require DTC to "promptly identify the participants and indicate the number of shares owned by each."[177] The securities position list that DTC provides in response to an inquiry is frequently referred to as a "Cede breakdown."[178]

Once DTC provides this Cede breakdown, the issuer must send search cards to the participants identified on the breakdown.[179] The next steps in the process differ depending on whether the issuer is communicating with a bank or a broker. If the issuer is communicating with a bank, it must ask the bank to identify how many of its customers are beneficial owners of the issuer's stock,[180] as well as whether the bank is holding the issuer's shares for any respondent banks.[181] If the bank is holding for respondent banks, the bank then has one business day to respond to the issuer and identify those respondent banks.[182] The issuer then has one business day to send search cards to identified respondent banks.[183] It is possible that respondent banks hold for other respondent banks as well.[184] This further complicates the process, as the same requirements will apply concerning the respondent bank: it must provide to the issuer the identities of the respondent banks that hold through it within one day, issue an omnibus proxy to the respondent banks holding through it, and the issuer must send search cards to the lower-tier respondent banks as well.[185]

If an issuer is communicating with a broker, the process is simpler. Upon contact from an issuer, a broker has seven business days to inform the issuer how many of its customers hold the issuer's stock beneficially

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the participants in such clearing agency who may hold on behalf of a beneficial owner or respondent bank, and shall comply with the above paragraph with respect to any such participant."). This request must be made "at least twenty business days prior to the record date" of a shareholder meeting. Donald, *supra* note 5, at 68.

175. Brown, *supra* note 38, at 746.

176. *Id.* (footnote omitted).

177. *Id.* at 748–49; *see also* § 240.17Ad-8(b) (requiring a registered clearing agency to promptly furnish a securities position listing upon request).

178. Donald, *supra* note 5, at 68.

179. Brown, *supra* note 38, at 749.

180. § 240.14b-2(b)(1)(ii)(A).

181. Brown, *supra* note 38, at 749.

182. *Id.*

183. *Id.* at 750.

184. *See id.*

185. *See id.*

through the broker.[186] Once this process has been completed, "the issuer *should* know the *approximate number* of beneficial owners owning shares through each . . . intermediary."[187] The issuer must then deliver the necessary proxy materials to the intermediary banks and brokers.[188] Those intermediary banks and brokers then "have five business days to forward them to [the] beneficial owners."[189] If an intermediary bank holds shares for a respondent bank, federal regulations require the intermediary bank to issue an omnibus proxy transferring its voting authority down the chain to the respondent banks that hold through the intermediary bank.[190] It should be noted that actual proxy authority is not generally transferred to the ultimate beneficial owners through this process.[191] It is actually the banks and brokers that will vote the shares for their clients; however, they are prohibited from deciding how to vote on important matters.[192] Instead, they will deliver a voting instruction form (VIF) to their clients.[193] The beneficial owners will indicate on the VIF how their shares should be voted and return it to their bank or broker.[194]

Banks and brokers typically outsource these operations to an independent company—Broadridge Financial Solutions, Inc. (Broadridge).[195] First, the "[b]rokers and banks transfer their proxy authority . . . to Broadridge."[196] Broadridge then distributes the proxy materials to the beneficial owners, receives their voting instructions, executes proxies on behalf of its clients "aggregating the instructions it has

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186. *Id.* at 749; 17 C.F.R. § 240.14b-1(b)(1)(i) (2013).

187. Donald, *supra* note 5, at 68.

188. *See* § 240.14a-13(a)(4) (requiring the issuer to supply proxy materials to record holders). Readers should remember that under federal regulations the intermediary banks and brokers are considered the record holders, not DTC. *See supra* Part II.B.

189. Kahan & Rock, *supra* note 32, at 1246.

190. § 240.14b-2(b)(2)(i).

191. *See* Kurz v. Holbrook, 989 A.2d 140, 147–48 (Del. Ch. 2010), *aff'd in part, rev'd in part sub nom.* Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377 (Del. 2010) (quoting John C. Wilcox, John J. Purcell III & Hye-Won Choi, *"Street Name" Registration & the Proxy Solicitation Process*, *in* A PRACTICAL GUIDE TO SEC PROXY AND COMPENSATION RULES 10-1, 10-3 (Amy L. Goodman, John F. Olson & Lisa A. Fontenot eds., 4th ed. 2007 & Supp. 2008)).

192. *See* Richard W. Barrett, Note, *Elephant in the Boardroom?: Counting the Vote in Corporate Elections*, 44 VAL. U. L. REV. 125, 150 (2009) (noting that beneficial owners have an equitable right to direct record holders how to vote). However, banks and brokers are allowed to vote the shares themselves on routine matters when they do not receive instructions from beneficial owners. *Id.* at 151.

193. *See* Concept Release on the U.S. Proxy System, Exchange Act Release No. 34-62495, Investment Advisers Act Release No. 3052, Investment Company Act No. 29340, at 19–20 (July 14, 2010), http://www.sec.gov/rules/concept/2010/34-62495.pdf.

194. *Id.* at 20.

195. Donald, *supra* note 5, at 66; *see* Concept Release on the U.S. Proxy System, *supra* note 193, at 22 n.57 (noting that Broadridge handles over 98% of proxy services).

196. Barrett, *supra* note 192, at 154.

received," and forwards the results to a vote tabulator.[197] Although Broadridge serves as agent for the custodians, federal rules require the issuers—not the bank and broker custodians—to pay the cost of these services.[198] The fees Broadridge may charge both issuers and its custodian clients are limited by NYSE rules.[199] However, while Broadridge typically charges issuers the maximum fees permitted by the NYSE, it sometimes charges its larger broker-dealer clients less than the maximum fees permitted.[200] By charging the issuers more than their broker-dealer clients, Broadridge effectively transfers the difference from issuers to broker-dealers, giving rise to concerns that the broker-dealers are being unjustly enriched by receiving more than what was necessary to cover their reasonable expenses.[201]

This convoluted web of rules makes up the procedure by which banks and brokers pass on voting rights to the beneficial owners who hold through them, but there is a loophole. To recap, the rules require issuers to request a Cede breakdown from DTC, and send a search card to the banks and brokers listed in the Cede breakdown. The banks and brokers are then required to forward proxy cards or requests for voting instructions to the ultimate beneficial owners. But remember, under state law, DTC as the record owner—not the intermediary banks and brokers—has the authority to vote and exercise other shareholder rights.[202] Yet there is nothing in the rules compelling DTC to transfer this authority down the communication chain that was created by the federal proxy rules.[203] One of the primary reasons the more elaborate proxy system was chosen was the concern that a simpler system that provided for direct communication between issuers and beneficial owners would not work because beneficial owners did not have the power to vote.[204] However, no legal mechanism was ever established to transfer that power from the depository down through the ownership chain.[205]

To allow the beneficial owners to vote as the proxy system intended, DTC created an omnibus proxy to transfer its voting authority to the

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197. Kahan & Rock, *supra* note 32, at 1245–47.

198. 17 C.F.R. § 240.14a-13(a)(5) (2013) (requiring issuers to pay "reasonable expenses" for sending proxy materials to the beneficial owners).

199. *See* Concept Release on the U.S. Proxy System, *supra* note 193, at 56.

200. *Id.* at 57.

201. *See id.*

202. *See* Mooney, *supra* note 40, at 319–20 & n.34.

203. *See* Kurz v. Holbrook, 989 A.2d 140, 170 (Del. Ch. 2010), *aff'd in part, rev'd in part sub nom.* Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377 (Del. 2010).

204. *See* Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988); *see also* Lord v. Equitable Life Assur. Soc'y of U.S., 87 N.E. 443, 448–49 (N.Y. 1909).

205. *Kurz*, 989 A.2d at 170.

ultimate beneficial owners.[206] This omnibus proxy "confers voting authority upon bank and broker participants with respect to the shares held in their DTC accounts on the record date."[207] However, there remains no federal or state statute, exchange requirement, or case law governing the issuance of this proxy.[208] No authority whatsoever governs when it is issued, "who should ask for it," or the events compelling its issuance.[209]

Scholars simply discuss the occurrence as expected.[210] DTC's website merely states, "On the day after record date DTC provides the Omnibus Proxy to the issuer along with a Security Position Report."[211] DTC has stated in a letter to the SEC that it has a "longstanding and well established" procedure governing the issuance of the omnibus proxy.[212] However, the document it pointed to as evidence of the procedure simply states, "DTC mails an Omnibus Proxy to the issuer as soon as possible after the record date."[213] This is merely the same thing stated on their website, not evidence of a longstanding and well-established procedure.

There are an estimated 17,000 reporting companies in the U.S., and Broadridge delivers over one billion communications per year.[214] This burden is compounded by the fact that annual meetings tend to be seasonal, with most companies holding them during the second quarter of the year.[215] Given the short time windows available, the concentration of the majority of shareholder votes in the same part of the year, and the complexity of this

206. John C. Wilcox, John J. Purcell III & Hye-Won Choi, *"Street Name" Registration & the Proxy Solicitation Process*, *in* A PRACTICAL GUIDE TO SEC PROXY AND COMPENSATION RULES, at 12-1, 12-7, § 12.3[1] (Amy L. Goodman, John F. Olson & Lisa A. Fontenot eds., 5th ed. Supp. 2012).

207. *Id.*

208. *Kurz*, 989 A.2d at 170.

209. *Id.*

210. *See, e.g.*, Brown, *supra* note 38, at 761 ("The rules contemplate that depositories will execute an omnibus proxy and transfer voting power to participating brokers and banks."); Donald, *supra* note 5, at 69–70 ("Since only shareholders of record can vote . . . it is necessary for Cede & Co. to give its participants an 'omnibus proxy,' which covers all the shares a given participant holds with DTC." (footnote omitted)); Kahan & Rock, *supra* note 32, at 1247 ("At the beginning of the process, DTC executes an omnibus proxy in favor of its participant firms.").

211. *Proxy Services*, DEPOSITORY TRUST & CLEARING CORP., http://www.dtcc.com/asset-services/issuer-services/proxy-services.aspx (last visited Aug. 22, 2014).

212. DTCC Response to SEC Concept Release on the U.S. Proxy System, Exchange Act No. 34-62495, Investment Advisors Act No. 3052, Investment Company Act No. 29340, 2010 WL 4462994 (Oct. 25, 2010).

213. *See Reorganizations Service Guide*, DEPOSITORY TRUST & CLEARING CORP. 26, http://www.dtcc.com/~/media/Files/Downloads/legal/service-guides/Reorganizations.ashx (last visited Aug. 22, 2014).

214. Kahan & Rock, *supra* note 32, at 1249.

215. *Id.*

process, there will be cases where the materials simply do not make it to the owner in time to vote.[216] "It is an accident waiting to happen."[217]

B. *Omnibus Failure and the Breakdown of the System*

That accident happened in *Kurz v. Holbrook*, a Delaware case concerning the validity of a consent solicitation for an election of directors.[218] A group of insurgent stockholders had joined under the name "Take Back EMAK" (TBE) and sought to obtain consents from EMAK shareholders that would allow them to take over the board of directors.[219] On behalf of TBE, Broadridge collected the voting instructions it received from EMAK's beneficial owners of shares held in street name.[220] DTC provided EMAK with the Cede breakdown, which contained all of the substantive information that would have been contained in the omnibus proxy, but never provided the omnibus proxy itself.[221]

Because no legal authority addressed who had the responsibility to obtain the omnibus proxy from DTC, the parties themselves disagreed over who should request it.[222] "TBE's proxy solicitor . . . took the initial steps that ordinarily would result in DTC issuing an omnibus proxy, but then assumed it would happen and failed to follow up."[223] In its contract with the election inspector, EMAK agreed to provide the omnibus proxy but failed to do so.[224] On the final day of the consent solicitation, the inspector informed EMAK that it did not have the DTC omnibus proxy.[225] TBE alleged that EMAK "improperly delayed informing [them] until it was too late."[226] The failure to obtain the omnibus proxy from DTC threatened to swing the election by invalidating TBE's votes and disenfranchising a majority of EMAK's common stockholders[227] because Delaware law

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216. *Id.*
217. *Id.*
218. *See* Kurz v. Holbrook, 989 A.2d 140, 154 (Del. Ch. 2010), *aff'd in part, rev'd in part sub nom.* Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377 (Del. 2010) ("My task is to determine whether either the Crown Consents or the TBE Consents validly effected corporate action."). State laws allow for elections to be held via written consent in lieu of a meeting. *E.g.*, DEL. CODE ANN. tit. 8, § 228(a) (West 1974 & Supp. 2011).
219. *Kurz*, 989 A.2d at 144–45, 147.
220. *Id.* at 148.
221. *Id.* at 161.
222. *Id.* at 148–49.
223. *Id.* at 149.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.* at 161.

expressly limits voting rights to those registered on a corporation's stock ledger.[228]

A witness for the defendants testified that obtaining the omnibus proxy was TBE's "responsibility [as] the soliciting stockholder in a consent solicitation, even though it is the responsibility of the issuer . . . in a proxy contest."[229] However, the witness could not provide any legal authority that imposed this responsibility on the soliciting stockholder.[230] Extensive research has revealed no legal authority imposing this duty on either party. There are no apparent public-policy justifications supporting different rules or practices for consent solicitations versus proxy solicitations. The witness also recognized that an issuer has a contractual relationship with DTC that soliciting shareholders do not have, as well as the ability to request and obtain an omnibus proxy from DTC.[231] The witness went so far as to admit that even if a soliciting stockholder requests a proxy from DTC, the proxy will only be delivered to the issuer.[232]

After analyzing the factual record, Vice Chancellor Laster found that whether an issuer holds a meeting or solicits consents, it "does not 'get' the . . . omnibus proxy."[233] Federal securities laws require an issuer to contact DTC in advance of a meeting or consent solicitation, and through this interaction DTC "issues the . . . omnibus proxy as a matter of course."[234] As Vice Chancellor Laster pointed out, "It just happens."[235] Yet it failed to happen in this case.

This left the vice chancellor with a tough decision. Falling back on the statute would have disenfranchised the majority of EMAK's stockowners.[236] But he recognized that Delaware public policy supported the certainty and efficiency provided by the rule allowing corporations to recognize only record holders as shareholders.[237] He could have issued a

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228. DEL. CODE ANN. tit. 8, § 219(c) (West 1974 & Supp. 2011). Different states may use different terms to refer to corporate books. In Delaware, the stock ledger includes all the transactions made by every shareholder, "with each transaction separately posted to separately maintained shareholder accounts"; the stocklist compiles the currently effective entries found in the stock ledger. *Kurz*, 989 A.2d at 163.

229. Plaintiffs' Post-Trial Brief at 26, Kurz v. Holbrook, 989 A.2d 140 (Del. Ch. 2010) (C.A. No. 5019-VCL).

230. *Id.*

231. *Id.*

232. *Id.*

233. *Kurz*, 989 A.2d at 149 ("[T]here is no legal obligation for the company to obtain the DTC omnibus proxy, nor any legal mechanism for the company to compel its issuance.").

234. *Id.* at 149, 170.

235. *Id.* at 149.

236. *Id.* at 161.

237. *See id.* at 164.

ruling on equitable grounds that applied only to these circumstances.[238] There was evidence in the record that EMAK intentionally delayed obtaining the proxy until it was too late.[239] EMAK was not subject to the federal proxy rules, and thus was not required to contact DTC to initiate the search card process.[240] This allowed EMAK to publicly solicit consents without initiating the process that typically results in the issuance of the omnibus proxy.[241] EMAK's contract with the inspector of elections expressly stated that the inspector expected EMAK to provide the omnibus proxy.[242] The inspector informed EMAK before the deadline that it needed the proxy, and the inspector followed up in another e-mail telling EMAK that only it could request the omnibus proxy from DTC.[243] And yet, EMAK not only "failed to request an omnibus proxy" but also waited until it was too late to get one before informing TBE.[244]

The vice chancellor could have equitably estopped EMAK from relying on the absence of the omnibus proxy. Equitable estoppel is the doctrine "intended to prevent a party from taking unconscionable advantage of his own wrong by asserting his strict legal rights."[245] There was certainly enough smoke to indicate that EMAK had acted wrongly. Ruling against them on equitable grounds would have been the easier way to prevent disenfranchising EMAK's shareholders. But the vice chancellor did not take the easy way out in reaching his decision.

Instead of deciding the case on equitable grounds, Vice Chancellor Laster incorporated the Cede breakdown that EMAK obtained from DTC into the stock ledger.[246] The vice chancellor reasoned that the federal policy requiring share immobilization essentially forced corporations to outsource part of their stock ledger to DTC, effectively transforming it into the Cede breakdown, and noted that this approach aligned Delaware law with federal regulations that treat the participant banks and brokers as record holders.[247] The vice chancellor reasoned that the Cede breakdown contained the same substantive information as the omnibus proxy, and that the omnibus proxy

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238. *See* Parfi Holding AB v. Mirror Image Internet, Inc., 954 A.2d 911, 939 (Del. Ch. 2008) (noting that the Delaware Chancery Court is one of equity).

239. *Kurz*, 989 A.2d at 149.

240. *See* Answering Brief of Appellees at 23, Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377 (Del. 2010) (Nos. 64, 2010, 85, 2010).

241. *Id.*

242. *Kurz*, 989 A.2d at 148.

243. Answering Brief of Appellees, *supra* note 240, at 23.

244. *Id.* at 23–24.

245. N. Petrochemical Co. v. U.S. Fire Ins. Co., 277 N.W.2d 408, 410 (Minn. 1979).

246. Kurz v. Holbrook, 989 A.2d 140, 174 (Del. Ch. 2010), *aff'd in part, rev'd in part sub nom.* Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377 (Del. 2010).

247. *Id.* at 171.

"simply reformats the information and appends a computer generated page reciting a boilerplate grant of proxy authority."[248] Acknowledging that even this stamping of boilerplate proxy language was not an affirmative act by DTC—since DTC has no discretionary voting authority over shares in its vault—the vice chancellor concluded that the omnibus proxy was merely a formality.[249]

This would have been a landmark decision with significant positive effects for Delaware corporate law; however, the Supreme Court of Delaware overruled the case on other grounds.[250] With regard to Vice Chancellor Laster's integration of the Cede breakdown into the stock ledger, the court announced that "the Court of Chancery's interpretation of stock ledger in section 219 [was] *obiter dictum* and without precedential effect."[251] Notably, the court believed the failure to obtain the omnibus proxy may have been a "one-time anomaly that may not again occur."[252]

That decision leaves open the possibility that the same reasoning could be reapplied in a later case; however, shareholder rights remain on unstable ground. The shareholder vote is the ideological underpinning that legitimizes the corporate form.[253] The Supreme Court of Delaware is wrong about the likelihood of recurrence. As discussed above, the demands placed upon DTC and Broadridge by the ever-growing corporate voting system make such an occurrence increasingly likely.

V. THE NECESSITY OF THE OMNIBUS PROXY

Anything that threatens to destroy the legitimacy of the voting process endangers the integrity of the corporate form. If the shareholder vote is what legitimizes corporations, then corporate law must promote, not inhibit, shareholder voting. It is certainly a worthwhile endeavor to determine now, before the omnibus proxy fails again, whether it is really legally necessary—and if so, what changes may be made to protect shareholder suffrage.

A. The Policy Supporting Shareholder Suffrage

It has long been theorized that shareholders vote in the "best interest of the corporation . . . to further [their] own self-interest," while individuals

248. *Id.* at 161.
249. *Id.*
250. *Crown EMAK Partners, LLC*, 992 A.2d at 402.
251. *Id.* at 398.
252. *Id.*
253. *See* Warren, *supra* note 88, at 91; Williston, *supra* note 74, at 156.

"with voting power disproportionate to their capital risk 'would be tempted to use that power to further their private interests in opposition to the welfare of the corporation.'"[254] Other capital investors—secured creditors, general creditors, and preferred shareholders—have priority over common shareholders in claims against the corporation.[255] The values of their claims are fixed, so they receive little benefit from maximizing the value of the corporation.[256]

Only the residual owners, i.e., those who bear the marginal risk and enjoy the marginal gains, have the proper incentives to make decisions that are first and foremost in the best interests of the corporation.[257] This is why, even though most states permit corporations to "establish almost any voting practices they please," holders of common shares universally hold voting rights "to the exclusion of creditors, managers, and other employees."[258] It is also why "shareholders lose the controlling votes" when a corporation is insolvent or bankrupt.[259] "When [a] firm is in distress, the shareholders' residual claim goes under water, and they lose the appropriate incentives to maximize on the margin."[260] When this happens, the residual claim flows up the chain to creditors or preferred shareholders, who now have the proper incentives to make decisions for the company in order to maximize their own claims.[261]

The importance of shareholder voting rights is further demonstrated by their value to investors. In cases where "firms have outstanding [classes] of stock with identical rights to share in the profits but significantly different voting rights, the stock with the stronger voting rights trades at a premium."[262] Investors will make tender offers at a substantial premium over market price to gain voting control over a corporation.[263] Non-voting stock is not as attractive to investors because it does not allow them to improve the performance of a corporation.[264] It is no surprise then that firms with no residual claimants perform poorly in relation to firms with residual

254. Warren, *supra* note 88, at 91 (quoting Earl Sneed, *The Stockholder May Vote as He Pleases: Theory and Fact*, 22 U. PITT. L. REV. 23, 27 (1960)).

255. *Id.*

256. *See* EASTERBROOK & FISCHEL, *supra* note 57, at 67–68.

257. *See id.*

258. *Id.* at 63, 67.

259. *Id.* at 69.

260. *Id.*

261. *Id.* This transfer of the residual claim is typically accomplished via contract terms or bankruptcy law. *Id.*

262. *Id.* at 71.

263. *See id.* at 26.

264. *Id.* at 71–72.

claimants.[265] It is clear when you consider the desirability of voting stock in this manner why the voting process increases corporate efficiency.[266]

Corporations are often discussed as a "nexus of contracts," and corporate law is said to provide "the terms people would have negotiated, were the costs of negotiating at arm's length for every contingency sufficiently low."[267] Thus, corporate law supplies rules that will "maximize the value of [the] corporate endeavor as a whole."[268] This is why it has long been considered public policy to refuse to enforce agreements separating voting power from stock ownership, except in carefully-carved-out exceptions.[269]

Where those exceptions have been made, they have not been made without due regard to the potential harm of separating voting rights from beneficial ownership. Thus, the common law recognized that a legal holder with no interest in the stock, called a "naked" or "dry" trustee, was bound to vote at meetings according to the instructions of the beneficial owners.[270]

Voting trusts, in which shares were pooled into a common bloc to be voted as such by a trustee, were illegal at common law.[271] Once the practice of personal attendance at shareholder meetings became impractical, and the majority of corporate votes shifted to proxy contests, the law evolved to accept voting trusts.[272] However, these were subject to "strict statutory limits and regulation,"[273] which recognized that beneficial owners would still be legally protected because they would have claims against a trustee who violated its fiduciary duties.[274] Thus, there was no true severance of the legal and beneficial interests.[275]

When there was real severance of legal and beneficial interests, courts have had no problem denying record owners from voting. Thus, in a case where a corporate director bought a controlling interest in the corporation but took proxies from the sellers instead of registering the transactions with

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265. *Id.* at 72.

266. *See id.*

267. *Id.* at 12, 15.

268. *Id.* at 35.

269. *See* Richard Maidman, *Voting Rights of After-Record-Date Shareholders: A Skeleton in a Wall Street Closet,* 71 YALE L.J. 1205, 1207 (1962).

270. Am. Nat'l Bank v. Oriental Mills, 23 A. 795, 799 (R.I. 1891); *In re* Canal Constr. Co., 182 A. 545, 548 (Del. Ch. 1936).

271. EASTERBROOK & FISCHEL, *supra* note 57, at 65.

272. *See* Mackin v. Nicollet Hotel, Inc., 25 F.2d 783, 786–87 (8th Cir. 1928).

273. A. A. Berle, Jr., *Non-Voting Stock and "Bankers' Control,"* 39 HARV. L. REV. 673, 675 (1926).

274. *See In re* Giant Portland Cement Co., 21 A.2d 697, 702 (Del. Ch. 1941).

275. Carnegie Trust Co. v. Sec. Life Ins. Co. of Am., 68 S.E. 412, 421 (Va. 1910) (noting that in the case of an active trust, as opposed to a dry or naked trust, "there would be no separation . . . of the ownership of the stock from the beneficial interest in it").

the corporation—in an attempt to evade a one-vote-per-shareholder limitation in the corporate charter[276]—the Minnesota Supreme Court invalidated the proxy votes cast because the record owners had no beneficial interest in the shares.[277] In Delaware, courts have long recognized that unrecorded assignees had the right to compel a record owner they purchased from to grant them a proxy or cast votes according to the instructions of the assignee.[278]

Today, the policy supporting corporate suffrage is recognized by the implementation of the SEC proxy framework.[279] However, it is complex and confusing, and drives up agency costs by imposing significant compliance costs on issuers.[280] These costs are borne by the shareholders. In effect, shareholders are forced to pay an extra fee to vote.

Corporate law is intended to supply rules that "maximize the value of [the] corporate endeavor as a whole,"[281] not rules that decrease its value. Securities law works toward similar ends. Its goal is to maximize the value of securities by encouraging liquidity.[282] This Comment has shown how the evolution of securities law and practices had an unquestionably significant benefit for stock as an investment security, but that evolution has also had unintended consequences that have harmed stock as a corporate membership interest under corporate law. By inhibiting efficient shareholder suffrage, this evolution has restrained the ability of corporations to maximize their value. But this does not need to be an either/or choice. Corporate law is meant to be enabling, and is intended to allow for significant "private ordering" for corporations to run themselves largely as they see fit.[283]

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276. Dennistoun v. Davis, 229 N.W. 353, 354 (Minn. 1930).

277. *Id.* at 356. This case also demonstrates the importance of the stock ledger to the corporation. Were a corporation not permitted to rely on the stock ledger to determine its shareholders, it would be much easier for people to gain control of the corporation without the corporation's knowledge. *See id.*

278. *See In re Giant Portland Cement Co.*, 21 A.2d at 701. This may seem at odds with the ruling in *Dennistoun*; however, that case was focused on the relationship between a corporation and an unrecorded assignee, not the relationship between a record-owner seller and beneficial assignee. *Compare Dennistoun*, 229 N.W. at 356 (noting that the purpose of the transfer-registration requirement was for the protection of the corporation against transfers it lacked notice of), *with In re Giant Portland Cement Co.*, 21 A.2d at 702 (noting that a nominal owner owes duties to the beneficial owners it has sold to, and may be answerable in damages to the beneficial owner if the nominal owner votes in a manner that materially affects the rights of the beneficial owner).

279. *See supra* Part IV.

280. Brown, *supra* note 38, at 726 (noting that all of the costs of the communications process, including brokers' costs, are absorbed by the issuers).

281. *See* EASTERBROOK & FISCHEL, *supra* note 57, at 35.

282. *See* Mann, *supra* note 128, at 959–60.

283. *See* Williams v. Geier, 671 A.2d 1368, 1381 (Del. 1996).

The role of corporate law is to provide a framework that prevails unless changed by a corporate charter or bylaws; that framework "should be the one that is either picked by contract expressly or is the operational assumption of successful firms."[284] The absolute cornerstone of the corporate form has always been the voting participation of the residual claimants. Any law that threatens this right should be interpreted very strictly to ensure that it does not violate the policy concerns that underlie the corporate form.

B. The Omnibus Proxy Should Not Be Required

It is clear that a shareholder's right to vote today does not originate from registration with a corporation.[285] Rather, "the right to vote . . . is an incident of the ownership of stock" itself.[286] The right of a corporation to rely on its stock ledger is really an evidentiary rule that functions as a legal defense protecting the corporation.[287] In an era in which shareholders attended meetings in person, and did not have airplanes to take them anywhere in the country in a matter of hours, this rule was vitally necessary. Corporations had to provide sufficient notice to their shareholders before the meeting, which meant they had to know who to send notice to and who would be allowed to vote months before the meeting.[288] Reliance on the stock ledger guaranteed a more certain and efficient process.[289] Allowing shareholders to prove their interests any other way would have crippled the voting process.[290] It would have also been legally impossible, as inspectors of elections had purely ministerial powers.[291] They had no judicial powers and thus were not allowed to exercise discretion in determining whether a voter was a valid shareholder or not.[292]

Today, shareholders rarely attend meetings in person. Record dates remain necessary due to the time needed to provide notice and distribute proxy materials; however, the original purpose of looking to the corporate

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284. EASTERBROOK & FISCHEL, *supra* note 57, at 36.

285. *See In re* Giant Portland Cement Co., 21 A.2d 697, 701 (Del. Ch. 1941).

286. Dennistoun v. Davis, 229 N.W. 353, 355 (Minn. 1930).

287. *See In re Giant Portland Cement Co.*, 21 A.2d at 702.

288. *See id.* at 699–700 (explaining the purpose of record dates to allow for the determination of shareholders "entitled to notice of, and to vote at" a meeting).

289. Kurz v. Holbrook, 989 A.2d 140, 164 & n.6 (Del. Ch. 2010), *aff'd in part, rev'd in part sub nom.* Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377 (Del. 2010).

290. *See* Williams v. Sterling Oil of Okla., Inc., 273 A.2d 264, 265 (Del. 1971) (noting that disenfranchisement was unfortunate but preferable to uncertain election procedure and impractical delay).

291. *Id.*

292. *Id.*

books is no longer served by actually looking to the corporate books.[293] Looking at the stock ledger of most publicly traded companies today simply reveals what anyone involved in the process already knows—that its shares are held at DTC.[294] Before the immobilization of shares, corporate law provided for direct communication between corporations and their shareholders, "and relied on the information in registered shares to do so."[295] But today corporate books no longer record all the transactions of the issuer's stock, nor do they indicate who any of the shareholders are.

As Vice Chancellor Laster observed, these responsibilities have effectively been outsourced to DTC; the stock ledger is now DTC's transfer books, which evidence their netted transactions, and the stocklist has become the Cede breakdown.[296] This is why courts have long incorporated the Cede breakdown into the stock ledger when shareholders have exercised their right to inspect corporate books and records.[297] In this sense, the vice chancellor's reasoning was perfectly on point. Recall that under the original concept of stock ownership, registration on an issuer's books established a shareholder's rights because a corporation was viewed as the custodian of its shares.[298] By incorporating the Cede breakdown into the stock ledger, he may have technically been redefining the stock ledger, but he was simply restoring its definition to include the information it was originally intended to include.

While courts should "accord to clear and definite statutory words their ordinary meaning," interpreting statutes is not merely a "dictionary-driven enterprise."[299] When interpreting statutes, courts should interpret them in a way that promotes the goal the legislature had in mind when passing the statute.[300] The definition of a stock ledger may seem clear and unambiguous to some, but that is a false perception. As the saying goes, the only constant is change. The meanings of words change over time. It is impossible to expect courts not to grant deference to historically understood meanings,

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293. *See generally Kurz*, 989 A.2d at 169 (explaining how the depository system was created and why "DTC is the world's largest securities depository").

294. *See id.* (stating that DTC holds roughly 75% of publicly traded companies' shares (quoting Larry T. Garvin, *The Changed (And Changing?) Uniform Commercial Code*, 26 FLA. ST. U. L. REV. 285, 315 (1999))).

295. Donald, *supra* note 5, at 66.

296. *Kurz*, 989 A.2d at 171.

297. *See, e.g.*, *id.* at 161–62 ("[O]ver three decades ago, when stockholders first sought stocklists after the creation of the depositary system, the Court of Chancery did not hold that the depository was the stockholder of record and the stock ledger stopped there. Our courts instead held that the Cede breakdown was part of the stock ledger . . . .").

298. *See supra* notes 100102.

299. Speiser v. Baker, 525 A.2d 1001, 1008 (Del. Ch. 1987).

300. *Id.* at 1009.

but the idea that words are immutable and thus should always be taken to mean what they were understood to mean at one stationary point in time is flawed. Here, where that idea would serve to inhibit the clear intent of the legislature, it cannot be said to be unambiguous. "When application of [a] statute . . . reveals a latent ambiguity," courts examine the law "in the context of the particular social problems it [sought] to address."[301] When a corporation needs to know who its shareholders are and the statute directs the corporation to use the stock ledger to determine their identities, but an inspection of the stock ledger does not reveal the residual claimants, the statute is clearly ambiguous.

The importance of shareholder suffrage—and its exercise by those with the beneficial interest—is clear; since the days of the first corporations it has been supported by common law, statutory law, public policy, and corporate practices. This is demonstrated by the fact that corporations have universally granted the vote to residual investors at the expense of all others.[302] It is made even clearer by the fact that when corporations are insolvent or bankrupt, shareholders lose the controlling vote because they no longer have the residual interest.[303] And it becomes irrefutable when one recognizes the fact that corporations that vest voting power—and therefore control—in beneficial owners perform better than those that do not.[304] Integrating the Cede breakdown into the stock ledger would prevent the disenfranchisement of shareholders without offending this concern.

Many may be unconvinced by this argument for integrating the Cede breakdown into the stock ledger to satisfy legislative intent. Indeed, the vice chancellor's ruling in *Kurz* was contrary to long-established precedent in every state. Courts believed it necessary to prevent every close proxy fight from leading to "protracted and costly litigation."[305] If the Cede breakdown is not to be integrated into the stock ledger, then the Delaware statute seems to clearly require the omnibus proxy; it specifically states that the ledger "shall be the only evidence as to who are the stockholders,"[306] and it has been common practice to treat DTC as the registered holder. Even for states that follow the Revised Model Business Corporation Act—such as Texas, where the statute states, "[A] corporation *may* consider the person registered as the owner of a share in the share transfer records of the

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301. MMI Invs., L.L.C. v. E. Co., 701 A.2d 50, 63 (Conn. Super. Ct. 1996) (quoting Conway v. Town of Wilton, 680 A.2d 242, 249 (Conn. 1996)).

302. *See* EASTERBROOK & FISCHEL, *supra* note 57, at 67.

303. *Id.* at 69.

304. *See id.* at 72.

305. *E.g.*, Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 668 (Del. Ch. 1988).

306. DEL. CODE ANN. tit. 8, § 219(c) (West 1974 & Supp. 2011).

corporation . . . as the owner of that share"[307]—the practice has been the same.

However, there is an alternative argument against the necessity of the omnibus proxy. Recall that the omnibus proxy is said to confer "voting authority upon bank and broker participants with respect to the shares held in their DTC accounts on the record date."[308] While a written instrument typically evidences a proxy, the writing does not establish the proxy authority.[309] Vice Chancellor Laster noted this important point in his opinion in *Kurz*.[310]

A proxy is simply a specific type of agency relationship in which one party authorizes another to act on her behalf.[311] Proxy authority can exist without the piece of paper,[312] and can be implied from the facts and relationships in a case.[313] It stands to reason that because DTC generally transfers the omnibus proxy to its participants as a matter of course, the agency relationship is implied and DTC simply issues the omnibus proxy as a matter of ministerial recordation. This is the approach Vice Chancellor Laster took when he recognized that DTC "inevitably" transferred its voting authority.[314] If an implied agency already exists between DTC and its bank and broker participants—a claim further supported by DTC's contracts with its participants—then the physical omnibus proxy is unnecessary for beneficial owners to vote.

VI. CONCLUSION

While these are practical legal arguments that may work within the existing legal framework, they are inelegant solutions at best. Indeed, the entire concept of requiring a proxy from DTC flips the notion of the traditional agency relationship on its head. When a broker executes a proxy, he is acting as an agent—in accordance with federal rules—for his customer who holds the beneficial interest, not for DTC.[315] The right to vote under

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307. TEX. BUS. ORGS. CODE ANN. § 21.201 (West 2012).

308. Wilcox et al., *supra* note 206, at 12-7.

309. Duffy v. Loft, Inc., 151 A. 223, 227 (Del. Ch.) (noting that the written instrument is merely evidence of an agency relationship), *aff'd*, 152 A. 849 (Del. 1930).

310. Kurz v. Holbrook, 989 A.2d 140, 165 (Del. Ch. 2010), *aff'd in part, rev'd in part sub nom.* Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377 (Del. 2010).

311. *Duffy*, 151 A. at 227.

312. *See id.*

313. *See, e.g.*, Davis, *supra* note 101, at 1066 (analyzing cases in which courts have inferred proxies from agreements between parties, even when the agreement was not originally intended to grant proxy authority).

314. *Kurz*, 989 A.2d at 161.

315. *See* discussion *supra* in Part IV.

corporate law is intended to belong to the residual claimant, i.e., the beneficial owner,[316] and the proxy arose to allow the residual claimant to cast a vote without having to attend a meeting.[317] As markets evolved and investors began purchasing and holding securities in nominee name through intermediaries, courts began implying proxy relationships between the beneficial owners and the brokers they held through to justify the continued reliance on recordation.[318] While courts recognized the intermediary as the record owner, they also clearly recognized that the right to vote derived from the beneficial owner.[319] The beneficial owner was the principal in the relationship, and her bank or broker was the proxy.

Share immobilization has unfortunately inverted the traditional proxy concept. The SEC proxy system, though it had the noble goal of restoring shareholder rights to beneficial owners, has helped to enshrine this inversion in practice and law. Recall that DTC does not have discretionary authority to vote the shares it holds, nor does it have any interest in the shares that it stores.[320] Even if corporations are entitled to recognize its votes under state law, DTC likely does not have the legal power to vote the shares that it holds since it does not have legal title to those shares.[321] Yet under the system as it exists today, DTC is treated as if it is the principal shareholder and the beneficial owners as DTC's proxies. The concepts underlying proxies simply do not apply to DTC, and there is no practical reason to require a proxy from DTC. This requirement is an absurd result of ad hoc modifications to the law. It is a legal artifact of a bygone legal era, stretched beyond recognition to the point that it now inhibits what it was created to empower.

The immobilization of share certificates has proven to be enormously beneficial for capital markets. However, while immobilization solved one problem, it gave rise to another by decoupling shareholder rights from the owners most interested in exercising them. The federal regulations and stock exchange rules that have been implemented to bridge the gap and

316. *See* EASTERBROOK & FISCHEL, *supra* note 57, at 68–69.

317. *See* Mackin v. Nicollet Hotel, Inc., 25 F.2d 783, 786 (8th Cir. 1928).

318. *See* Brown, *supra* note 38, at 694–95 ("Early cases routinely concluded that, by using street name accounts, beneficial owners implicitly transferred their voting rights to brokers.").

319. *See, e.g.*, *In re* Pressed Steel Car Co. of N.J., 16 F. Supp. 329, 336 (W.D. Pa. 1936) ("An equitable owner of shares who permits them to stand in his broker's name impliedly authorizes the broker to vote them; any other rule would lead to hopeless confusion.").

320. *See* Kurz v. Holbrook, 989 A.2d 140, 161 (Del. Ch. 2010), *aff'd in part, rev'd in part sub nom.* Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377 (Del. 2010).

321. *See* Dennistoun v. Davis, 229 N.W. 353, 355 (Minn. 1930) (noting that statutory regulations, corporate bylaws, and common law provide that title to shares passes to purchasers upon assignment for value).

keep shareholders involved have been inadequate, hugely inefficient, and have created numerous problems of their own.

Allowing corporations to limit their recognition of shareholders to those registered on corporate books once served an important public policy. However, this limit now restricts the very purpose it was intended to serve, and technology today has greatly reduced the burden on issuers of keeping track of beneficial owners. Continued reliance on this old tradition harms both shareholders and corporations. The right to vote is important to investors who continue to value voting stock over non-voting stock, and critically necessary to optimize corporate decision-making. Communication between corporations and their owners is also vital for the proper functioning of corporations.

Federal law recognizes these important policy concerns and has evolved to protect them. State corporate law, which was designed to support these interests, has failed to evolve with the marketplace. By blindly adhering to and codifying old common-law principles, corporate law has lost track of its foundational principle that voting rights belong to the residual claimants. This blind adherence has ironically completely subverted those principles and now threatens the integrity of the corporate form.

By continuing to rely on the old rule requiring stockholders to register with the corporation before exercising their rights, corporate law now hinders the same policy goals it originally developed to support. It is time for significant revisions to corporate codes that reconnect corporations with their shareholders. This is necessary to allow corporations to maximize their efficiency and value once again, and to improve the value of stock as an investment by reconnecting stock ownership with the voting rights that investors value so highly. However, until those revisions are made, shareholders remain at risk of being disenfranchised, public trust in corporations will continue to decrease, and the integrity of the corporate form will remain at risk. Courts should not let blind adherence to old applications of statutes threaten the vital policy goals those statutes were originally designed to promote.

David Brooks