1998

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CLOSING THE COURTS TO FELONIOUS PLAINTIFFS WHO ARE INJURED BY THEIR OWN CONDUCT: A CASE FOR CODIFYING COMMON SENSE

Michael A.L. Balboni*

Introduction

Occasionally, a story appears in the news about an individual who is injured while committing a crime. This fact alone is not necessarily newsworthy, but the event becomes notable when the criminal brings a lawsuit against the property owner, police department, and sometimes even the victim, to recover damages. Whether the lawsuit is brought by a teenager who is injured while making a bomb, a burglar who is shot while robbing an inn, or a felon who is fleeing after committing a mugging, these cases never fail to raise a public outcry. Many members of the public see these lawsuits as literally adding insult to injury. They fail to see any possible justification in either public policy or common sense to permit the claims.

Despite the fact that common sense dictates criminals and wrongdoers should be prohibited from taking advantage of the court system to further a criminal scheme, current New York State

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2. See Burglar Sues Man Who Shot Him, UNITED PRESS INT'L, Oct. 3, 1985, at 1 (“A Saratoga Springs man, who pleaded guilty to a charge of burglarizing the Greenfield Village Inn, has filed a suit for $1 million dollars because he was shot.”).
3. See Anthony Scaduto, A $4.3 Million Bullet, NEWSDAY, Apr. 6, 1993, at 5.
4. See, e.g., Anthony Scaduto, Supreme Court Lets $4.3M Award To Mugger Stand, NEWSDAY, Nov. 30, 1993, at 6 (McCummin’s “victim, Jerome Sandusky, who was 71 at the time of the attack, says he is ‘indignant.’ It is so ludicrous, and it sends such a terrible message. It proves once again that crime does pay.”).
5. This thought is perhaps best articulated in Justice Brandeis' dissent in Olmstead v. United States:

The court’s aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant’s wrong. It is denied in order to maintain respect for the law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination.

277 U.S. 438, 484 (1928).
law permits these lawsuits. Furthermore, certain legislative attempts by the New York State Legislature to prohibit these suits have been thus far unsuccessful. 

Nevertheless, an examination of New York State’s jurisprudence reveals a definitive rejection of such lawsuits and, arguably, provides the foundation for declaring a broad public policy to prohibit such suits. Part I of this Article examines New York statutes which limit criminals’ rights. Part II describes state cases which have granted, and those that have denied, recovery to wrongdoers. Part III outlines proposed legislation which would have prevented lawsuits filed by felonious plaintiffs, and argues why those bills should have been passed. Finally, this Article concludes that the state legislature must take steps to ensure that wrongdoers do not use the court system to benefit from their crimes.

I. New York Statutory Law

New York State law is replete with examples of civil alienation wherein convicted felons’ rights and privileges are restricted. Below are various examples, along with their jurisprudential interpretations, which illustrate this concept.

A. Pari Delicto

In the law of contracts, under the doctrine of “Pari Delicto,” courts will not enforce contracts which require the parties to prove an illegal transaction in order to make out their case. 

This principle has been consistently followed by the New York State Court of Appeals. In Spivak v. Sachs, the plaintiff was barred from suing for services rendered because of an illegal contract to practice law. Likewise, in McConnell v. Commonwealth Pictures Corporation, the court prohibited the plaintiff from enforcing a legal contract because, in performing the terms of the contract, he would have had to commit several acts of bribery.
B. The "Unworthy Heir"

In 1994, the Legislature enacted Section 4-1.6 of the Estates, Powers, and Trust Law, which prohibits the taking of funds from a joint bank account by a wrongdoer or "unworthy heir." The "unworthy heir" doctrine, long the caselaw of New York, prohibits an individual, convicted of murdering a benefactor, from profiting from the crime.\(^{12}\) Though the doctrine was first enunciated in 1889 by the New York Court of Appeals in *Riggs v. Palmer,\(^{13}\)* the 1994 legislation marked the first time that this doctrine had been codified. The legislative intent underlying the bill was to close a loophole in the law which permitted a joint tenant who murdered the other joint tenant from taking the corpus of the account.\(^{14}\) The effect of this amendment was to disinherit an individual convicted of murdering his testamentary benefactor.

C. Insurance Law

The general principle against criminals profiting from their crimes is continued in the New York State Insurance Law. Section 5103 permits insurers to deny coverage to individuals if their injuries were precipitated by participation in a felonious act.\(^{15}\) This principle has been upheld by courts in this state.\(^{16}\)

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13. See id.
14. The author of this article was also the draftsman and sponsor of this bill. At the time, the author had been appointed by the Queens County Surrogate to represent the interest of an infant beneficiary in a 1992 Queens County case. See In re Strouse, File No. 1150-1979 (Queens Sur. Ct. 1993), wherein the son of a Testrix had killed his mother. The murdering beneficiary petitioned the court for the proceeds of a joint bank account. The court was unable to deny the payment of the proceeds of such account to the beneficiary, who was a joint tenant of the account, since the joint bank account fell outside the terms of the decedent's will. In reaching its decision, the court deferred to the statutory provisions of the Banking Law and permitted the payment of the son's moiety, or one half of the account. The 1994 legislation was drafted and enacted in response to this loophole. See N.Y. BANK LAW § 675 (McKinney 1971 & Supp. 1998).
15. N.Y. INS. LAW § 5103 (b)(3) (McKinney 1985). Specifically this statute states that "[a]n insurer may exclude from coverage required by subsection (a) hereof a person who [i]s injured while he is committing an act which would constitute a felony . . . ."
D. Civil Death

Conviction of a felony renders a person unable to participate in certain civic activities. This result is referred to by statute as "civil death." Section 79-a of the Civil Rights Law provides that a sentence of imprisonment for life renders the person "civilly dead."17 This section embodies New York State’s public policy of depriving convicted felons of civil rights as a part of the penal scheme.18

Furthermore, section 60.30 of the Penal Law provides that a court may decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any civil penalty.19 In addition, the law states that any appropriate order exercising such authority may be included as part of the judgment of conviction.20 Similarly, section 5-106 of the Election Law strips felons of their voting rights.21

Convicted criminals can also lose their property. The Civil Practice Law and Rules ("CPLR") provides that the profits of a crime are subject to forfeiture.22

These provisions evidence the New York State Legislature’s intent to deprive convicted criminals of certain rights, in addition to their liberty (i.e., the right to vote, marry, obtain certain licenses, or hold certain jobs). The provisions of the Insurance Law and Estates Powers and Trusts Law cited above recognize that individuals who participate in criminal acts should not be able to gain from those acts. The laws in our state clearly establish that those who choose to break the law are not entitled to its full protection. Why, then, are convicted felons being allowed to utilize our court system to sue their victims for injuries sustained during the commission of a crime?

17. This section specifically refers to marriage contracts.
19. See N.Y. PENAL LAW § 60.30 (McKinney 1997).
20. N.Y. PENAL LAW § 60.30 (McKinney 1998).
21. No person who has been convicted of a felony pursuant to the laws of this state, shall have the right to register for or vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the governor, or his maximum sentence of imprisonment has expired, or he has been discharged from parole.
N.Y. ELEC. LAW § 5-106 (McKinney 1978).
22. N.Y. C.P.L.R. § 1311(1) (McKinney 1985) (“A civil action may be commenced by the appropriate claiming authority against a criminal defendant to recover the property which constitutes the proceeds of a crime . . . .”). This legislation has survived constitutional challenges. See Short Stop Indus. Catering Corp. v. City of New York, 127 Misc. 2d. 363, 368, 485 N.Y.S.2d 921, 925 (N.Y. Sup. Ct. 1985).
E. **A Step Backward: The Abolishment of the “Assumption of Risk”**

A significant change to New York’s tort system came from the enactment of Section 1411 of the CPLR in 1975, which adopted the doctrine of pure comparative negligence. Prior to 1975, the standard was one of contributory negligence. Under this standard, plaintiffs were denied recovery for a cognizable tort if they had in any way contributed to their injury. After 1975, however, negligent plaintiffs were no longer barred from seeking compensation. Rather, their conduct is “compared” to the conduct of the defendant, and a percentage of fault is assigned. Thus, rather than prohibit the criminal from getting to the courthouse, the current law requires that the conduct of criminal plaintiffs must be compared to that of the defendant. The law, however, fails to distinguish between plaintiffs who innocently are injured as a result of negligence, and plaintiffs who place themselves in harm’s way by committing a criminal act.

In addition to abolishing the rule of contributory negligence, the doctrine of “assumption of risk” was also abolished. This doctrine prevented injured people from receiving compensation for their injuries if they had voluntarily exposed themselves to known dangers. The effect of CPLR section 1411 is that there is no preclusion of suit in New York State based on plaintiffs’ actions, only a diminished recovery proportionate to the plaintiffs’ percentage of fault.

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23. *N.Y. C.P.L.R.* § 1411 (McKinney 1997) states:

In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or the assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.

*Id.* Companion sections of the New York Civil Practice Law and Rules sections 1401 and 1402, enacted around the same time as section 1411, also abolished the common-law rules of contribution and permitted co-defendants to seek contribution from other defendants based upon the degree to which each of them had contributed to the plaintiff’s injury. These sections essentially codified decisions of the Court of Appeals that had rejected the common-law rules of contribution, on the ground that they depended upon outmoded notions that served as arbitrary or artificial obstacles to fair distribution of liability.

24. *See Black’s Law Dictionary* 123 (6th ed. 1990). Assumption of risk is defined as containing four elements: 1) the plaintiff has knowledge of facts constituting a dangerous condition; 2) he knows the condition is dangerous; 3) he appreciates the nature or extent of the danger; and 4) he voluntarily exposes himself to that danger.
CPLR section 1411 fails to address those cases in which a criminal is injured while committing a felony. This section fails to recognize the cost, time, and effort that municipalities, businesses, and individuals must expend to defend these suits. The irony of the current CPLR section 1411 and its failure to carve out an exception for felonious plaintiffs is that it runs contrary to the statutory intent referenced heretofore. The New York Court of Appeals has criticized it for this very reason.\(^{25}\)

**II. Relevant Case Law**

**A. New York Case Law**

Unlike New York’s statutory law, New York’s case law has consistently held that a criminal suffers his or her injuries without recourse or redress by the state’s court system. In fact, the New York Court of Appeal’s declaration on this point is so clear that it establishes a mandate for this policy.\(^{26}\)

1. **Cases Denying Recovery**

Case law, with few exceptions, has consistently prohibited an individual from taking advantage of his or her wrong. In order to justify denial of relief to the criminal plaintiff, however, the trend in these cases is to require that the criminal act be both serious and the proximate cause of the plaintiff’s injury. Recovery may be permitted, however, if, at the time of injury, the plaintiff engaged in an act which violated the law but did not proximately contribute to his injury.\(^{27}\)

a. **Riggs v. Palmer**

In *Riggs v. Palmer*,\(^ {28} \) the Court of Appeals enunciated for the first time the concept of an “unworthy heir.”\(^ {29} \) Francis Palmer’s will bequeathed a large portion of his estate to his grandson, Elmer Palmer. Elmer, who knew of the provisions in the will, wanted to prevent his grandfather from changing these provisions in order “to obtain the speedy enjoyment and immediate possession of his


\(^{26}\) See id.

\(^{27}\) See generally 74 Am. Jur. 2d Torts § 46 (1974).

\(^{28}\) 115 N.Y. 506, 22 N.E. 188 (1889).

\(^{29}\) Id. at 513, 22 N.E. at 190 (stating that an heir “may not vest himself with title by crime.”).
property." Thus, he poisoned his grandfather to death and then attempted to take possession of the property.

The court acknowledged that there were no clear statutes on point specifically prohibiting a person from profiting from his crime. The court rejected, however, the notion that the absence of direction signaled an intention by lawmakers to permit a murdering beneficiary to profit from his crime as a result of strict adherence to the terms of a will. The Court of Appeals held that the grandson could not recover because he should not be allowed to profit from his own crime. They reasoned that this aphorism is dictated by public policy and has its foundation in law administered in all civilized countries.

b. Carr v. Hoy

Carr v. Hoy involved the alleged conversion by the defendant, a sheriff, of funds that the plaintiff had collected from photographers taking pictures of nude models. In exchange for receiving this money, the sheriff agreed not to prosecute the photographers for violations of the penal code. The plaintiff pleaded guilty to a charge of violating public decency. The Court of Appeals held that the money the plaintiff sought to recover was the fruit of an admitted crime and "no court should be required to serve as paymaster of the wages of crime."

c. Reno v. D'Javid

In Reno v. D'Javid, plaintiff Margaret Reno, upon whom the defendant physician had performed an abortion at her request in 1970, sought damages for injuries sustained as a result of alleged medical malpractice, breach of warranty, and assault. The Appellate Division concluded that the abortion was an illegal operative procedure on the date performed. The plaintiff was also guilty of a

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30. Id. at 508, 22 N.E. at 189.
31. Mindful of the absence of any statutory authority, the court held, "The writers of laws do not always express their intention perfectly, but either exceed it or fall short of it, so that judges are to collect it from probable or rational conjectures only. This is called 'rational interpretation' . . . ." Id. at 509, 22 N.E. at 189.
32. See id. at 514.
33. See id. at 511, 22 N.E. at 190.
34. 2 N.Y.2d 185, 139 N.E.2d 531, 158 N.Y.S.2d 572 (1957).
35. Id. at 187, 139 N.E.2d at 533, 158 N.Y.S.2d at 574 (1957) (citing Stone v. Freeman, 298 N.Y. 268, 271, 82 N.E.2d 571, 572 (1948)).
crime, and having participated in an illegal act, she could not profit therefrom. Upon review, the Court of Appeals agreed.\textsuperscript{37}

d. Barker v. Kallash

In \textit{Barker v. Kallash},\textsuperscript{38} the Court of Appeals held that a fifteen-year-old plaintiff, injured while constructing a "pipe bomb," could not maintain an action against a nine-year-old defendant who allegedly sold the firecrackers from which the gun powder was extracted.

The court stated that a plaintiff whose injuries were the direct result of the commission of serious criminal conduct is not entitled to recover.\textsuperscript{39} The court discussed that constructing a bomb, not just handling firecrackers, is certainly a dangerous activity, not only to the maker, but also to the public at large.\textsuperscript{40} Recovery was denied, however, not because the plaintiff's negligence contributed to his injury, but because the public policy of New York State generally denies judicial relief to those injured in the course of committing a serious criminal act.\textsuperscript{41}

When the plaintiff's injury is a direct result of a knowing and intentional participation in a criminal act, the court ruled that he cannot then seek compensation for the loss, particularly if the criminal act is judged to be of a serious nature. This rule "involves preclusion of recovery at the very threshold of the plaintiff's application for judicial relief."\textsuperscript{42}

The \textit{Barker} court distinguished between "lawful activities regulated by statute," which are in the purview of CPLR section 1411, and "activities which are entirely prohibited by law."\textsuperscript{43} The Court of Appeals also specifically rejected the argument that the CPLR's

\begin{itemize}
  \item \textsuperscript{37} The Court of Appeals stated that: \\
        "[t]he more grievous violation at issue is not that of the statute prohibiting abortions, itself the object of a changing legislative view, but of the paramount public policy imperative that law, whatever its content at a given time or for however limited a period, be obeyed."
  
  \textit{Id.}
  
  
  \textsuperscript{39} \textit{Id.} at 26, 468 N.E.2d at 42, 479 N.Y.S.2d at 204.
  
  \textsuperscript{40} \textit{Id.}
  
  \textsuperscript{41} The \textit{Barker} court noted, however, that a complaint should not be dismissed merely because the plaintiff's injuries are occasioned by a criminal act. \textit{Id.} at 25, 468 N.E.2d at 41, 479 N.Y.S.2d at 203.
  
  \textsuperscript{42} \textit{Id.} at 26, 468 N.E.2d at 42, 479 N.Y.S.2d at 204.
  
  \textsuperscript{43} \textit{Id.} at 24, 468 N.E.2d at 41, 479 N.Y.S.2d at 202. In reference to this second type of activity, the \textit{Barker} court stated that "the courts will not entertain the suit if the plaintiff's conduct constituted a serious violation of the law and the injury he seeks recovery were the direct result of that violation." \textit{Id.}
comparative negligence scheme can abrogate public policy. According to New York case law, limiting the expanse and scope of CPLR section 1411 is permissible as long as it is consistent with public policy.

e. Smith v. Guli

In Smith v. Guli, defendant Guli, an underage drinker, drove an automobile in which plaintiff Smith was injured when the car hit a tree. In addition to suing Guli, Smith also sued Ryan's Tavern in the city of Rochester, based upon New York's Dram Shop Act. The tavern had served alcoholic beverages to Guli, knowing that he was under the influence of alcohol or intoxicated. Guli disclosed that he was seventeen and did not possess a driver's license at the time of the accident. After drinking all evening, defendant and his friends picked up plaintiff and proceeded to purchase and consume more beer. They visited two more bars, the last being Ryan's, where they consumed additional alcohol. Guli admitted being intoxicated at the time of the accident.

Ryan's Tavern commenced a third party action seeking contribution from the grocery store which had also sold Guli alcoholic beverages. The store, relying heavily on the rationale in Barker, maintained that the tavern was precluded from maintaining the third party action since its own wrongful and illegal conduct was in direct violation of fundamental New York public policy.

The court found that the grocery store misconstrued the impact of Barker in failing to appreciate the distinction between an action to recover damages and an action to apportion liability among tortfeasors. The court found that the grocery store's argument

44. See id. at 29, 468 N.E.2d at 43, 479 N.Y.S.2d at 206 ("[C]ourts should not lend assistance to one who seeks compensation under the law for injuries resulting from his own acts when they involve a substantial violation of the law.").

45. Id.


48. See 484 N.Y.S. 2d 741.

49. Id.

50. Id.

51. Id.

52. Id.

53. Id.

54. The court held that "[p]ublic policy considerations, that one may not profit from his own wrong, do not apply to third-party actions involving contribution between joint, concurrent, or successive tortfeasors." Smith, 106 A.D.2d at 122, 484 N.Y.S.2d at 742.
was not persuasive, and held that the tavern’s illegal conduct did not preclude recovery from a contributing tortfeasor.\(^5\)

\(f\). LaPage v. Smith

In *LaPage v. Smith*,\(^5\) the decedent’s estate brought suit against a driver who allegedly had bumped the decedent’s car from behind, causing the accident and the decedent’s death. At trial, evidence was presented which showed that the decedent had been intoxicated and was racing the defendant’s car. Witnesses at the trial testified that both cars were traveling at over 100 miles per hour. The Appellate Division dismissed the plaintiff’s action, ruling that the decedent’s criminal conduct prohibited recovery.\(^5\)

\(g\). City of New York v. Corwen

In *City of New York v. Corwen*,\(^5\) the city brought an action alleging that landlords’ payments to an employee of the city’s Department of General Services’ Bureau of Leasing and Space Management were bribes, and that the city was injured by these illegal payments.\(^5\) In this case, the court found the doctrine of comparative negligence to be inapplicable to a complaint alleging bribery. Because bribery is a felony, the court held, such a “serious violation of law” renders the doctrine of comparative negligence immaterial.\(^6\)

\(h\). Manning v. Brown

In *Manning v. Brown*,\(^6\) the Court of Appeals once again relied on *Barker* in reaching its decision.\(^6\) This case involved two high school students, neither one possessing a driver’s license, who stole

\(5\). See id. at 123, 484 N.Y.S.2d at 743.


\(5\). See id. at 833, 563 N.Y.S.2d at 175 (“In our view, such hazardous illegal conduct falls clearly within the ambit of the rules as outlined in Barker v. Kallash . . . .”).


\(5\). See id.

\(5\). See id. at 217, 565 N.Y.S.2d at 459. Specifically, the Supreme Court held that “contributory negligence was not available as defense to landlords who had committed intentional tort.” *Id.* at 212, 565 N.Y.S.2d at 457. Interestingly, the court also found that the landlords who had paid bribes to the city’s employee may be able to use an extortion defense as an affirmative defense in the event that they are able to establish they were victims of the city employee’s extortion. *See id.* at 218, 565 N.Y.S.2d at 460. See N.Y. Penal Law §§ 155.05, subd.2(e)(viii), 200.05 (McKinney 1997), which states that “[o]ne who is victimized by extortion will not be held civilly liable for amounts of payment.”


\(6\). See id. at 121, 689 N.E.2d 1382, 667 N.Y.S.2d at 338.
a car and proceeded to joy-ride. The car in which they were driving eventually hit a pole, and one of the students was injured.

The primary issue facing the court was whether a plaintiff who knowingly participates in a crime is precluded from recovering for injuries resulting from that conduct. The court had to determine if the crime was of such a serious nature that recovery would be prohibited. In reaching its determination, the court revisited *Barker*. The court concluded that the crime of joy-riding was so serious that it precluded the guilty plaintiff from recovering for his injuries.

2. Cases Allowing Recovery

a. Arbegast v. Board of Education

In the year following its decision in *Barker*, the New York Court of Appeals stated in *Arbegast v. Board of Education* that CPLR section 1411 does not require comparison of negligence, but rather comparison of conduct which, for whatever reason, the law deems blameworthy. The court's interpretation of CPLR section 1411 was that the culpable conduct attributable to the claimant be compared with the total culpable conduct that caused the injury.

The Court of Appeals found that the comparative negligence statute section 1411, leaves it "unclear whether express assumption of risk is subject to comparison." The Court of Appeals then concluded that, "CPLR 1411 requires diminishment of damages in the

63. See id. at 119, 689 N.E.2d 1382, 667 N.Y.S.2d at 337.
64. See id.
65. See id. at 120, 689 N.E.2d 1382, 667 N.Y.S.2d at 338.
66. See id. at 120, 689 N.E.2d 1382, 667 N.Y.S.2d at 338.
67. The court had "distinguished between conduct that is regulated by statute and activities that are entirely prohibited by law." Id. at 121, 689 N.E.2d 1382, 667 N.Y.S.2d at 338. As a matter of public policy, conduct that constitutes a serious violation of law and directly results in injury, is a bar to recovery. See id.
68. The court stated that joyriding is usually: accompanied by reckless or excessively fast driving, posing a threat to innocent third parties. Such criminal conduct which puts the public at grave risk constitutes a serious violation. We therefore conclude that plaintiff's active participation in joy-riding in the circumstances presented here are such a serious violation of law as to preclude recovery for injuries stemming directly from the violation . . . .

Id.
70. See id. at 168, 480 N.E.2d at 371, 490 N.Y.S.2d at 756 ("Comparative causation is, therefore, the more accurate description of the process, as is evident . . . from the wording of CPLR § 1411.")
71. See id.
72. Id. at 169, 480 N.E.2d at 371, 490 N.Y.S.2d at 757.
case of an implied assumption of risk, but... does not foreclose a complete defense that by express consent of the injured party no duty exists and, therefore, no recovery may be had. The court ultimately ruled that in cases in which serious crime has not been committed, the comparable negligence law in CPLR section 1411 applies.

b. Izzo v. Manhattan Medical Group

In Izzo v. Manhattan Medical Group, the plaintiff alleged that the death of her husband was caused by acute drug intoxication from his ingestion of controlled substances. Among the defendants were seven physicians, two nurses, and twelve pharmacies, including Glen Rock Drugs. Plaintiff alleged that the negligence of the drug store in the filling of a single prescription caused or contributed to the decedent's addiction and, ultimately, his death. Glen Rock Drugs had dispensed Emprin Number 3 to the decedent pursuant to a union prescription form, which bore the dentist's signature, alleged by the plaintiff to have been forged by the decedent. The form did not include the mechanically imprinted name of the prescribing practitioner. The decedent, who had allegedly become physically dependent on drugs, died four months later.

Glen Rock moved for summary judgment dismissing the complaint, arguing that it was not negligent in filling a single prescription. The Court determined that the appeal presented other questions, such as whether, because of the forgery, the decedent's estate and his survivors could avail themselves of this cause of action.

The court recognized that the basic principle that one may not profit from his own wrong has been extended to tort actions seeking compensation for injuries resulting from the plaintiff's own criminal activities of a serious nature. However, the court concluded that the principle should not be applied in the instant case where the decedent was so addicted to drugs that he lacked the capacity to realize that forging prescriptions was wrong.

73. Id. at 170, 480 N.E.2d at 371-72, 490 N.Y.S.2d at 757-58.
74. See id. at 170, 480 N.E.2d at 371-72, 490 N.Y.S.2d at 757-58.
76. See 560 N.Y.S. 2d 645.
77. See id. at 18, 560 N.Y.S.2d at 647.
78. See id. at 18, 560 N.Y.S.2d at 647.
B. Survey of Other States

A review of other states’ court decisions shows a mixed result: some states strictly adhere to the doctrine of contributory negligence when the plaintiff commits a criminal act, while others permit the suit but apply a comparative scheme. In this latter treatment, however, the suit is permitted based upon other provisions of that state’s laws, such as the state’s constitution.

1. Ashmore v. Cleanweld Products, Inc.

The issue presented in *Ashmore v. Cleanweld* was whether Oregon’s public policy barred the plaintiff from suing a manufacturer and retailer for injuries he sustained as a result of the premature explosion of a bomb he was making while using defendant’s product. The Court of Appeals of Oregon, citing the Restatement Second of Torts, held that the plaintiff was not barred. The court acknowledged the defendant’s argument that the plaintiff’s activities violated public policy. However, the court ultimately held that a provision in the Oregon Constitution may allow even a criminal to seek damages for his personal injuries. The New York State Constitution does not have a provision similar to this.

2. Siess v. Layton

The question in *Siess v. Layton* was whether a person under the age of sixteen years, and thereby not qualified to obtain a motor vehicle operator’s license in Missouri, could maintain a cause of action for injuries sustained while operating a vehicle on a public highway. The court noted that no statute purported to make such violation (driving without a license on a public highway) a disqualification to sue for injuries sustained in the course of the violation. The court held that the minor was not barred since the mere failure to have a driver’s license does not establish a causal connection between the operation of the vehicle and an injury. The court did not address whether driving without a valid license was a serious

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79. 672 P.2d 1230 (Or. 1983).
80. See id. at 1231.
81. See 66 Or. App. 65, 672 P.2d 1231.
82. See id.
83. See id. (“Barring a person who may have violated a criminal statute from seeking civil damages for personal injuries may violate Article I, section 10, of the Oregon Constitution, which provides in relevant part . . . [E]very man shall have remedy by due course of law for injury done him in his person, property or reputation.”).
84. 417 S.W.2d 6 (Mo. 1967).
85. See id. at 7.
violation. In deciding this case, the court chose to ignore the question of "seriousness," and instead focused on causation in order to permit recovery.\textsuperscript{86}

3. Lord v. Fogcutter Bar

In \textit{Lord v. Fogcutter Bar},\textsuperscript{87} plaintiff Lord spent several hours at the Fogcutter Bar, where the bartender served him more than fourteen drinks over a nine-hour period. Lord left the bar with a woman whom he subsequently kidnapped, raped, and assaulted. While serving a thirty-year sentence for those crimes, he brought an action against the Fogcutter and its bartender, alleging violations of his federal constitutional rights and Alaska's Dram Shop Statute.

The lower court granted Fogcutter's motion for summary judgment on the ground that the suit was frivolous. The Supreme Court of Alaska affirmed, not because the suit was frivolous, but because Lord's criminal conduct precluded his recovery for any cause of action based on his criminal conduct. The court held that the dram shop statute was not intended to protect persons from the consequences of their own intentional, criminal conduct.\textsuperscript{88}


In \textit{Adkinson v. Rossi Arms Co.},\textsuperscript{89} the same Alaska court produced a similar result. It held that an assailant convicted of manslaughter for shooting and killing his victim with a shotgun had no claim for relief against either the manufacturer or the seller of the gun for direct personal loss alleged to have resulted from the shooting.\textsuperscript{90}

5. Flanagan v. Baker

In \textit{Flanagan v. Baker},\textsuperscript{91} the Appeals Court of Massachusetts was presented with facts almost identical to those presented to the New

\textsuperscript{86} See id. at 8.
\textsuperscript{87} 813 P.2d 660 (Alaska 1991).
\textsuperscript{88} In doing so, the court stated that "[c]ourts have consistently refused to aid those whose claims are based upon their own illegal acts. This principle is grounded in public policy and precludes recovery at the 'very threshold of the plaintiff's application for judicial relief.'" \textit{Id.} at 663 (citation omitted).
\textsuperscript{89} 659 P.2d 1236 (Alaska 1983).
\textsuperscript{90} In June 1986, the Alaska Legislature enacted a statute prohibiting a convicted felon from suing for personal damages resulting from the commission of the felony for which he or she had been convicted. \textit{Alaska Stat.} \S 09.17.030 (Michie 1997).
\textsuperscript{91} 621 N.E.2d 1190 (Mass. 1993).
York Court of Appeals in Barker. However, the Flanagan court declined to follow the opinion of the New York Court of Appeals in Barker.

In Flanagan, a fourteen-year-old boy, was injured when the pipe bomb, which he was making with gunpowder obtained from firecrackers, exploded at his friend’s house. The boy brought a negligence action against the friend and his parents. The court examined a state statute which expressly provided that the “violation of . . . [a criminal] statute, ordinance or regulation shall not as a matter of law and for that reason alone, serve to bar a plaintiff from recovery.” The court stated that although the statute seems to comprehend all illegal conduct, it could also be construed as allowing for some exceptions.

The court then decided not to bar the plaintiff from recovery based merely on public policy reasons. This case, though on point factually, interpreted Massachusetts statutes to provide for a broader protection than New York law provides.

III. The Need for Legislative Reform in New York State

Every year, in what has become an annual ritual in futility, a number of bills are introduced in the New York State Legislature that attempt either to provide protection for “good samaritans,” limit the rights of criminals to sue, or exonerate crime victims from tort liability. Each year, these bills, which are intended to

92. See id. at 1192-93.
93. See id. at 1191.
94. MASS. GEN. LAWS ch. 231, § 85 (1997).
95. Flanagan, 621 N.E.2d at 1192.
96. See id. at 1193.
97.

Even were we to conclude that § 85 allows actions by certain lawbreakers to be defeated for public policy reasons, we would not preclude [plaintiff] from recovery for his injuries on that basis. Such a preclusion would itself offend a countervailing public policy to the extent it could also protect from possible liability those persons from whom the firecrackers were obtained.

Id. at 1193.
limit the access of criminals to use the justice system, die in com-
mittee or pass one house of the legislature but not the other.\textsuperscript{101}

Many of the proposed measures have a long history. In 1993,
Assemblyman Dov Hikind introduced a bill\textsuperscript{102} which would bar a
violent criminal perpetrator from bringing a civil damage lawsuit
against his victim when the victim’s resistance to the criminal en-
counter injured the perpetrator. Similarly, in 1992, Assemblyman
Kelleher introduced a bill\textsuperscript{103} to prohibit an individual from bringing
a cause of action stemming from injuries sustained during the com-
misson of a crime. Both of these bills died in committee. The rea-
sons why are not documented.\textsuperscript{104}

Lastly, a 1993 bill introduced by Senator Dean Skelos\textsuperscript{105} pro-
posed to amend the CPLR to restore the concept of assumption of
risk in cases where individuals are injured during the course of a
felony for which they are subsequently convicted. Known as the
“Culpable Crime Bill,” this measure received strident and adamant
criticism, such as a memorandum in opposition filed by the New
York State Trial Lawyers Association (“NYSTL”) calling the legis-
lation “legally indefensible, morally repugnant, and dangerous to
society.”\textsuperscript{106}

Essentially, the NYSTL memorandum in opposition attacks on
three points. Point one argues that this type of a bill would give
legitimacy to wrongful acts, such as setting up a spring gun or other
trap for unwary burglars. Point two contends that the bill is “dan-
gerous” because its enactment will permit police organizations to
assault criminal suspects without fear of retribution. Lastly, point
three argues that the current system of comparative negligence
permits a jury to return a defendant’s verdict by reason of apor-
tionment of the culpable conduct. All three points, however, fail to
make a convincing argument that a law restricting the rights of fe-
lonious plaintiffs would be dangerous.

\textsuperscript{101} As of the date of this article, all of the above mentioned sponsors have re-
introduced these bills with the exception of Assemblyman Kelleher, who is no longer
a member of the Assembly.
\textsuperscript{102} A. 2378, Reg. Sess. (N.Y. 1993).
\textsuperscript{104} Records and transcripts are only provided for the debate of a bill on the floor
of the Legislature. Commentary by legislators during discussion of a bill in Commit-
tee is conducted informally without any record. \textit{See Rules of the N.Y.S. Senate,
Rule VII, §§ 3-5 (1997).}
\textsuperscript{106} New York State Trial Lawyers Association, Inc., \textit{Memorandum in Opposition
to Senate 7652, Skelos, and Assembly 10617, Weisenberg}, (May 11, 1992) (on file with
author).
The first argument fails to recognize that civil liability is only one facet of the legal responsibility that any individual faces. In addition to civil liability, there is criminal liability. Common sense dictates that the threat of a lengthy prison term is much more of a deterrent to a property owner than a civil lawsuit. It is difficult to imagine that simply by eliminating the threat of a civil lawsuit, ordinary citizens will begin to set traps or use deadly force, even in self-defense, recklessly or casually.

Point two fails to account for the development of federal law and the realities of municipal indemnification. No one can argue that police brutality should not be deterred and punished. The most effective way to do this, however, is by criminal prosecution and conviction, not by civil lawsuits brought in state court. Many jurisdictions in New York State treat police brutality as falling within a municipality's respondeat superior liability. Indeed, some jurisdictions have even enacted legislation to indemnify the police officer for punitive damage awards. Therefore, there currently is little or no personal financial threat against the individual police officer wrongdoer. Furthermore, abolishing state civil suits will not immunize officers from civil liability because police officers also face liability under the Federal Civil Rights Law.

108. See, e.g., N.Y. GEN. MUN. LAW § 50-L (McKinney 1986):

[T]he County of Nassau shall provide for the defense of any civil action or proceeding brought against a duly appointed police officer of the Nassau County police department and shall indemnify and save harmless such police officer from any judgement of a court of competent jurisdiction whenever such action, proceeding or judgement is for damages, including punitive or exemplary damages arising out of a negligent act or other tort of such police officer committed while in the proper discharge of his duties and within the scope of his employment.

Id.


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

Id.; see also Monnell v. Department of Social Services of City of New York, 436 U.S. 658, 691 (1978), wherein female employees of the Department of Social Services of New York City challenged employment policies of the department which required pregnant women to take unpaid leave of absences before a medical reason justified a regular leave of absence. The court held that local governments could be classified as persons under the provisions of section 1983, and that while local governments could
Finally, point three ignores the cost associated with trying these cases for municipalities, insurance companies, school districts, individuals, and the medical community.

Dissimilar treatment of convicted felons in our society is consistent with our penal scheme as well as society's expectation of fairness. Under the current provisions of the CPLR, however, the law fails to provide any distinction between the non-criminal and criminal plaintiff. The ability of a felon to step outside the boundaries of society to commit a crime, and then step back in to use the court system to obtain damages, erodes society's confidence in the judicial process. Individuals expect to be treated fairly under law. An individual, by committing the criminal act, places himself or herself within a separate category and therefore should not be afforded society's protections.

New York State should carve out an exception to CPLR section 1411 and exclude plaintiffs who commit crimes of a serious nature. The assumption of risk doctrine will act to bar the plaintiff from recovering for an injury resulting from voluntary exposure to a known and appreciated danger, such as the commission of a criminal act. This doctrine appears to have been consistently applied by many different courts and laws. Re-enacting the doctrine would save municipalities and society the financial burdens of defending the lawsuits, as well as promote the public's perception of our judicial system.

Conclusion

The foregoing survey of cases and statutes demonstrates that a variety of jurisdictions have arrived at the same conclusion, namely, that individuals who commit crimes forfeit certain protections of the law. In addition, civil remedies should not be available to individuals who have been injured during the commission of crime.

not be liable under the doctrine of respondeat superior, they could be held liable when constitutional deprivation resulting from government custom arises.

The United States Supreme Court has specifically held that section 1983 actions are meant to punish the officer personally, so as to act as a deterrent against egregious behavior. Therefore, elimination of state sponsored negligence actions will not abolish existing deterrents. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267, 271 (1981), wherein the Supreme Court held that a municipality and not the individual defendant, was immune from punitive damages under 42 U.S.C. § 1983. Id. at 271. The court reasoned that a deterrence to constitutional violations would adequately be accomplished by allowing punitive damage awards directly against individuals responsible for the violations. Id. at 270.
Against the backdrop of public outrage, decisional law, logic, and common sense, the state legislature should act to eliminate these types of lawsuits. This common sense codification by the New York State Legislature of the holding in *Barker v. Kallash* is long overdue.

As Justice Brandeis once stated, convicted criminals should be denied the court's aid “in order to maintain respect for the law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination.”\textsuperscript{110}

\textsuperscript{110} Olmstead v. United States, 277 U.S. 438, 484 (1928).
“REASONABLE ACCOMMODATION” UNDER THE FEDERAL FAIR HOUSING AMENDMENTS ACT

Robert L. Schonfeld*

Introduction

Congress amended the Federal Fair Housing Amendments Act (‘Fair Housing Act’) in 1988 “to end the unnecessary exclusion of persons with handicaps from the American mainstream.” To that end, Congress defined prohibited housing discrimination against people with disabilities as, among other actions, “a refusal to make reasonable accommodation in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.”

As the United States Supreme Court has held, the Fair Housing Act has a “broad and inclusive” compass requiring a “generous construction.” However, many federal courts have narrowly interpreted the “reasonable accommodation” clause of the Fair Housing Act in conflict with both Congressional intent and the Supreme


The author gratefully acknowledges the assistance of Beth Pepper and Seth P. Stein on this article.


Court's mandate that the statute be given a "generous construction." Some courts have interpreted the terms "necessary" and "equal opportunity" in a manner that nullifies the "reasonable accommodation" clause of the statute. These court decisions have permitted landlords and municipalities to exclude people with disabilities from housing.

This Article examines recent Federal court decisions interpreting the "reasonable accommodation" clause of the Fair Housing Act and proposes an interpretation of the clause that is consistent with both the language of the statute and the intent of its drafters. Part I explores the legislative history of the Fair Housing Act and, in particular, the "reasonable accommodation" clause of the statute. This Part also examines the 1995 United States Supreme Court decision City of Edmonds v. Oxford House, Inc. which explains how the statute should be interpreted as well as the Supreme Court's decision interpreting the phrase "reasonable accommodation." As this Part demonstrates, both Congress and the Supreme Court intended the statute be used to promote housing for people with disabilities and not be used as a barrier to housing. In addition, they intended that a "reasonable accommodation" be made except where the accommodation would constitute a substantial hardship, undue burden, or fundamental alteration of a program.

Part II examines the provisions of the Federal Fair Housing Act and the way they are used to attack housing discrimination against people with disabilities. This Part discusses in detail the "reasonable accommodation" clause of the statute and explores the earlier federal district court cases interpreting the "reasonable accommodation" standard.

Part III discusses some of the issues from recent cases brought under the "reasonable accommodation" prong of the statute. This Part examines whether people with disabilities and housing providers must exhaust administrative remedies before resorting to litigation, as well as which parties — people with disabilities and housing providers or municipalities and landlords — have the burden of proof in a "reasonable accommodation" case. This Part also explores the recent narrow Federal court interpretations of the terms "reasonable," "necessity," and "equal opportunity" that

4. See, e.g., Bryant Woods Inn, Inc. v. Howard County, Maryland, 124 F.3d 597 (4th Cir. 1997); Gamble v. City of Escondido, 104 F.3d 300 (9th Cir. 1997); Elderhaven v. City of Lubbock, 98 F.3d 175 (5th Cir. 1996); Brandt v. Village of Chebanse, 82 F.3d 172 (7th Cir. 1996).

5. Id.
have hindered the use of the statute to fight housing discrimination against people with disabilities.

Part IV demonstrates how the "reasonable accommodation" clause of the statute can be interpreted so that it comports with the intention of its drafters and the United States Supreme Court. It also considers an expanded use of the other prongs of the Fair Housing Act as well as the use of the Americans With Disabilities Act in land use disputes.

I. The History of the Fair Housing Act and "Reasonable Accommodation"

In 1968, Congress enacted the Fair Housing Act to prohibit housing discrimination on the basis of race, color, religion and national origin and, in 1974, expanded the law to cover sex discrimination. Congress enacted the Rehabilitation Act of 1973 to prohibit discrimination against people with disabilities in federally-funded programs. However, it was not until 1988 that Congress enacted the Fair Housing Act which placed disability discrimination on the same footing as discrimination on the basis of race, color, religion, national origin, and sex.

This Part first examines the report of the Judiciary Committee of the House of Representatives ("the Report"), especially as it relates to the concept of "reasonable accommodation." This part then explores the Supreme Court cases that have interpreted both the Fair Housing Act and the concept of "reasonable accommodation."

A. Report of the Judiciary Committee of the House of Representatives

The Report supporting the Fair Housing Act enunciates a strong policy favoring the establishment of housing for people with disabilities in all residential areas. The Report states that the statute "is a clear pronouncement of a national commitment to end the

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unnecessary exclusion of persons with handicaps from the American mainstream." The Report specifically rejects the use of generalized perceptions about disabilities and unfounded speculations about threats to safety as grounds to exclude people with disabilities from residential neighborhoods.

The Report recognizes several types of municipal ordinances that exclude people with disabilities. First, health, safety, or land-use requirements on congregate living arrangements among non-related persons with disabilities violate the statute since such requirements are not imposed on other families and non-related groups of similar size. Similarly, the statute was intended to prohibit the use of special requirements through land use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of people with disabilities "to live in the residence of their choice in the community." Finally, the Report states that neutral rules and regulations on health, safety and land-use may violate the statute whether they are based on false or over-protective assumptions about the needs of people with disabilities or on unfounded fears or difficulties about the problems their residency in the community may pose.

The Report further notes that a reasonable accommodation must be made when necessary to permit people with disabilities to live in a dwelling of their choice. The Report states that the concept of "reasonable accommodation" has a long history in regulations and case law dealing with discrimination on the basis of handicap, citing a Supreme Court decision interpreting the Rehabilitation Act of 1973. According to the Report, a discriminatory rule is not defensible simply because it has become a tradition. The Report notes that the "reasonable accommodation" provision of the statute requires changes to traditional rules and practices if necessary to permit a person with disabilities an equal opportunity to use and enjoy a dwelling.

As a whole, the Report expresses a policy prohibiting legal barriers that inhibits people with disabilities from residing in dwellings

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14. See id.
15. See id. at 2185.
16. Id.
17. See id.
18. See id. at 2186.
20. See House Report, supra note 1, at 2186.
of their choice. This policy also suggests that the statute be construed liberally in favor of housing for people with disabilities.

B. The Supreme Court’s Interpretation of the Fair Housing Act

In *City of Edmonds v. Oxford House, Inc.*21, the Supreme Court interpreted the Fair Housing Act. This case may indicate how that Court will interpret future Fair Housing Act cases.

In *City of Edmonds* the issue for the Court was whether a municipal zoning ordinance limiting the number of unrelated people who could be considered a “family” for zoning purposes constituted “any reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.”22 If the municipal ordinance was a restriction on the “maximum number of occupants permitted to occupy a dwelling,” the ordinance would have been exempt from the Fair Housing Act. The municipality could then have excluded a home for recovering alcoholics and substance abusers which housed more than five unrelated people.23

The United States Supreme Court held in *City of Edmonds* that the ordinance was not a restriction on the “maximum number of occupants permitted to occupy a dwelling” and thus was not exempt from the Fair Housing Act.24 The Court held that the type of restriction exempt from the statute was rules aimed at preventing overcrowding. The exemption does not include family composition rules aimed at limiting the number of unrelated people living together in a residential neighborhood that are not applicable to all families.25

In reaching this decision, the Court noted that the statute had a “broad and inclusive” compass requiring a “generous construc-

22. Id. at 728, 731 (Thomas, J. dissenting) (citing 42 U.S.C. § 3607(b)(1) (1994)). “The Fair Housing Act exempts from coverage “any reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.” Id.
23. Prior to the Supreme Court’s decision in *City of Edmonds*, courts were split on the issue of whether a “family composition” ordinance was exempt under 42 U.S.C. § 3607(b)(1). In *Elliot v. City of Athens*, 960 F.2d 975 (11th Cir. 1992), the Eleventh Circuit held that such ordinances were exempt from the Fair Housing Act. On the other hand, the Ninth Circuit in *City of Edmonds*, 18 F.3d 802 (9th Cir. 1994), and the District Court for the Eastern District of Virginia in *Oxford House, Inc. v. City of Virginia Beach*, 825 F. Supp. 1251 (E.D. Va. 1993), held that such ordinances were not exempt from the Fair Housing Act.
25. See id.
tion,” and that the statute’s exception was to be read “narrowly in order to preserve the primary operation of the [policy].” The Court further recognized that the Fair Housing Act required reasonable accommodations to afford people with disabilities an equal opportunity to use and enjoy housing. The Supreme Court’s decision clearly comports with the intentions of the drafters of the statute.

In confirming the findings of previous decisions, the Court noted in City of Edmonds that land use restrictions aim to prevent problems caused by “the pig in the parlor instead of the barnyard” and to encourage “family values, youth values, and the blessings of

26. Id. at 731 (citing Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209, 212 (1972)). While the Supreme Court does afford a “generous construction” to the Fair Housing Act, it did not find that the municipality’s code or actions were themselves discriminatory. City of Edmonds, 514 U.S. at 731 n.4. Instead, the Court confined itself to the narrow issue before it. The decision in City of Edmonds should be compared to the Court’s previous case involving zoning a group housing for people with disabilities. See City of Cleburne v. Cleburne Living Centers, 473 U.S. 432 (1985). There, the Supreme Court condemned the municipality’s decision to zone out a home for people with mental disabilities as being discriminatory and prejudicially based. See id. at 450. Justice Marshall’s concurrence in City of Cleburne also details the history of discrimination against people with disabilities in the Untied States. See also id. at 455-78. For other law review analysis of City of Edmonds, see Stephen C. Hall, City of Edmonds v. Oxford House, Inc: A Comment on the Continuing Vitality of Single-Family Zoning Restrictions, 71 Notre Dame L. Rev. 829 (1996).

27. See City of Edmonds, 514 U.S. at 737.

28. The Supreme Court cited the House Report in support of its conclusion. See City of Edmonds, 514 U.S. at 734 n.8. The Supreme Court’s decision also demonstrates the power of the Fair Housing Act and its ability to make uniform the rights of people with disabilities throughout the country. Had the Fair Housing Act not existed, a challenge to the ordinance under the Due Process Clause of the Constitution would have failed. See Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (finding that a “family composition” ordinance did not violate Due Process Clause of the United States Constitution). Assuming that City of Edmonds is federally funded, there would have been a question as to whether the Rehabilitation Act of 1973 would have applied. Compare Knutzen v. Eben Ezer Lutheran Housing Center, 815 F.2d 1343 (10th Cir. 1987) and Brecker v. Queens B’hai Brith Housing Development Fund Co., 607 F. Supp. 428 (E.D.N.Y. 1985), aff’d 798 F.2d 52 (2d Cir. 1986) (holding that the Rehabilitation Act did not require reasonable accommodation to permit housing for people with disabilities) with City Wide Associates v. Penfield, 564 N.E.2d 1003 (Mass. 1992); Schuett Inn. Co. v. Anderson, 386 N.W.2d 249 (Minn. App. 1986) (holding that the Rehabilitation Act could require reasonable accommodation for people with disabilities in federally funded housing) and Crossroads Apartments Associates v. LeBoo, 152 Misc.2d 830, 578 N.Y.S.2d 1004 (N.Y. City Ct. 1991). In some states, the ordinances involved in City of Edmonds would have been deemed to be violative of the Due Process Clause of the Sate constitution. See City of Santa Barbara v. Adamson, 610 P.2d 436 (Cal. 1980); Charter Township v. Dinolfo, 351 N.W.2d 831 (Mich. 1984); State v. Baker, 405 A.2d 368 (N.J. 1979); McMinn v. Town of Oyster Bay, 66 N.Y.2d 544 (1985).
quiet seclusion and clean air.” If the housing proposal does not constitute the proverbial pig and does not negatively impact on the abovementioned values, seclusion, and air, the housing must be permitted.

C. The Supreme Court’s Interpretation of “Reasonable Accommodation”

In its report, the House Judiciary Committee noted that the concept of “reasonable accommodation . . . has a long history in regulations and case law dealing with discrimination on the basis of handicap.” In writing this, the House cited to *Southeastern Community College v. Davis*, a Supreme Court case interpreting the expression “reasonable modification” under a regulation enacted to interpret the Rehabilitation Act of 1973.

Under this regulation, a school receiving federal funds was required to change its academic requirements to ensure such requirements do not discriminate against students on the basis of their disabilities. In *Davis*, a student with a serious hearing disability challenged the requirements of a college’s nursing program as violative of the Rehabilitation Act. The student alleged that the college was required to undertake affirmative action that would dispense with the need for effective oral communication.

The Supreme Court held that the student’s request was not a reasonable modification of the school’s nursing program, and that the school was not required to change its program. The Court found that since the student was unable to function in clinical

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31. *Id.*
33. See *id.* at 408 n.9 (citing 45 C.F.R. § 84.44 (1978)). The Code of Federal Regulations requires a school receiving federal funding to “make such modification to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student.” 45 C.F.R. § 84.44. While *Southeastern Community College* was brought under the Rehabilitation Act of 1973, the substantive portions of that statute do not refer to a requirement that a school make a “reasonable accommodation.” *Southeastern Community College*, 442 U.S. at 400; see also 29 U.S.C. § 794 (Supp. 1997). However, the “remedies and attorneys fees” portion of the statute states that a court in fashioning a remedy “may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefore or other appropriate relief in order to achieve an equitable an appropriate remedy.” 29 U.S.C. § 794a (a)(1) (1985).
34. See *Southeastern Community College*, 442 U.S. at 407-09.
35. See *id.*
36. See *id.* at 410-12.
courses without close supervision, the college could only allow her to take academic classes and that such change would be a "fundamental alteration in the nature of a program," rather than a modification of the program.\footnote{420} The Court noted that in some instances, however, changes could be made in programs without imposing undue financial and administrative burdens on a State. In those situations, a refusal to modify an existing program might become unreasonable and discriminatory.\footnote{420}

Therefore, between City of Edmonds and Davis, the Supreme Court has spoken on how to interpret the Fair Housing Act and the expression "reasonable accommodation." In City of Edmonds, the Supreme Court has said that the Fair Housing Act should be given a generous interpretation. In Davis, the Supreme Court held that a reasonable modification is one that does not fundamentally alter a program or impose an undue financial and administrative burden on a government. Additionally, in City of Edmonds, the Supreme Court reaffirmed that the purpose of land use restrictions is to prevent the "pig in the parlor" and to promote "family values."

Interpreting City of Edmonds and Davis together, housing for people with disabilities may only fundamentally alter a zoning scheme where it causes substantial identifiable problems for a community or somehow destroys family and youth values, seclusion, and clean air. This interpretation is consistent with that of the drafters of the statute as enunciated in the House Report.

\section*{II. The Elements of a Fair Housing Act Case}

Courts use four tests to determine whether a violation of the statute has occurred. Under the first test, called either "intentional discrimination" or "discriminatory treatment," a person with a disability must prove that the alleged violator intentionally acted to deprive people with disabilities of housing because of their disabil-
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ity. The second test, a form of intentional discrimination, is called "facial discrimination" and involves statutes and ordinances that on their face treat people with disabilities differently from other people. The third test, known as the "disparate impact" test, requires a showing that the discriminatory conduct, though seemingly neutral, has had a "disparate impact" on a person because of their disability. The fourth test is the "reasonable accommodation" test.

This Part first presents an overview of the elements of an "intentional discrimination," "facial discrimination," and "disparate impact" cases. It then discusses the elements of a "reasonable accommodation" case in more detail and discusses some of the earlier federal district court decisions that applied the "reasonable accommodation" test. This Part demonstrates the significance of the "reasonable accommodation" test in assuring that people with disabilities are not excluded from the American mainstream.

A. "Intentional Discrimination," "Facial Discrimination," and "Disparate Impact"

Intentional discrimination occurs when a municipality deprives people with disabilities of housing because of their disabilities. Thus, the disabilities of the residents form the basis for the decision. However, as one court has held, "clever men easily conceal their intentions." While occasionally cases have been won based upon


43. See supra note 39 and accompanying text.

44. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d at 934-36 (quoting United States v. Black Jack, 508 F.2d 1179, 1185 (1974)).
discriminatory statements made by town officials, most intentional discrimination cases are proven by circumstantial evidence demonstrating that procedures or substantive criteria were changed by a municipality in response to neighborhood opposition for the purpose of limiting housing. In such cases, courts examine the historical background of the municipality, the sequence of events leading up to the challenged decision, departures from normal procedural sequences, and departures from substantive criteria. Because of the need to rely upon circumstantial evidence, an intentional discrimination case is often difficult to prove.

Courts have considered challenges to laws placing special requirements on housing for people with disabilities to be a type of intentional discrimination action known as a "facial discrimination" action. In a facial discrimination action, the burden of proof is on the municipality to demonstrate that the special and unique needs the individuals warrant the imposition of special safety requirements. While several cases have succeeded in striking ordinances placing special safety requirements on people with disabilities, this cause of action does not apply to neutral statutes and ordinances challenged in many actions.

With regard to "disparate impact" cases, a person with a disability or a housing provider must demonstrate that the challenged practice "actually or predictably results" in discrimination. This


47. See supra note 40 and accompanying text.

48. See id.

49. See Bangert, 46 F.3d at 1500-01 (holding that the disparate impact and reasonable accommodation tests apply to neutral ordinances and only intentional discrimination and facial discrimination apply to non-neutral laws).

mean that the conduct of the alleged discriminatory party is more harshly felt on people with handicaps than those without.\textsuperscript{51} Once a prima facie disparate impact case has been established, a municipality must demonstrate that its actions furthered, in theory and in practice, a legitimate bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect.\textsuperscript{52}

However, some courts have limited the use of the "disparate impact" test. One circuit court has held that the test cannot be applied to an individual instance of discrimination.\textsuperscript{53} As most cases center around individual instances of discrimination, this interpretation virtually eliminates the use of the test.

The Ninth Circuit has suggested that statistics are required in a disparate impact case to demonstrate that the challenged practice has a greater impact on people with disabilities than non-disabled people.\textsuperscript{54} Statistics are not always available, and this requirement makes it difficult to prove some cases involving people with disabilities.

Regardless, to demonstrate disparate impact, the plaintiff must show that a discriminatory practice has a greater detrimental effect on people with disabilities than non-disabled people. That level of evidence would appear to be considerably more than that required under the "reasonable accommodation" test.

B. The "Reasonable Accommodation" Test and the Early Cases Interpreting "Reasonable Accommodation"

To prevail on a "reasonable accommodation" claim, a person with a disability must demonstrate that (1) a request for an accommodation was made, (2) such request was either ignored or denied, (3) the accommodation was necessary to enable the person an equal opportunity to use and enjoy the dwelling of that person's choice, and (4) the accommodation was reasonable.\textsuperscript{55} The "reasonable accommodation" test requires neither a showing of intent or facial discrimination, nor does it require proof that a discrimina-

\textsuperscript{52} See id. at 936.
\textsuperscript{53} Bryant Woods Inn, Inc. v. Howard County Maryland, 911 F. Supp. 918, 931 (D. Md. 1996), aff'd 124 F.3d 597 (4th Cir. 1997) (citing Coe v. Yellow Freight Systems, Inc. 646 F.2d 444, 451 (10th Cir. 1981)).
\textsuperscript{54} See Gamble v. City of Escondido, 104 F.3d 300, 306 (9th Cir. 1997).
\textsuperscript{55} 42 U.S.C. § 3604(f)(3)(B) (1994); see also Bryant Woods Inn, Inc., 124 F.3d at 597.
tory practice has a greater impact on people with disabilities than on non-disabled people. Therefore, it appears easier to prove a case under the "reasonable accommodation" standard than under the other standards.

In the earlier "reasonable accommodation" cases decided shortly after the enactment of the Fair Housing Act, courts largely examined whether the proposed housing would be harmful to either the neighborhood or the proposed residents. It is generally assumed that an accommodation was necessary to enable the residents an equal opportunity to use and enjoy the dwelling of that person's choice.\textsuperscript{56} For example, in \textit{United States v. City of Philadelphia},\textsuperscript{57} the court ordered a municipality to make a reasonable accommodation in its ordinance requiring that all rear yards must have a certain specified footage.\textsuperscript{58} The court held as such because municipal officials admitted that the rear yard of the house in question did provide free access to light and air, access to firefighters, and room for recreation, and that there was no danger of substantial harm to the municipality.\textsuperscript{59} The court in \textit{City of Philadelphia} also determined that a nexus was not required between the barrier to proposed housing and the disability of the proposed residents.\textsuperscript{60}

Similarly, in \textit{Oxford House, Inc. v. Town of Babylon},\textsuperscript{61} a court applied the "reasonable accommodation" to enjoin a municipality from enforcing an ordinance prohibiting transients from living in a residential area.\textsuperscript{62} The court found that since the residence did not have a negative impact on the area and did not cause an undue administrative or financial hardship on the municipality, the municipality had to make a reasonable accommodation and not enforce its ordinance.\textsuperscript{63} The court in \textit{Town of Babylon} only considered whether it was reasonable to permit the residence to continue its

\textsuperscript{58} See id. at 228-30.
\textsuperscript{59} See id. at 228.
\textsuperscript{60} See id. at 229-30. Compare this decision to \textit{Bryant Woods Inn}, 124 F.3d. at 604, where the Fourth Circuit held that there had to be a direct linkage between the proposed accommodation and the disability of the person, noting that the requirement "has attributes of a causation requirement." See also \textit{Salute v. Stratford Greens Garden Apartments}, 136 F.3d 293 (2d Cir. 1998) (holding that economic discrimination without regard to disability is not covered by the Fair Housing Act).
\textsuperscript{61} 819 F. Supp. 179 (E.D.N.Y. 1993).
\textsuperscript{62} See id. at 1185-86.
\textsuperscript{63} See id. at 1186.
operation and assumed that the accommodation was necessary.\textsuperscript{64} Other decisions have similarly considered only the "reasonableness" of the housing involved in requiring municipalities to make a "reasonable accommodation," and likewise assumed that such accommodation was necessary to provide an equal opportunity.\textsuperscript{65}

While these decisions may appear simplistic in their analysis of "reasonable accommodation," they are reflective of the intentions of Congress and the decisions of the Supreme Court than later decisions of several courts. If a municipal zoning law prevented housing for people with disabilities, an "accommodation" — either a waiver of the rule or an interpretation of the rule permitting the housing — was certainly necessary. Similarly, people with disabilities will often need accommodations in local rules to permit them to be able to live in non-traditional groups. Without such accommodations, people with disabilities would not have the same opportunities of non-disabled people to live in a residential neighborhood of their choice.

The aim of the Fair Housing Act was to promote housing for people with disabilities in residential neighborhoods. In looking largely to the reasonableness of such housing and presuming rightfully that the accommodations were necessary, the earlier "reasonable accommodation" decisions correctly gave the Fair Housing Act the "generous construction" endorsed by the Supreme Court in \textit{City of Edmonds}.

\section*{III. Analysis of Recent Circuit Court Decisions Interpreting the "Reasonable Accommodation" Clause of the Fair Housing Act}

In the past several years, the majority of courts have considered cases involving whether a "reasonable accommodation" was made to permit housing for people with disabilities.\textsuperscript{66} Unfortunately, a

\textsuperscript{64} See id.; see also United States v. California Mobile Home Park Management Comp., 107 F.3d 1374, 1381 n.3 (9th Cir. 1997) (noting that causation should pose no "independent hurdle" in cases where zoning ordinances are used to block housing for people with disabilities because "the city policies directly interfere with use and enjoyment because they prevent the housing from being built").


\textsuperscript{66} See Bryant Woods Inn, Inc. v. Howard County, Maryland, 124 F.3d 597 (4th Cir. 1997); Gamble v. City of Escondido, 104 F.3d 300 (9th Cir. 1997); Smith & Lee
majority of these cases have taken a much more narrow view of the "reasonable accommodation" test than that of the earlier decisions.67

This Part examines and analyzes those decisions, particularly with regard to the following questions: (1) must a party exhaust administrative remedies before filing a court action using the "reasonable accommodation" test, (2) which party has the burden of proof in a reasonable accommodations case, (3) what evidence is required to demonstrate that an accommodation was "reasonable" or "unreasonable," (4) what evidence, if any, is required to demonstrate that an accommodation is "necessary," and (5) what evidence, if any, is required to demonstrate that an accommodation would provide an "equal opportunity" for housing for people with disabilities.

A. Exhaustion of Remedies

The Fair Housing Act is clear that an aggrieved party does not need to exhaust parallel administrative remedies provided through the United States Department of Housing and Urban Development (HUD) before commencing a Federal action.68 However, the courts are divided with regard to whether an aggrieved party must follow local and state zoning procedures before filing a Federal action.69 It would seem logical that if an aggrieved party does

67. See, e.g., Bryant Woods Inn, Inc. v. Howard County, Maryland, 124 F.3d 597 (4th Cir. 1997).
68. Under 42 U.S.C. § 3613(B)(2) (1994), an aggrieved person may commence a civil action whether or not a complaint has been filed with the United States Department of Housing and Urban Development. Similarly, in "pattern or practice cases," the United States can immediately go to court to challenge an act of discrimination. See 42 U.S.C. § 3614(a) (1994).
69. See Bryant Woods Inn, Inc., 124 F.3d at 597 (holding that administrative remedies need not be exhausted); Oxford House-C v. City of St. Louis, 77 F.3d 249 (8th Cir. 1996) (finding that in the guise of a "ripeness" analysis, administrative remedies must be exhausted); United States v. City of Palatine, 37 F.3d 1230 (7th Cir. 1994); Huntington Branch, NAACP v. Town of Huntington, 689 F.2d 391, 394 n.3 (2d Cir. 1982); see also Oxford House v. City of Virginia Beach, 825 F. Supp. 1251 (E.D. Va. 1993) (deciding administrative remedies must be exhausted).
not need to exhaust HUD remedies before filing a Federal action, he or she should not have to exhaust local remedies.

Both the Second Circuit in *Huntington Branch, N.A.A.C.P. v. Town of Huntington*70 and the Fourth Circuit in *Bryant Woods Inn, Inc. v. Howard County*71 correctly held that administrative remedies need not be exhausted before the commencement of a Fair Housing Act action in federal court, even where the "reasonable accommodation" test is invoked. Both decisions note that the drafters of the statute intended administrative remedies to be a primary and not an exclusive method for seeking redress.72

However, in two very similar cases, the Seventh and Eighth circuits under the guise of a "ripeness" theory have required housing providers for people with disabilities to exhaust administrative remedies before commencing a federal action. In *United States v. Village of Palatine*,73 and *Oxford House-C v. City of St. Louis*,74 municipalities had ordinances limiting the number of unrelated people who could live in a residential neighborhood, and requiring residences with a greater number of unrelated people to apply for a special use permit.75 Residences for recovering alcoholics and substance abusers challenged the ordinances as being discriminatory under the Fair Housing Act.76 The residences may have been permitted in the zoning district had they applied for a special use permit, but they did not apply for such permits.77

The courts in *Village of Palatine*78 and *City of St. Louis*79 dismissed the residences' actions, holding that the cases were not ripe because the residences did not exhaust their administrative remedy of seeking a special use permit. Although the Seventh and Eighth circuits couched their decisions in terms of the doctrine of "ripeness," in effect, both of these decisions required housing providers for people with disabilities to exhaust administrative remedies before filing a federal action.

The decisions of the Second and Fourth circuits represent the view more consistent with the drafters of the Fair Housing Act. By

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70. See Huntington Branch, NAACP, 689 F.2d at 394 n.3.
71. See Bryant Woods Inn, Inc., 124 F.3d at 599.
72. See Bryant Woods Inn, Inc., 124 F.3d at 597; Huntington Branch, 689 F.2d at 394 n.3.
73. 37 F.3d 1230 (7th Cir. 1994).
74. 77 F.3d 249 (8th Cir. 1996).
75. See Oxford House-C, 77 F.3d at 251; Village of Palatine, 37 F.3d at 1231-32.
76. See Village of Palatine, 37 F.3d at 1231-32.
77. See id.
78. 37 F.3d at 1233-34.
79. 77 F.3d at 253.
their very nature, permit applications cause delays in access to housing. Accordingly, homeowners may decline to sell or rent their houses to people with disabilities if the sale or rental must await the outcome of the permit process. Additionally, permit applications often subject the applicant to public scrutiny and thus ultimately discourage people with disabilities from residing in neighborhoods with permit requirements.  

Not all permit requirements are necessarily discriminatory. However, the drafters of the Fair Housing Act intended that the statute be used to vigorously promote access to housing for people with disabilities in all residential neighborhoods. Therefore, as permit requirements could discourage access to housing in residential neighborhoods, it would appear that the drafters of the statute intended that permit requirements be scrutinized in federal court at the first instance.

It is not clear that the housing providers in *Village of Palatine* and *City of St. Louis* were able to demonstrate that people with disabilities needed to live in groups of unrelated people greater than that permitted as of right by the municipalities for therapeutic reasons because of their disabilities. However, if a housing provider were able to show that its people with disabilities needed to live in groups of unrelated people for therapeutic or financial purposes, a permit requirement would clearly impede those people with disabilities from having an opportunity to live in the community. In such a circumstance, exhaustion should not be required as the imposition of such a permit requirement would be discriminatory *per se*.

80. See *Horizon House Dev. Servs. v. Township of Upper Southampton*, 804 F. Supp. 683, 700 (E.D. Pa. 1992), aff'd, 995 F.2d 217 (3d Cir. 1993) (holding that provider of housing for people with disabilities did not have to apply for variance because procedures were too burdensome); *Easter Seal Society of New Jersey v. Township of North Bergen*, 798 F. Supp. 228, 236 (D.N.J. 1992) (holding that a provider of housing for people with disabilities did not have to apply for variance or permits before filing action under Fair Housing Act); *Stewart B. McKinney Foundation v. Town Plan and Zoning Comm'n*, 790 F. Supp. 1197, 1219-20 (D. Conn. 1992) (holding that provider of housing for people with AIDS need not follow municipal administrative procedures because of their burdensomeness and stigmatization of prospective residents).

81. Courts have noted that whether an accommodation is necessary for financial or therapeutic reasons will be considered by a court in determining whether to require such accommodation. See, e.g., *Bryant Woods, Inn, Inc.*, 124 F.3d at 605; *Gamble v. City of Escondido*, 104 F.3d 300, 307 (9th Cir. 1996); *Smith & Lee Associates v. City of Taylor*, 102 F.3d 781, 795 (6th Cir. 1996); *Erdman v. City of Fort Atkinson*, 84 F.3d 960, 962 (7th Cir. 1996); *Brandt v. Village of Chebanse*, 82 F.3d 172, 174 (7th Cir. 1996).
As housing discrimination against people with disabilities is now on an equal footing with housing discrimination on other bases, analogies can be made to these types of cases. For example, if a law had required that members of a particular race, religion, or national origin had to apply for a permit before residing in a community, no court would have required that a member of such particular race, religion or national origin apply for a permit before being able to challenge such a law. Similarly, here, exhaustion should not be required before the commencement of a Federal action.

B. Burden of Proof

The courts are also split as to which party should have the burden of proof in a reasonable accommodation case.

In Hovsons, Inc. v. Township of Brick, the Third Circuit held that the burden of proof was on the municipality to demonstrate that it could not make a reasonable accommodation to permit housing for people with disabilities. In reaching this conclusion, the court followed its precedents interpreting the Rehabilitation Act, placing the burden of proving on the defendant.

On the other hand, the Fourth Circuit in Bryant Woods Inn, Inc. v. Howard County held that the burden of proof in a reasonable accommodation should be on the proponent of housing because the burden of proof in an action is usually on a plaintiff and, in its view, the statute's text "evidences no intent to alter normal burdens." The Fifth Circuit in Elderhaven, Inc. v. City of Lubbock, had a similar view, and noted that in the Fifth Circuit, it is the plaintiff that has the burden of proof in a case brought under the Rehabilitation Act.

82. See, e.g., Potomac Group Home Corp. v. Montgomery County, 823 F. Supp. 1285, 1996 (D. Md. 1993) (holding that requirement that group homes for people with mental disabilities notify the neighborhood before their establishment was equally as offensive as a requirement that minority persons give notice before moving into a non-minority neighborhood). See also Epicenter of Steubenville, Inc. v. City of Steubenville, 924 F. Supp. 845, 851 (S.D. Ohio 1996) (noting that the municipality's imposition of a moratorium constituted discriminatory intent and that it was "like the hoods of Klansmen masking the faces of criminals" and equated a law excluding people with disabilities with laws excluding minorities).

83. 89 F.3d 1096 (3d Cir. 1996).

84. See id. at 1103.

85. See id.

86. Id.

87. 98 F.3d 175 (5th Cir. 1996).

88. Id. at 177. As discussed in detail in the Second Circuit's decision in Borkowski v. Valley Central School District, 63 F.3d 131 (2d Cir. 1995), there is a split in circuits
Generally, burdens of proof are allocated based upon which party has the possession of the most evidence necessary to prove the position. In consideration of that principle, the decisions of the Fourth and Fifth circuits unreasonably place housing providers with the burden of proving that their housing would not cause and undue burden or substantial hardship on a community or that their housing would not fundamentally alter a neighborhood.

Remembering that a reasonable accommodation case has three elements—reasonableness, necessity, and equality—the burden of proof for these elements should be split between the parties. As a proponent of housing for people with disabilities knows more about its proposed housing than the municipality, the housing proponent should be required to demonstrate why it needs an accommodation from an ordinance or rule, and why such an accommodation would provide people with disabilities with an equal housing opportunity. On the other hand, a municipality, which would normally have more information about its own structure and finances and its neighborhoods, should bear the burden of proof of showing that housing for people with disabilities would cause an undue burden or hardship on the municipality.

The model for this standard is the Second Circuit’s decision in Borkowski v. Valley Central School District, an employment discrimination case brought under the Rehabilitation Act pursuant to a reasonable accommodation theory. In Borkowski, the Second Circuit placed the burden on the employee to show that she needed an accommodation to retain her employment and that such an accommodation existed to provide her with the opportunity to continue her employment. As for the employer, the Second Circuit placed the burden on it to demonstrate that the accommodation sought by the employee was unreasonable; i.e., that it would create an undue hardship or substantial burden on the employer.

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89. See, e.g., Morgado v. Birmingham-Jefferson County Civil Defense Corps., 706 F.2d 1184, 1189 (11th Cir. 1983) (holding that employer relying in Equal Pay Act provision allowing pay differentials for reasons other than sex must prove entitlement to provision’s protection because such facts are peculiarly within the knowledge of the employer); EEOC v. Radiator Specialty Co., 610 F.2d 178, 185 n.8 (4th Cir. 1979) (holding that “general principle of allocation of proof to the party with the most ready access to the relevant information” requires Title VII defendant to show in appropriate of labor pool statistics).
90. 63 F.3d 131 (2d Cir. 1995).
91. See id. at 138-39.
92. See id.
The *Borkowski* court correctly recognized both the purposes of the Rehabilitation Act and the reality of which party would have the most access to evidence in allocating the burden of proof in a reasonable accommodation case.

C. *Reasonableness*

Obviously, a court must consider whether an accommodation sought by a proponent of housing for people with disabilities is "reasonable" under the "reasonable accommodation" test. Adopting the "reasonableness" test used under the Rehabilitation Act, an accommodation is reasonable if it does not cause an undue hardship or burden on a municipality or result in the fundamental alteration of the residential nature of an area.\(^9\)

Whether an accommodation to permit a particular house in a particular neighborhood is "reasonable" must be examined on a case-by-case basis. The following are some of decisions that have examined whether a particular accommodation is "reasonable."

Three courts have ruled that requested accommodations for housing for people with disabilities were reasonable and required the provision of such accommodations. In *Shapiro v. Cadman Towers, Inc.*,\(^9\) a resident of an apartment complex needed a nearby parking space within the building complex because of her disability. Even though the building allocated three spaces for building staff and another parking spot for a person that did not live in the building, the apartment complex refused to grant her a space, and put her on a waiting list.\(^9\)

The Second Circuit ruled in favor of the resident, holding that it would not be unreasonable to permit that person to have the spot of one of the employees.\(^9\) The court held that permitting the resident to have a spot in spite of the waiting list would not cause an undue hardship or substantial burden on the apartment complex.\(^9\)

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94. 51 F.3d 328 (2d Cir. 1995).
95. See id. at 331.
96. See id. at 335-36.
97. See id. The Court cited both the HOUSE REPORT and Southeastern Community College v. Davis in reaching its conclusion. See id. at 334. However, the Court, refused to determine the issue of whether the resident with a disability could have usurped the rights of other tenants on the ground that the Court found that the resident with a disability could be accommodated without burdening any other resident. See id. at 336.
In *Hovsons, Inc. v. Township of Brick*, the issue was whether a municipality was required to permit a developer of a nursing home for people with disabilities to build the nursing home in a residential zoning district. In *Hovsons*, the Third Circuit held that a municipality's refusal to permit a 210-resident nursing home in a residential neighborhood was unreasonable.

In ruling in favor of the nursing home, the Third Circuit noted that granting a variance to the housing developer would not have placed undue financial and administrative burdens on the municipality, or have resulted in the imposition of an undue hardship on the community, or have changed the residential character of the area. The court noted that the residents of the nursing home would be taxpaying members of the municipality, that the nursing home would arrange for its own garbage collection, street maintenance and snow removal, and that the nursing home would not be using municipal emergency services to any more than area retirement developments.

Finally, in *Smith & Lee Associates v. City of Taylor*, the Sixth Circuit held that requiring a municipality to permit an adult foster care home for nine residents in a neighborhood whose zoning only permitted adult foster care homes for six people was not unreasonable and directed the municipality to permit an adult foster care home for nine people. The Sixth Circuit held that the addition of three additional residents to the neighborhood would not fundamentally alter the nature of the single-family neighborhood.

In reaching its conclusion that the municipality was required to accept an adult foster care home for nine residents, the Sixth Circuit engaged in a cost-benefit analysis. The Sixth Circuit weighed the fact that three additional people would be moving into the neighborhood with the fact that the residents would likely not drive and cause traffic or parking problems for the neighborhood.

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98. 89 F.3d 1096 (3d Cir. 1996).
99. See id. at 1098-99.
100. See id. at 1105-06.
101. See id.
102. See id.
103. 102 F.3d 781 (6th Cir. 1996).
104. See id. at 785.
105. See id. at 795-96. The Court also cited the House Report and the Supreme Court's decision in *Southeastern Community College*. See id. at 795.
106. See id. at 796.
While the decisions in Shapiro, Hovsons, and Smith & Lee Associates all resulted in services or housing being afforded to people with disabilities and comported with the intentions of the drafters of the statute, it could be argued these cases discriminate against people with disabilities. A non-disabled person can move into a community and cause an administrative and financial burden on a municipality. However, a non-disabled person would not be subject to court scrutiny or forced to leave a community if that person did cause an administrative and financial burden on a municipality or fundamentally alter a residential neighborhood provided that said person’s actions were not illegal.

On the other hand, even under the most liberal interpretations of the Fair Housing Act, housing for people with disabilities can be excluded if they create an administrative and financial burden on a municipality or fundamentally alter a residential neighborhood. Whether people with disabilities who do create an administrative and financial burden or fundamentally alter a residential neighborhood should have the same right to do so as non-disabled people may well be the subject of future litigation.

Two cases have ruled that proposed accommodations for housing for people with disabilities were unreasonable. In Bryant Woods Inn, Inc. v. Howard County, the Fourth Circuit ruled that a request to increase housing for elderly people with disabilities from eight to fifteen people was unreasonable because a member of the municipal planning board observed vehicles parked “all over the place and also in the driveway.”

The Fourth Circuit’s decision view of “reasonableness” in Bryant Woods Inn is too constrained and does not comport with the intentions of the drafters of the statute. Even if it were observed that there were vehicles “all over the place and also in the driveway,” the Court’s decision failed to consider how often such parking problems occurred. Likewise, other cited problems such as minimal frontage of the site and the comparison of the size of the site with other group homes of similar size do not necessarily demonstrate that an accommodation here would have been unreasonable.

Moreover, the court failed to address the fact that a related family of fifteen non-disabled people could have moved into the house

107. See Bryant Woods Inn, Inc., 124 F.3d at 597; Brandt, 82 F.3d at 172.
108. See Bryant Woods Inn, Inc., 124 F.3d at 604-06.
109. Id.
110. Yet, the court does acknowledge the House Report and the dictates of Southeastern Community College v. Davis. See id. at 603.
in question. If fifteen non-disabled related people lived at the residence in spite of its minimal frontage and the size of other housing in the community for fifteen people, then why was it unreasonable to permit fifteen disabled people at the residence?

In Brandt v. Village of Chebanse, the Seventh Circuit held that a municipality's denial of a variance to build a four-unit house in an area zoned for single families was not unreasonable because of the "loss of whatever tranquility single-family zoning offers to a neighborhood." However, the Court’s decision failed to describe in detail how construction of the four-unit house would increase the potential for noise, and did not consider that a large family in a single family house could have the same or greater impact noise.

In determining that various housing proposals for people with disabilities were unreasonable, the courts in both Bryant Woods Inn and Brandt made factually unsupported assumptions that housing for people with disabilities would be more deleterious for the community than housing for non-disabled people. Such assumptions were in conflict with the intent of the drafters of the statute.

D. Necessity

The “reasonable accommodation” prong of the statute requires that an accommodation sought “be necessary to afford such person equal opportunity to use and enjoy a dwelling.” Considering that the statute was intended to increase access to housing for people with disabilities, the “necessary” clause should simply mean that if it is necessary to lift a barrier to permit housing, the barrier must be lifted.

For example, in Smith & Lee Associates v. City of Taylor, the Sixth Circuit found that a requested accommodation to permit nine unrelated people with disabilities to live in a residence was “neces-
necessary” because there was a demonstrated need for the housing and that it was necessary to permit nine residents rather than the six permitted by the ordinance for financial reasons.116

However, several circuit courts have used the “necessary” clause as a barrier to housing for people with disabilities.117 Such an interpretation of the clause conflicts with both the intention of the drafters of the Fair Housing Act and the mandate of the Supreme Court that the statute be given a “generous construction.”

For example, in Elderhaven, Inc. v. City of Lubbock,118 the Fifth Circuit held that the municipality did not have to make a reasonable accommodation to a housing provider to permit it to house two more residents with disabilities because the provider failed to allege or prove that the number of people it sought to house was a “critical number” to make housing sought economically feasible.119 However, unlike the Sixth Circuit in Smith & Lee, the Fifth Circuit viewed the case from the point of view of the provider rather than the person with a disability. Even if the number of people in Elderhaven was not the “critical number” to make housing sought economically feasible, the Fifth Circuit’s decision allowed a municipality to make housing unavailable to two people with disabilities. For those two people, an accommodation was certainly “necessary.”

Some courts have suggested that an accommodation is not necessary when people with disabilities could live elsewhere. For example, in Brandt120 the Seventh Circuit held that an accommodation to build four-unit housing for people with disabilities in a single-family zone was not “necessary” because the developer could have built his four-family unit elsewhere.121

The Seventh Circuit’s decision in Brandt ignores the language of the statute stating that an accommodation may be necessary to afford such person equal opportunity “to use and enjoy a dwell-

116. Id. at 795-96.
117. See Bryant Woods Inn, Inc., 124 F.3d at 605; Elderhaven v. City of Lubbock, 98 F.3d 175, 178 (5th Cir. 1996); Brandt, 82 F.3d at 175.
118. 98 F.3d 175 (5th Cir. 1996).
119. See id. at 179. The court in Elderhaven seemed to be impressed by the city’s past record regarding housing for people with disabilities. See id. at 178. While a municipality’s past record with regard to housing for people with disabilities may be relevant in an intentional discrimination case, it should have no relevance regarding whether a particular accommodation sought is reasonable and necessary to provide an equal opportunity.
120. 82 F.3d 172 (7th Cir. 1996).
121. Id. at 175.
"To use and enjoy a dwelling" logically would mean to use and enjoy a particular dwelling, and not some other configuration of the dwelling or a dwelling at another location. The latter concept, that a municipality could prevent housing for people with disabilities in some areas by permitting such housing in other areas, is particularly offensive. As a municipality certainly could not designate limited areas of a municipality for people of a particular race, religion, or national origin, it should not designate a limited area of a municipality for housing for people with disabilities.

Perhaps the decision on the "necessity" of an accommodation that is most at variance with the intent of the statute's drafters and the Supreme Court's "generous construction" of the statute is the Fourth Circuit's recent decision in *Bryant Woods Inn*. The issue before the Fourth Circuit there was whether the municipality should grant a variance to permit a housing provider to expand its residence for people with disabilities from eight to fifteen. The court held that an accommodation was not "necessary" because: a) other group homes in the municipality housed eight people; b) there was no evidence that group homes were not financially or therapeutically viable with only eight people; and c) there were vacancies in other group homes in the municipality.

In viewing the question of "necessity" from the point of view of the housing provider, rather than the point of view of the person

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123. In contrast, see *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1344 (D.N.J. 1991), which noted in rejecting a municipality's argument that it could exclude a housing for people with a disability in a given area because it permitted such housing in other areas that "anti-discrimination laws are designed to prevent just such discriminatory segregation." See also *Elliot v. City of Athens*, 960 F.2d 975, 982-84 n.12 (11th Cir. 1992) (holding that a municipality can exclude housing people with disabilities from some areas if it permits such housing in other neighborhoods).
124. 124 F.3d 597 (4th Cir. 1997).
125. See id. at 605.
126. See id.
with a disability seeking to live in a particular residence,\textsuperscript{127} the
court’s decision on “necessity” in \textit{Bryant Woods Inn} was errone-
ous. As a result of the municipality’s determination, seven people
with disabilities were prevented from living in a particular resi-
dence, regardless of whether other group homes housed eight peo-
ple, whether group homes were financially or therapeutically viable
with only eight people, or whether there were vacancies in other
group homes in municipality. Since the municipality’s determina-
tion barred seven people from living in a particular group home,
the court should have determined that an accommodation was nec-
essary for those seven people, and then proceeded to determine
the reasonableness of the accommodation sought.

\section*{E. Equality}

An accommodation sought must be necessary “to afford such
person equal opportunity to use and enjoy a dwelling.”\textsuperscript{128} As the
Sixth Circuit correctly held in \textit{Smith & Lee Associates v. City of
Taylor},\textsuperscript{129} the “equal opportunity” clause prohibits the exclusion of
people with disabilities from zoning neighborhoods or municipal
decisions “that will give disabled people less opportunity to live in
certain neighborhoods than people without disabilities.”\textsuperscript{130} Simi-

\textsuperscript{127} The issue is not one of standing, but rather one of perception. Housing prov-
ders clearly have the right to commence actions under the Fair Housing Act. \textit{See},
\textit{e.g.}, Horizon House Developmental Servs., Inc. v. Township of Upper Southampton,
804 F. Supp. 683, 692-93 (E.D. Pa. 1992), \textit{aff’d}, 995 F.2d 217 (3d Cir. 1993); Stewart B.
McKinney Foundation, Inc. v. Town Plan & Zoning Comm’n, 790 F. Supp. 1197, 1208-09
(D. Conn. 1992).


\textsuperscript{129} 102 F.3d 781 (6th Cir. 1996).

\textsuperscript{130} \textit{Id.} at 795. The court also correctly noted that the phrase “equal opportunity”
under the Fair Housing Act involves “achieving equal results, not just formal equal-
ity” and an “affirmative duty.” \textit{Id.} at 795; \textit{see also} Oxford House, Inc. v. Town of
Babylon, 819 F. Supp. 1179, 1186 n.11 (E.D.N.Y. 1993) (finding that the Fair Housing
Act required an affirmative action). In contrast, the Fourth Circuit in \textit{Bryant Woods
Inn, Inc. v. Howard County, Maryland}, 124 F.3d 597 (4th Cir. 1997), rejected the no-
tion that the Fair Housing Act intended to require “equal results.” \textit{See id.} at 604. The
court cited to \textit{Alexander v. Choate}, 469 U.S. 287, 309 (1985), where the Supreme
Court held that if a state reduced a benefit equally to both people with disabilities and
non-disabled people, such action did not violate the Rehabilitation Act even though it
had effectively had a greater impact on people with disabilities. \textit{See Bryant Woods
Inn, Inc.}, 124 F.3d at 605. However, the \textit{Bryant Woods Inn} application of \textit{Alexander}
is erroneous. \textit{See id.}. The decision of the municipality in \textit{Bryant Woods Inn} resulted in
the exclusion of residents from the municipality, while the decision of the defendant
state in \textit{Alexander} did not result in an exclusion of services or denial of access. In-
deed, the Supreme Court noted that it based its decision on the fact that there was no
denial of access or exclusion from benefits involved in its case. \textit{Alexander}, 469 U.S. at
309.
larly, the Seventh Circuit in *Erdman v. City of Fort Atkinson*\(^1\) noted that where the issue is whether a number of unrelated people with disabilities can live in a single-family residence, "equal opportunity" can be demonstrated by showing that living in unrelated groups of a particular size is therapeutic and also is the only way most of the residents can live in a single-family home.\(^2\)

In contrast, the Fourth Circuit in *Bryant Woods Inn* held that a request for a variance to expand a group home from eight to fifteen people would not provide an equal opportunity to the provider's residents but instead a financial advantage to the provider.\(^3\) Again, the Fourth Circuit wrongfully viewed the Fair Housing Act through the eyes of the housing provider rather than the eyes of the person with a disability. If people with disabilities need to live in an unrelated group for therapeutic reasons, a deprivation of that right would deny them an equal opportunity to reside in a community. If fifteen related people can live in a residence, then inequality would exist if fifteen unrelated people could not live in the residence if they needed to live together because of their disability.

It has been argued that ordinances limiting group living such as fraternities and sororities constitute "equality" because it is applicable to both people with disabilities and non-disabled people.\(^4\) However, non-disabled people do not need to reside in fraternities and sororities to be able to live in a residential neighborhood, while people with disabilities, because of their disabilities, may need to live in a group setting in order to be able to live in a residential zone.\(^5\)

**IV. Recommendations**

As was the case in the earlier district court "reasonable accommodation" cases, the focus in a "reasonable accommodation" case should be on whether a proposed accommodation is "reasonable." The issues of "necessity" and "equality" should be relatively easy to resolve in most cases. If a zoning barrier remains between a person with a disability and the housing the person desires, an ac-

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\(^1\) 84 F.3d 960 (7th Cir. 1999).
\(^2\) See *id.* at 963.
\(^3\) *Bryant Woods Inn, Inc.*, 124 F.3d at 605.
\(^4\) See Elliot v. City of Athens, 960 F.2d 975, 982-84 (11th Cir. 1992).
commodation is "necessary" to remove the barrier. If a person with a disability, because of the disability, cannot live in housing or an area that a person without a disability can live in, inequality of opportunity has been proven. As the Seventh Circuit noted in *Erdman v. City of Fort Atkinson*,136 the amount of proof necessary to show that equal opportunity does not exist "is slight," and, ordinarily, "inequality is fairly obvious."137

Therefore, the key question in a "reasonable accommodation" case should be whether a proposed accommodation is "reasonable." Since the municipality possesses the most information about its services, finances, and neighborhoods, it should be forced to bear the burden of proving that a reasonable accommodation cannot be made. Placing the burden on the housing provider to demonstrate that the municipality would not suffer an undue hardship or burden or would not substantially alter the nature of a residential neighborhood would illogically force the provider to have to prove a negative fact. Similarly, courts should not require housing providers to exhaust administrative remedies which are generally barriers to housing that the drafters of the statute sought to eliminate.

While some courts have placed a more cramped reading on the "reasonable accommodation" test than necessary, they have provided a more expansive reading of the "facial discrimination" standard, as well as the provisions of the Americans With Disabilities Act barring discrimination by zoning authorities against people with disabilities. These readings are more consistent with intentions of the drafters of the statutes, and correctly consider the impact on people with disabilities, rather than the impact on housing providers.

For example, in *Larkin v. State of Michigan Department of Social Services*,138 the Sixth Circuit considered the question of whether a state statute placed a spacing requirement between group homes for people with disabilities violated the Fair Housing Act.139 The Sixth Circuit held that the statute was facially discriminatory in violation of the statute, stating that a statute could only survive a challenge if it were "warranted by the unique and specific needs and

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136. 84 F.3d 960 (7th Cir. 1996).
137. Id. at 963.
138. 89 F.3d 285 (6th Cir. 1996).
139. See id. at 288-89.
abilities of those handicapped persons." Similarly, the Tenth Circuit in *Bangerter v. Orem City Corporation* held that an ordinance requiring a certain level of supervision in residences for people with disabilities would violate the statute unless it was necessary to satisfy the unique and special needs of the people to whom applied.

Both the *Larkin* and *Bangerter* decisions are significant because they considered the needs of people with disabilities in determining the validity of statutes. Similarly, in reasonable accommodation cases, courts should consider the needs of people with disabilities in determining whether an accommodation is reasonable and necessary to provide an equal opportunity for housing.

Finally, in *Innovative Health Systems, Inc. v. City of White Plains*, the Second Circuit held that Title II of the Americans With Disabilities Act applied to zoning ordinances and that a zoning decision barring an alcohol and drug-dependency treatment center violated the Act. If courts continue to interpret the "reasonable accommodation" prong of the Fair Housing Act in a restrictive fashion, housing providers should look to the Americans With Disabilities Act for relief.

The Fair Housing Act was aimed at removing barriers to housing for people with disabilities. The restrictive interpretation placed upon the "reasonable accommodation" test by several courts only creates new barriers to housing for people with disabilities not intended by either the drafters of the statute or the Supreme Court. The Court held in *City of Edmonds*, the statute should receive a "generous construction" to remove unnecessary barriers to housing for people with disabilities.

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140. Id. at 290. The court also cited to the House Report. Id. at 285. The court rejected two decisions by the Eighth Circuit: *Familystyle of St. Paul, Inc. v. City of St. Paul*, 728 F. Supp. 1396 (D. Minn. 1990), aff’d, 923 F.2d 91 (8th Cir. 1991), and *Oxford House-C v. City of St. Louis*, 77 F.3d 249 (8th Cir. 1996) (holding that facially discriminatory laws lacking a malevolent motive do not constitute intentional discrimination and that facially discriminatory laws must be upheld if they merely are rationally related to a legitimate government objective). See *Larkin*, 89 F.3d at 290.

141. 46 F.3d 1491 (10th Cir. 1995).

142. See id. at 1503-05.

143. 117 F.3d 37 (2d Cir. 1997).

144. See id. at 49. Unlike the Fair Housing Act, a provider can prevail under the Americans With Disabilities Act without proof of either a malevolent motive or a facially discriminatory ordinance, or that a particular accommodation is "necessary."
Conclusion

In enacting the Fair Housing Act, Congress intended to remove land use barriers to housing for people with disabilities. The Supreme Court recognized this intent when it refused to exempt a land use restriction in *City of Edmonds*. However, more recent federal cases have wrongfully interpreted the language of the statute in ways that create new barriers for housing for people with disabilities. As the language of the statute can be easily interpreted in a manner which provides access to housing for people with disabilities, the cases placing a restrictive reading on the language of the statute wrongfully conflict with the intentions of the drafters of the statute.
A RATIONAL DISCUSSION OF CURRENT DRUG LAWS*

Nicholas deB. Katzenbach**

I do not want to be characterized here as an expert because I think the experts are here as members of the panel. I am really just speaking as a lawyer, as a citizen, and as somebody who is concerned about these problems.

Thirty years ago this month the President's Crime Commission came out with a rather extensive report.¹ I had the honor to chair that. It came at a time of increasing crime, riots, etc., back in the late 1960s. It had as its purpose trying to promote a rational discussion of crime problems that were at that time very much on people's minds. These were highly emotional and politically rewarding public issues to discuss. Well, thirty years later I am still at it. But I have learned that those involved in government and politics respond more comfortably to public views, as perhaps they should, than simply to intellectual pleas. That was true of the Commission's report.

The report had a major effect on professionals in law enforcement and indeed one purpose of the report, one major recommendation, was to increase professionalization of state and local law enforcement and of the judiciary. That, in turn, got the Congress and state legislatures involved, although, of course, the rhetoric with respect to crime continued. One of the report's major points was trying to get people to see the criminal law system as a system, not as a bunch of separate components, but as something that could be put on a flowchart, that you could see from the top — police, arrested, prosecutors, courts, probation officials, prison officials — all put various ways going off to one side.

A goal was to see it in that way, and to realize that you cannot tinker with one part of the system without affecting the other parts

* Nicholas deB. Katzenbach delivered these remarks at a public forum, sponsored by the Waterbury, Connecticut Bar Association and the Voluntary Committee of Lawyers, on June 5, 1997, in Waterbury Connecticut.


of the system, and that you have to look at it really as a system. It emphasized for that reason the importance of alternative approaches (of weighing costs/benefits, for example) with regard to methods of dealing with crime, juvenile courts, and with the potential of community service — ideas at that time that were new.

Even family problems. I must say the Commission discovered the importance of policy to families before the politicians discovered the importance of family values. Thirty years ago we realized there was a very strong connection between families and crime and I am not talking about families of organized crime.

We talked about the role of the federal government and the state government. We saw the role of the federal government as assisting the states and giving the principal responsibility to the states, with the federal government assisting in technology and things that could be done on a common base. And one of the major things we dealt with was trying to improve statistics on crime to find out what was really going on. We drew those flow charts but the flow charts were not terribly accurate because we did not really have terribly accurate statistics. With respect to crime in general, I think statistical information has greatly improved now through the cooperation of agencies in the states, federal government, and cities.

We did not do a lot on drugs because that was just beginning to be a problem. There was some talk about treatment. I do not think we appreciated at that time the enormous political potential of declaring the War Against Drugs. Now, as I have said, all crime has an emotional appeal and there is a great deal of political appeal in playing the role of the tough enforcer. Successful prosecutors can become governors, senators, even aspiring to the Presidency as Tom Dewey did, and the War on Drugs is an ideal vehicle for political rhetoric.

There are a number of reasons for that. Crime in the streets has increasingly become drug-connected. Drugs attract young people and raise serious family concerns. Every parent has concerns about children and drugs. Drugs mostly come from abroad so it is easy to think of the fault being over there and not here. There is a strong race connection with drugs and that can have a political appeal to some. And it certainly has had an effect, as so many problems in this country have, on our ability to deal with racial problems. It also is an ideal vehicle for the federal government to involve itself in much more directly for the simple reason that it has some international aspects and that almost all drugs have an
CURRENT DRUG LAWS

interstate connection. And most importantly of all, it is a real problem.

Declaring a War on Drugs is popular for all of those reasons, but it seems to me that the term “war” may be an unfortunate one if we are seeking answers to real problems. From the outset, presidents, drug czars, and federal and state officials have always paid lip service to the need to take a balanced approach, meaning a balance between tough enforcement and other modalities of control such as treatment for addiction. But the balance has mostly been attained with a very heavy hand on the scale tipping it towards getting tough, because that is where the political appeal is. That approach, I believe, has cost a great deal in dollars, a great deal in justice, and even affected adversely a good deal of foreign policy without, at least yet, achieving results comparable to those costs. That is why I think the time has come to consider the problem as rationally and as calmly as is possible to see if we can achieve better results.

When I say something like that, I do not mean to toss the law enforcement out of the window. I do not mean stop interdiction. I simply mean look at those in flow charts, to see whether we are putting the resources in the places that are best. Maybe we are. But a war suggests that its us against them — whether the foreign drug kings, or the street dealers, or the addicts, or whomever — good guys against bad guys. And it assumes the drug problem could be solved if only we could control the supply of drugs. Now obviously that is an overstatement, but I do want to make Pogo’s point: we have met the enemy and it is us. Demand is the other side of that problem and if demand increased, I do not think there is any question about the fact that supply will increase to meet that demand.

Let me put it this way. I do not have any problems with enforcement efforts aimed at lessening supply if they are cost-effective. Indeed, I think many are essential to a balanced approach. But I also want to be sure we are putting our funds where we can get the most bang for the buck. Again, wars are to be won. I would be satisfied simply to see some steady progress reducing addiction, accepting that progress will be slow, that it will be expensive, and that it will probably never result in any kind of total victory. But let us go as far as we can, there simply is no magical, simple answer to the problem of drugs.

The predominantly law enforcement approach of the past twenty-five years has had substantial costs in terms of money and,
of equal or maybe greater importance, I think cost to the justice system itself. But first money. Both federal and state jails are overcrowded. New prisons are required to be built at what I regard an alarming rate. We have more people per capita incarcerated in this country than in any other country in the world.  

If the objective is to fill the prisons to capacity, then the drug laws' enforcement has been a smashing success. But the result has not significantly reduced drug traffic, and its monetary cost is very substantial, twenty to thirty thousand dollars a year to support each person in jail.

Unfortunately, relatively few of those convicted — and this is no fault of law enforcement — are the big drug dealers, and almost all of them in the drug economy can be easily replaced in the distribution scheme because of the enormous amounts of money involved. Relatively few are also convicted of crimes of violence. Some are themselves addicts convicted of unlawful possession. Some are not addicts, just young people doing foolish experiments. Most are serving quite long mandatory sentences. I think a rational approach would at least consider some alternatives to long-term incarceration, such as more community service, supervised probation, parole, treatment, and so forth. All, I believe, are cheaper.

Success and failure, and this is important, should really be monitored with the understanding that failures will occur, so we have some idea of what works and some idea of what does not work, and under what circumstances. We should not expect perfection. Just aiming at any kind of cost-effective improvement ought to be politically popular. Treatment, well that is not any kind of magic bullet either. Getting rid of addiction is tough and you can expect frequent failures and relapses. But even a modest rate of success is quite cost-effective. And any reduction in demand is important.

Treatment in prison is relatively cheap. Treatment for addicts who want it, and not all do by any means, seems to me to be a moral imperative. If we create the administrative mechanism necessary to measure success and failure, we can promote a rational, rather than emotional, approach to the drug problem. I include, for example, methadone maintenance and treatment modalities, in part because I think it can become a step toward being drug free.


Education is a difficult subject and one that is delicate because young people are not really scared. Young people think they are going to live forever, that is why they are such good soldiers. They are not scared when they ought to be. And the great problem with education and drugs is to strike a balance that makes sense to young people so that they do not want to experiment merely because it is dangerous, merely because it is illegal. It is difficult to develop education programs and appeals in the schools and elsewhere that strike that balance fairly and effectively.

Frankly, I am more concerned with the non-monetary costs of the drug war to our criminal justice system. There are consequences to the rhetoric of toughness, the political consequences of being soft on crime, racial problems, concepts of fairness, concepts of the punishment fitting the crime, and I think an increasing federalization of criminal law generally, all stemming out of the effort to control drugs.

For example, mandatory sentences, stiff mandatory minimum sentences, I suppose are aimed at deterrence on the one hand and I think politically aimed at judges on the other. They succeed quite well on the latter count, less on the former. Their effect, of course, is to transfer a great deal of power from judges to prosecutors. I think that is a cause for concern. So, too, is the notion that one size fits all, so seldom consistent with common sense. And finally, one obviously unintended result is to release violent felons from overcrowded prisons because they do not have mandatory sentence minimums and are eligible for parole, when nonviolent drug felons are not.

Increasing federal laws has led to making state experimentation more difficult because federal authorities can almost always step in if they want to. I happen to be a conservative as far as federalism is concerned and I still think it makes sense to put responsibility for as many matters as possible with the states. There should be a constraint on the part of the federal government in drug enforcement and a more precise allocation of responsibility. To my mind, the role of the federal government is what years ago the Crime Commission though it was, and that is to provide help, not headlines.

A word on professionalization and specialization. I do not think most federal and state judges consider themselves very expert in drug matters. Not often do they like these cases in their courts. One result of the increased efforts in the war has been to crowd criminal courts of general jurisdiction with drug cases at the expense of other criminal and civil cases. More judges may be the
answer, but I think more specialized judges may well be a better one. That makes possible a more coordinated approach — to go back to my flow chart — of specialists in all aspects who know something about drugs and can communicate and talk with each other. At the moment it is spread all over the place and it would be helpful if the information could be focused in a computerusable form, so that we would have statistics, we would have information, and we would know much more about what is going on and be able to measure it much more accurately. Specialization permits judges with specialized training and interest to work for the public health with probation, with community organizations, and with others.

As I said at the outset, I do not pretend to have drug expertise, but I do believe a rational approach to the problems of society tends to spur them towards solutions. And most of all I think the best of our political leaders know this, and deserve our support when they search for solutions that may or may not work, rather than programs that greatly appeal to our less-educated instincts. That is why I think what is been going on in the State of Connecticut is useful, what has going on here tonight is useful, being willing to look honestly at the problems. I think the bar association here is to be congratulated for sponsoring this program and the panelists who are experts for participating.
JUNK SCIENCE — THE LAWYER'S ETHICAL RESPONSIBILITIES

Dick Thornburgh*

The following offers some observations designed to advance the cause of resolving the dilemma presented to judges and lawyers alike by the escalating concern over “junk science” in our nation’s courtrooms.

Nowhere has this phenomenon been more starkly, or sadly, described than in a recent New York Times review of a television documentary on women affected by breast cancer:

They are convinced that they were poisoned by their toxic environment. . . . Are crops sprayed with pesticides? Well, then of course pesticides caused breast cancer. Do we use electricity? Well, of course electromagnetic fields caused breast cancer. How about those plastics we use with such abandon? Once again, the women hear, those plastics contain chemicals that can cause breast cancer. ¹

The reviewer described the women interviewed as “far removed from the universe of scientists and others who make distinctions between hypotheses and evidence, who believe that speculation is not proof and that when evidence fails to support a hypothesis, the hypothesis should be abandoned.”²

Broadly speaking, I hold that “junk science” in the courtroom emanates from testimony by expert witnesses hired not for their scientific expertise, but for their willingness, for a price, to say whatever is needed to make the client’s case. Put simply, I believe that it is unethical lawyers who are largely to blame for introducing, or, in settlement negotiations, threatening to introduce this so-called “expert” testimony. As one commentator noted, “lawyers casting about for new theories to use to sue manufacturers of

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2. Id.
drugs, medical devices and other products create a limitless demand for junk science."

A recent example of this phenomenon was reported on the front page of the New York Law Journal in September 1997. Within days of the withdrawal of weight reduction medications Fen-Phen and Redux from the market, lawyers across the country were in court seeking damages and simultaneously placing ads in newspapers in search of plaintiffs. By mid-November, at least three nationwide and more than two dozen statewide class action suits, as well as hundreds of individual cases and a shareholder suit were pending. As the litigation explosion expands in this country, junk science is producing "junk law" that is pervading our courtrooms. The ultimate victims are America's workers and consumers through the increased costs, diminished innovation opportunities, and foregone product availability imposed on enterprises engaged in scientific research and development and product manufacturing.

As pointed out in the recent best-seller, Science on Trial, by Dr. Marcia Angell, the Executive Editor of the New England Journal of Medicine, breast implant litigation, threatening the existence of breast implant manufacturers and other suppliers, is but the most prominent of the abounding examples of this phenomenon. In 1992 the Food and Drug Administration ("FDA") imposed a mora-


5. See id.

6. Mark Hansen, Fen-phenomenal Tort Battle Brewing, 84 A.B.A. J., Jan. 1998, at 24. This issue of the ABA Journal also reports on law suits by health care workers against the latex glove industry. Mark Hansen, Wheeze, Sneeze . . . 'Scalpel, Please': Health Care Workers Allege Latex Gloves Cause Severe Allergic Reaction, 84 A.B.A. J., Jan. 1998, at 25. As of mid-November 1996, more than 200 lawsuits relating to latex allergies had been filed in state and federal court and have been consolidated for discovery purposes in United States District Court in Philadelphia. See id. The plaintiffs, nurses and doctors, allege that they have developed a "severe allergic reaction" to latex due to continued exposure through use of latex gloves. Id. They further allege that the latex glove makers were aware that continued exposure would cause such severe allergies, yet they did nothing to make a safer glove. See id. The latest research, an epidemiological study conducted by the National Center for Health Statistics, shows that there is no causal connection between working in the health care industry and latex sensitivity. Id. The National Center for Health is a federal, nonpartisan agency and the study is the largest epidemiological study on the subject ever done. See id. This is yet another apparent example of junk science litigation.

torium on the sale of silicone gel breast implants and subsequently
restricted the sale and use of the implants. Deluged with lawsuits, Dow Corning, the implant makers, entered into bankruptcy in 1995. Reliable epidemiological data, however, has since demonstrated that silicone breast implants do not cause the maladies they were alleged to cause in the myriad lawsuits brought by women implanted with them. In her book, Dr. Angell argues that the breast implant litigation has threatened the entire industry of medical devices, as well as an important area of medical research — epidemiological studies.

The classic example of this phenomenon was the Bendectin litigation. Faced with claims that the anti-nausea drug Bendectin caused defects in fetuses, Merrell Dow Pharmaceuticals was forced to withdraw this drug from the market despite the lack of evidence demonstrating such a causal connection. Indeed, although Bendectin litigation had been pending in the courts for over a decade, the United States Court of Appeals for the Ninth Circuit noted:

the only review plaintiffs' experts work has received has been by judges and juries, and the only place their theories and studies have been published is in the pages of the federal and state reporters. . . . Despite the many years the controversy has been brewing, no one in the scientific community — except defendant's experts — has deemed these studies worthy of verification, refutation, or even commentary. It's as if there were a tacit understanding within the scientific community that what's going on here is not science at all, but litigation.

Another recent target of junk science litigation is the contraceptive device Norplant. An avalanche of lawsuits has been brought by many of the same lawyers who engaged the makers of silicone breast implants. In addition, many of the same medical "experts" and laboratories that prospered from the breast implant litigation are assisting these lawyers in bringing suits against the makers of Norplant. Norplant entered the United States market in 1991, after thirty years of development and testing, and has been used by

8. See id. at 99-103, 110, 195-96; see also Junk Science, supra note 3 at 398.
9. See id. at 84-87.
about one million American women.\textsuperscript{14} Approximately 50,000 women have sued the company's manufacturer, alleging that it failed adequately to warn users of side effects like headaches, weight gain, ovarian cysts, and depression.\textsuperscript{15} A total of 2800 lawsuits are now pending in just one federal court in Texas.\textsuperscript{16}

The Texas Supreme Court was obliged to delay lawsuits that were set for trial while it ruled on defendant's motion to disqualify plaintiffs' lawyers for hiring a paralegal who used to work for the defense and for paying an expert $10,000 to switch sides.\textsuperscript{17} Despite extensive litigation and media coverage, the FDA and physician groups still insist the product is safe. Sales, nonetheless, have dropped dramatically — from $141 million in its first full year on the market to $3.7 million last year.\textsuperscript{18}

Junk science is made possible in part by so-called "experts" who will testify to any theory the lawyer wants for a price. A look at the classified section of any legal publication will produce samples of a whole industry of "experts" advertising their abilities to provide a wide range of expert testimony. Many of them get right to the point, highlighting jury awards or settlement amounts gained as a result of their testimony. One of the largest expert witness referral services maintains a list of 24,000 experts in 5500 fields. Their business is \textit{litigation}, not science. Their motivation raises serious questions about the use of expert testimony generally. Are these experts really seeking to assist the trier of fact, or are they hired guns aiming at a pre-determined result?

At the turn of the century, Judge Learned Hand was among the first to raise issues regarding the role of expert testimony, questioning an expert's ability to give an unbiased opinion when he is being liberally paid to defend one side to a dispute.\textsuperscript{19} Judge Hand also questioned a jury's ability to decipher and resolve conflicting expert testimony. As he observed, "the whole object of the expert is to tell the jury, not facts, . . . but general truths derived from his specialized experience. But how can the jury judge between two statements each founded upon an experience admittedly foreign in kind to their own? It is just because they are incompetent for such

\textsuperscript{14} Court Delays Trial's Start in Norplant Case, \textit{Hous. Chron.}, Aug. 9, 1997, at 35.
\textsuperscript{15} See \textit{id}.
\textsuperscript{16} See \textit{id}.
\textsuperscript{17} See \textit{id}.
a task that the expert is necessary at all." No better example of this quandary is presented than in Daubert, where the defense expert pointed out that none of the published literature examining a potential causal relationship between prenatal ingestion of Bendectin and birth defects found the product to cause birth defects. In response, plaintiffs presented eight experts who concluded that Bendectin can cause birth defects on the basis of animal studies, in vitro experiments, chemical structure analysis, and "re-analysis" of previously published studies. How is the ordinary lay juror to handle these diametrically opposed conclusions?

How, we might better ask, has this challenge been handled by the courts?

I. Judicial Responses to Expert Testimony

For the most part, judicially-administered evidentiary standards have been the only means — albeit highly imperfect ones — of excluding junk science from the courtroom. The standard of admissibility for expert testimony was first formulated over seventy years ago in Frye v. United States. Frye was the first case to hold that scientific evidence should be treated differently from any other evidence. The case involved a criminal matter, where a defendant charged with murder wanted to introduce the use of a new systolic blood pressure test to show that he was telling the truth. The court excluded the evidence, finding that the expert testimony was based on a principle not "sufficiently established to have gained general acceptance in the particular field in which it belongs." The Frye rule, in what has come to be known as the "general acceptance" standard, required expert testimony based on novel scientific evidence to have gained "general acceptance" by a large scientific group.

20. Id. at 54.
22. See Daubert, 509 U.S. at 583-84.
26. Id. at 1014.
In 1975, Congress enacted the Federal Rules of Evidence. Rule 702 governs the admission of expert testimony and, in sharp contrast to the Frye rule, provided that: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise." The Rules do not make any specific mention of Frye, and, in light of their more permissive attitude toward the admission of evidence generally, courts and scholars alike questioned whether the strict Frye test still survived. Under this new standard, some courts undertook to consider whether particular expert testimony was reliable. Others just questioned its relevance. And still others continued to apply Frye. Critics complained that some judges were imposing "no meaningful check on science in the courtroom" and were permitting experts "to testify to almost any claim regardless of the weight of contrary opinion," thus, increasingly relying on "junk science."

The United States Supreme Court granted certiorari in Daubert v. Merrell Dow Pharmaceuticals to resolve some of the issues regarding the judicial standard for admission of scientific evidence. As noted, the plaintiffs in this case were children who were born with birth defects and whose mothers had taken the anti-nausea drug Bendectin during their pregnancies. Plaintiffs sought to admit scientific evidence to support their claim that the drug caused the children's birth defects. The district court and the Ninth Circuit Court of Appeals excluded plaintiffs' expert's testimony because it did not satisfy the Frye test and granted summary judgment in favor of the defendant manufacturer.

The Supreme Court reversed and held that the general acceptance test in Frye was at odds with the "liberal thrust" of the Federal Rules of Evidence, and had thus been superseded. Instead, the Court explained, Rule 702 required federal trial judges to make

28. See id. at 528.
29. FED. R. EVID. 702.
30. See Congressional Action to Amend Rule 702, supra note 27, at 529-30.
31. See id.; see also Improving Judicial Gatekeeping, supra note 24, at 944; Congressional Action to Amend Rule 702, supra note 27, at 529-30.
32. Improving Judicial Gatekeeping, supra note 24, at 944.
35. See Daubert, 509 U.S. at 588.
a "preliminary assessment" as to both the reliability and relevance of the scientific testimony offered.\textsuperscript{36} To satisfy the reliability prong, the Court explained that a trial judge must find the subject of the expert's testimony to be "scientific knowledge." The Court offered a list of four, non-exhaustive factors or "general observations" for the trial judge to consider in determining whether the testimony was reliable scientific knowledge: (1) whether the theory or technique can be, or has been, tested; (2) whether it has been subjected to peer review and publication; (3) the known or potential rate of error; and (4) the degree to which the theory or technique is widely accepted in the scientific community.\textsuperscript{37}

On remand in \textit{Daubert}, the Ninth Circuit added a further consideration of its own: Was the evidence proffered by experts developed independent of the litigation, or was it developed solely for purposes of litigation and therefore potentially biased?\textsuperscript{38} \textit{Daubert} was heralded as the case that would resolve the "junk science" debate.\textsuperscript{39} To date, the case has been cited in at least 730 federal cases, 325 state decisions, and over 1000 law review articles.\textsuperscript{40} A quick review of some of these materials, however, makes it clear that the "junk science" debate, and indeed the application of the \textit{Daubert} case itself, is far from settled.

Chief Justice Rehnquist and Justice Stevens warned of such difficulties in their concurrence in \textit{Daubert}.\textsuperscript{41} They agreed that \textit{Frye} had been superseded by the enactment of the Federal Rules of Evidence, but criticized the majority for providing a list of "general observations" to further guide district courts.\textsuperscript{42} Because the Court was not applying these factors to decide whether any particular evidence was admissible, the concurrence argued that the list would give little more than "vague and abstract" guidelines to the district courts.\textsuperscript{43} They also criticized the way in which the majority required that trial judges make a preliminary assessment as to whether scientific evidence is reliable: "Questions arise simply from reading this part of the Court's opinion, and countless more...

\textsuperscript{36} See \textit{id.} at 592-93.
\textsuperscript{37} Id. at 593-94.
\textsuperscript{38} See \textit{Daubert v. Merrell Dow Pharm. Inc.}, 43 F.3d 1311, 1317 (9th Cir. 1995).
\textsuperscript{40} See \textit{Critical Examination}, supra note 39, at 227.
\textsuperscript{41} See \textit{Daubert}, 509 U.S. at 598.
\textsuperscript{42} Id.
\textsuperscript{43} Id.
questions will arise when hundreds of district judges try to apply its teaching to particular offers of expert testimony.” 44

Finally, the concurrence questioned the extent to which federal judges would now, under the dictates of Daubert, be faced with “either the obligation or the authority to become amateur scientists.” 45

II. Review of the Law Under Daubert

Just as the Daubert concurrence predicted, federal courts have been confronted with seemingly endless questions as they struggle to determine what evidence is admissible under the rules articulated in Daubert. 46

Consider, for example, the question of whether courts should hold hearings (under Federal Rule of Evidence 104(a)) as part of their “preliminary assessment” of the proffered evidence. 47 Any such hearing, as one commentator noted, is really a “win-win” situation for defendants since extended hearings can drain plaintiffs’ resources and result in plaintiffs’ loss of a key expert. 48 The Ninth Circuit has held that district courts are not required to hold such hearings. 49 That Court also requires a party challenging scientific evidence to make a prima facie case showing that the expert failed to follow accepted scientific methodology or reasoning before it will proceed with any kind of Rule 104(a) hearing. 50 The Third Circuit, on the other hand, has created something of a “cottage

44. Id. at 600.
45. Id. at 600-01.
46. See District Judge Takes Issue With Circuit Court’s Application of Gatekeeping Role, Federal Discovery News, Aug. 1997, at 4 (discussing Hon. Sam C. Pointer, Jr.’s comments on Daubert at a July ALI-ABA conference) [hereinafter FEDERAL DISCOVERY NEWS].
47. Federal Rule of Evidence 104 (a) provides:

Questions of admissibility generally: Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions (b). In making its determination it is not bound by the rules of evidence except those with respect to privilege.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit upon it, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of conditions.

48. See Emerging Law, supra note 39, at 390-91.
50. See Hopkins, 33 F.3d at 1124.
industry” out of *Daubert* hearings. In one case, for example, a court in that circuit scheduled most of one month and part of two other months for the preliminary assessment alone.

Consider, also, the extent to which judges are indeed becoming “amateur scientists,” as the *Daubert* concurrence predicted. Different circuits seem to look differently at how deeply they should probe in determining whether an expert’s testimony is admissible under *Daubert.* Must a court, after *Daubert,* simply consider the type of scientific data and methodology used by the expert? Or must the court go further and inquire into the reliability of specific data or procedures used by the expert? Must a court now reject expert testimony if it finds that the data or implementation of the methodology in that particular instance was unreliable?

The Third Circuit says yes. In the *Paoli II* litigation, where plaintiffs who lived near a rail yard alleged that they were exposed to and injured by PCBs, the district court engaged in a five-day hearing and extensive analysis to determine the admissibility of certain evidence. That court added three criteria in addition to the four proposed in *Daubert* and left open the possibility that other factors could be relevant. As part of its inquiry, the Third Circuit considered whether the methodology used was scientific and whether that methodology was used in an unobjectionable manner. It excluded some testimony because it determined that cer-

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51. *See Emerging Law, supra note 39, at 388-89* (discussing *In re Paoli R.R. Yard PCB Litigation II*, 35 F.3d 717 (3d Cir. 1994), cert. denied, 513 U.S. 1190 (1995) and subsequent district court holdings in that circuit). The author states that “in effect, the courts in the Third Circuit now appear to be creating a second trial, complete with witnesses and cross-examination, and lasting sometimes for weeks, just to decide the question of whether experts should be allowed to testify at the real trial.” *Id.* at 389.

52. *See id.*

53. *See id.* at 394-408.

54. *See id.*

55. PCBs is an acronym for polychlorinated biphenyls.

56. *See In re Paoli Railroad Yard PCB Litigation, 35 F.3d 717, 742 & n.8* (3d Cir. 1994) (ruling that district courts should take into account factors set forth in *United States v. Downing,* 753 F.2d 1224, 1238-39 (3d Cir. 1985), in addition to factors set forth in *Daubert,* cert. denied, 513 U.S. 1190 (1995). The court advised that factors deemed important by *Daubert* and *Downing* include the following:

   (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique’s operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; (8) the non-judicial uses to which the method has been put.

*Paoli,* 35 F.3d at 742 n.8.

57. *See id.* at 777-78.
tain protocol and quality control techniques had not been undertaken by the laboratory.58

Other circuits would answer the question differently. The Second Circuit, for example, has held that disputes about whether an expert correctly employed a particular scientific methodology should be left to the jury.59 These disputes, and others concerning the strength of an expert's credentials or the lack of textual authority for an expert's opinion, should (according to the Second Circuit) be "explored on cross-examination" because those issues go to the weight or credibility of the expert's testimony, not its admissibility.60 The Eleventh Circuit interpreted Daubert as "loosen[ing] the strictures of Frye and mak[ing] it easier to present legitimate conflicting views of experts for the jury's consideration."61

The Supreme Court recently reversed the Eleventh Circuit's decision in Joiner v. General Electric Company, resolving a split in the circuit courts of appeal regarding the appropriate standard of review for expert testimony.62 In Joiner, the Eleventh Circuit overruled a district court's exclusion of expert testimony and restored plaintiff's claim that his exposure to PCBs and other chemicals caused or helped to "promote" his lung cancer. (The plaintiff had been a smoker for eight years, his parents had both been smokers, and his family had a history of lung cancer.)63 Applying what it described as "Daubert's lower threshold" and a "particularly stringent" standard of review, the court emphasized the limited nature of its "gatekeeping role."64 The circuit court explained that the role of the gatekeeper was only to "guard the jury from considering as proof pure speculation presented in the guise of legitimate scientifically based expert opinion. It is not intended to turn judges into jurors or surrogate scientists."65 The court further opined that the

58. See id.
60. Id. at 1043.
62. Six circuits apply a "manifestly erroneous" standard; four circuits apply an abuse-of-discretion standard; and two circuits apply the "particularly stringent" standard discussed in Joiner, 78 F.3d at 529 (11th Cir. 1996), rev'd, 118 S. Ct. 512 (1997). See David L. Faigman et al., 1 MODERN SCIENTIFIC EVIDENCE § 1-3.5 (1997).
64. See Joiner, 78 F.3d at 529-30.
65. Id. at 530.
trial court should leave it to the jury "to decide the correctness of competing expert opinions." 66

The Supreme Court reversed, applying the abuse of discretion standard in reviewing the trial court's decision and concluding that the trial court did not abuse its discretion in excluding the expert testimony. 67 The Court ruled that "[t]he [animal] studies were so dissimilar to the facts presented in this litigation that it was not an abuse of discretion for the District Court to have rejected the experts' reliance on them." 68 The Court also upheld the district court's conclusion that "the four epidemiological studies on which respondent relied were not a sufficient basis for the experts' opinions." 69

Citing Daubert's language that the "focus . . . must be solely on principles and methodology, not on the conclusions that they generate," the respondent argued that the district court erred in focusing on the conclusions of the experts rather than the methodology. 70 The Court in Daubert, however, did not provide much guidance regarding the distinction to be made between methodology and conclusion. In Joiner, the Court stated,

But conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. 71

In other words, trial courts may focus on the conclusions of the experts in determining whether the data actually supports the conclusion. Thus, the ambiguity in Daubert, which on the one hand stressed the gatekeeping role of the trial judge, and on the other hand the "liberal thrust" of the evidentiary rules and the call for juries to resolve evidentiary disputes, 72 was clarified in Joiner. The Court in Joiner reemphasized the importance of the trial judge's role as gatekeeper.

66. Id. at 533.
67. See Joiner, 118 S. Ct. at 516.
68. Id. at 518.
69. Id.
70. See id. at 519 (quoting Daubert v. Merrell Dow Pharm., 509 U.S. 579, 595 (1993)).
71. Id.
72. See Daubert, 509 U.S. at 588, 597.
Presently, there are bills pending in Congress that propose amendments to Federal Rule of Evidence 702 relating to the admissibility of scientific evidence. These proposals would add a presumption of inadmissibility of such evidence, and, incidentally, would disqualify an expert witness whose compensation is contingent on the outcome of the case, a most salutary suggestion.

Critics, like Judge Ralph K. Winter of the Court of Appeals for the Second Circuit, complain that the bills do not accurately codify the decision in Daubert. Another commentator remarked that the amendment would improperly take away the jury’s responsibility to decide right and wrong, scientific truth and scientific falsity, and gives it “to a handful of government officials appointed for life.” This critic further observed that the attempted codification, captioned, felicitously, the “Honesty in Evidence Act,” would “be a wonderful lawyers’ full employment act for lawyers paid by the hour who will litigate for the next ten years over whether or not Congress was codifying the Daubert opinion.” One supporter praises the bill for ensuring “that the science that jurors and judges hear in a courtroom is not inferior to the science that scientists and researchers hear at their professional meetings.” He also notes that it is unlikely that the average juror will comprehend weaknesses in expert testimony brought out during cross examination.


74. See H.R. 988, 104th Cong., 1st Sess.; S. 79., 105th Cong., 1st Sess.; H.R. 10, 104th Cong., 1st Sess. Section 102 of H.R. 10, entitled Honesty in Evidence provides in pertinent part:

Rule 702 of the Federal Rules of Evidence is amended . . . by adding at the end the following: (b) Adequate basis for opinion. Testimony in the form of an opinion by a witness that is based on scientific knowledge shall be inadmissible in evidence unless the court determines that such opinion is - (1) based on scientifically valid reasoning; and (2) sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in rule 403. (c) Disqualification. Testimony by a witness who is qualified as described in subsection (a) is inadmissible in evidence if such witness is entitled to receive any compensation contingent on the legal deposition of any claim with respect to which such testimony is offered.


76. Id.


78. See id.
This review of the law under *Daubert*, and most recently *Joiner*, is certainly not intended to be exhaustive, but is meant to highlight the types of questions that courts continue to face when confronted with proffers of expert testimony. This analysis is also to dispel any notion that *Daubert* really did decide the junk science debate.

### III. The Lawyer’s Role

It is abundantly clear that lawyers cannot hide behind the guise of *Daubert* and contend that there is no need for further thought or debate about the proper use and role of junk science in our courtrooms. Instead, I suggest that it is time for lawyers to confront their own obligations in bringing this “expert” testimony to the courts in the first place.

We have discussed the role of the expert, the jury, the judge; but what is, or what should be, the lawyer’s role? *Daubert* may provide some guidance as to what expert testimony will or will not be accepted by courts, but it surely does not provide all the answers. Consider the following example, the facts of which are taken from an actual case in the Sixth Circuit. Plaintiff alleged that use of the drug Ritodrine caused plaintiff’s cardiomyopathy.\(^{79}\) One year before trial, plaintiff’s only causation expert opined that it was “least likely and least provable from a scientific standpoint” that the cardiomyopathy was caused by use of Ritodrine.\(^{80}\) On the eve of his testimony, however, the same expert informed plaintiff’s counsel that he had “moved up” his hypothesis to a more likely explanation based on subsequently discovered literature. The expert informed the lawyer that he was now prepared to testify that Ritodrine had a direct toxic effect on the plaintiff’s heart condition.\(^{81}\)

Should plaintiff’s lawyer have proceeded with the case knowing, up until the eve of testimony, that his own “expert” believed that it was “least likely and least provable” that the drug caused the heart ailments? If so, how should the lawyer have proceeded when the expert suddenly changed his opinion? It turned out, in this (pre-*Daubert*) case, that the district court and the Sixth Circuit rejected defendant’s claim that the expert’s testimony was “junk science” and, surprisingly, allowed the testimony.\(^ {82}\) This sort of result only

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80. Id. at 540.
81. See id.
82. Id. at 533-34.
compounds the lawyer's dilemma: should he, as a zealous advocate, simply try to introduce any evidence that would advance his client's claims? In short, what, if any, obligation does the lawyer have to scrutinize the expert testimony he seeks to admit?

It is clear that the lawyer does have a duty to determine whether he believes expert testimony will be admissible before trying to introduce such evidence in court.\(^8\) This duty arises both out of the lawyer's ethical obligation to represent a client zealously and his obligation to represent a client within the bounds of the law.\(^4\) To be an effective advocate, the lawyer must vigorously prepare for the presentation of facts and law and, in doing so, needs to test the accuracy and reliability of any testimony, including expert testimony, he wishes to introduce. At the same time, as an officer of the court, the lawyer has a duty to the adversarial system of justice not to introduce frivolous or unreliable expert testimony.

As the Model Code of Professional Responsibility declares,

> the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.\(^8\)

The partisan striving of an advocate is not compromised by a lawyer's duty of complete candor and loyalty to the legal system. The Supreme Court of the State of Washington recognized this notion in stating: "Vigorous advocacy is not contingent on lawyers being free to pursue litigation tactics that they cannot justify as legitimate. The lawyer's duty to place his client's interests ahead of all others presupposes that the lawyer will live with the rules that govern the system."\(^8\) Essentially, under this court's analysis, a lawyer's duty to scrutinize (and perhaps withhold) his own expert's testimony goes hand-in-hand with other obligations the lawyer owes to his client.

In this light, my thesis—that a lawyer has an ethical duty not to introduce junk science—may not seem so controversial. Ethical issues arise with regard to all strategic decisions made by the advocate in preparing a case for trial, and in conducting a trial. Charles

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Wolfram notes in his treatise on legal ethics that "an assumption that underlies the adversarial system is that the mutually contentious strivings of relatively equal advocates will make truth and justice apparent to the judge and, if different, the fact finder."87

But the lawyer's ethical duty is immeasurably more complex when scientific expert testimony is at issue. The ethical rules recognize that the law is ambiguous, but require that a lawyer must insure there is a good faith basis for the admissibility of evidence prior to introducing such evidence.88 When scientific evidence is at issue, the lawyer himself must first gain a comprehensive understanding of technical scientific data and methodology in order to make this determination in good faith. The Supreme Court observed in Daubert that, the law must "resolve disputes finally and quickly," while "scientific conclusions are subject to perpetual revision."89 Science is also, as the Supreme Court recognized, furthered by "broad and wide-ranging consideration of a multitude of hypotheses."90 Such conjectures, which are a part of the scientific process, are of little use to a lawyer who needs to reach a relatively quick, final decision regarding admissibility.91 In the face of this uncertainty, a lawyer must decide, before he seeks to introduce scientific testimony into evidence, that there is a good faith basis to believe that evidence is reliable scientific evidence.

The Daubert standards do not make this job any easier. District and circuit courts have had trouble applying the Supreme Court's standards or "general observations" in determining what is valid, reliable scientific knowledge.92 The decision in Joiner has clarified some of the ambiguities in Daubert, but it leaves the question of admissibility up to each trial judge's discretion. This will likely lead to varying standards of admissibility. As yet, there is certainly no consensus among the courts as to what scientific testimony should pass muster under Daubert. Even the Supreme Court in Daubert admitted that, under the standard it established for admissibility, "shaky" scientific evidence could still be admissible.93

90. Id.
91. Id. But see In re Breast Implant Cases, 942 F. Supp. 958, 960 (E.D.N.Y., S.D.N.Y. 1996), wherein Judge Weinstein has decided to allow plaintiffs' claims to stay alive rather than "rush to judgment," despite the lack of scientific support, because plaintiffs' scientific evidence "may have the scintilla of plausibility that merits reservation of judgement while evaluation goes forward."
92. See Daubert, 509 U.S. at 593.
93. See id. at 596.
IV. The Lawyer's Obligations to the Client

Lawyers, therefore, have no clear guidelines on what will, or will not, be deemed admissible scientific expert testimony. If the courts set no clear standards, how, then, should a lawyer define "junk science"? If Daubert acknowledges that "shaky" evidence may be admissible, does this mean that an attorney may, under the good faith standard embodied in the ethical rules, introduce "shaky" scientific evidence? How much time must the lawyer spend in determining whether the evidence constitutes junk science, and who is to be billed for this time?

Judges have acknowledged the daunting task they behold in deciding the admissibility of expert testimony. One judge bluntly stated:

Our responsibility, then, unless we badly misread the Supreme Court's opinion [in Daubert], is to resolve disputes among respected, well-credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus as to what is and what is not 'good science,' and occasionally to reject such expert testimony because it was not 'derived by the scientific method.'

Finally, if, as noted above, the federal courts are applying Daubert differently, it is certain that individual attorneys will also have different interpretations of what constitutes junk science. Will an ethical lawyer who goes up against a less scrupulous advocate be at a disadvantage? If lawyers now undertake the task of screening out junk science, will their clients be deprived of a level playing field? In today's competitive legal market, will lawyers hold fast to their ethical obligations at the risk of losing business?

Clients should not be underestimated regarding their responsiveness to advice with respect to the long-term costs a particular legal tactic may produce. A relevant ethical obligation of the attorney is to:

exert his best efforts to insure that decisions of his clients are made only after the client has been informed of relevant considerations. . . . In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may

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94. Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1316 (9th Cir. 1995).
95. See Mary Ann Glendon, A Nation Under Lawyers 84 (1994).
96. See id.
lead to a decision that is morally just as well as legally permissible.97

The report of the Joint Conference on Professional Responsibility remarked, in 1958, that:

[...the most effective realization of the law's aims often takes place in the attorney's office... Contrary to popular belief, the compliance with the law thus brought about is not generally lip-serving and narrow, for by reminding him of its long-run costs the lawyer often deters his client from a course of conduct technically permissible under existing law, though inconsistent with its underlying spirit and purpose.98

It has often been noted that a lawyer's role as advisor to the client is equally important as his role as advocate. The lawyer's ethical obligation would require him or her to counsel the client regarding the dangers of offering junk science into evidence, and the long term costs of such a tactic both to the client's case and to the legal system.

One retort to the proposition that a lawyer has an ethical obligation to refrain from introducing junk science is that the adversary system is designed to weed out unreliable evidence. As noted, the Supreme Court reiterated this observation in Daubert, in stating that "[v]igorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means" of preventing the consideration of junk science.99 Aren't motions in limine, objections, and cross-examination sufficient to protect the court process from junk science? Why should the lawyer advocating the position have to do his adversary's job by refraining from introducing evidence which is questionably reliable? Similar questions have been raised by Judge Sam Pointer, who has been charged with supervising the thousands of nationwide silicone breast implant lawsuits. In remarking on the judge's role as gatekeeper, Judge Pointer commented that, in the absence of a sufficiently strong basis or argument by an objecting party to the expert's opinion, trial judges should not be required to


99. Daubert, 509 U.S. at 596.
automatically resolve issues regarding the admissibility of scientific evidence.\textsuperscript{100}

There are certain problems with this argument in the context of a lawyer's obligations. One major problem with relying on the protections of the adversary system is that many times discussions take place during settlement negotiations, where the natural boundaries of the adversary system are not present. Lawyers can gain bargaining power by threatening to introduce junk science through qualified expert testimony. Take the example of the breast implant litigation. Dow Corning, the breast implant maker, agreed to a $4.25 billion class action settlement in 1994 (including $1 billion earmarked for lawyers) and filed for bankruptcy a year later. The manufacturer agreed to these concessions even though there had been no scientific evidence showing a causal connection between immune system disorder and silicone gel implants.\textsuperscript{101} Some say that the settlement has fallen apart, however, because Dow Corning has been winning lawsuits in the wake of the \textit{Daubert} decision.\textsuperscript{102} If such is so, in the settlement context, the adversary system is not sufficient to protect against the consideration of junk science. A lawyer's adherence to his ethical obligations, however, would help to prevent junk science from being improperly used as a sword in settlement negotiations.

Another issue to consider is whether the lawyer, as a gatekeeper of sorts, can help to prevent junk science from pervading our courtrooms. And here we are not talking just about claims bottomed on theories of astrology, numerology, or phrenology. Assume you are faced with a highly qualified expert with excellent credentials who is willing to testify in support of the proposition you are advocating. In your investigation, you discover that the vast weight of authority runs contrary to your expert's testimony. You have a good faith basis to believe it could be admissible, however, based on the expert's qualifications. Do your ethical obligations require you to refrain from introducing this evidence? At least one ethics expert has said "no." Professor Geoffrey Hazard has opined that, even if an attorney is aware that an expert's views are not respected by his

\textsuperscript{100} See \textit{Federal Discovery News}, \textit{supra} note 46, at 4.

\textsuperscript{101} \textit{Angell}, \textit{supra} note 7, at 57-61, 99-103, 195-96.

or her colleagues in the field, hiring such an expert is not unethical.\textsuperscript{103}

Taking this hypothetical case further, assume that the evidence is admitted and you win the case. What if you later discover that the "scientific expert" whose testimony you introduced was actually a charlatan who testified to nothing more than junk science? Just as a criminal defense lawyer who learns after a trial that his client lied on the stand must report the perjury to the tribunal, a lawyer who later discovers his expert was a quack should report this information to the court.\textsuperscript{104} The disciplinary rules require that a lawyer promptly disclose instances where "[a] person other than the [lawyer's] client has perpetrated a fraud upon a tribunal."\textsuperscript{105}

In this hypothetical case, an attorney's ethical obligations would not be enough to prevent the admission of junk science. If, in addition to acting as gatekeeper, an attorney were to be held accountable for introducing evidence that later turns out to be junk science, attorneys would be less likely to risk the introduction of junk science. To the extent that it is discovered before the conclusion of proceedings that certain evidence presented was, in fact, junk science, the offering attorney could be sanctioned pursuant to Rule 11.\textsuperscript{106} In this regard, one observer goes so far as to suggest that "[i]f the individual scientist in fact presents views that have not


\textsuperscript{104} See Model Code of Professional Responsibility, DR 7-102(A)(6) (1981) (in his representation of a client, a lawyer shall not "participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false"); Model Rules of Professional Conduct, Rule 3.3 (1983). See also, Wolfram, supra note 87, at 657-60.

\textsuperscript{105} MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(2)(1996).

\textsuperscript{106} Rule 11 of the Federal Rules of Civil Procedure:

(b) By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, — . . . (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

\textsuperscript{11} This is Fed. R. Civ. P. 11.

Rule 11 only applies:

to assertions contained in papers filed with or submitted to the court. It does not cover matters arising for the first time during oral presentations to the court, when counsel may make statements that would not have been made if there had been more time for study and reflection. However, a litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include
been derived, shared or checked by other scientists, there is a subtle but serious problem of misrepresentation.”¹⁰⁷ There are bills pending in Congress pushing amendments to Rule 11, proposing that its sanctions be made mandatory.¹⁰⁸

V. Solutions

Are there other alternatives? Judge Hand, who as you may recall had great distrust about the jury’s ability to sort through complex and conflicting expert testimony,¹⁰⁹ proposed that a court-appointed board of experts or advisory tribunal hear the expert evidence and then advise the jury.¹¹⁰ A similar suggestion is made by Dr. Marcia Angell, a non-lawyer and the author of the book Science on Trial,¹¹¹ which discusses the clash of medical evidence and the law in the breast implant case. Judge Pointer, as part of his supervision of the breast implant suits, has recently followed Judge Hand’s advice and has convened a panel of four independent experts to evaluate the current evidence regarding the causal connection between silicone and immune system disorder.¹¹² In so doing, Judge Pointer is seen as “turning over science decisions to the scientists.”¹¹³ Is he providing an easy out for attorneys, or does his answer just beg the question as to the lawyer’s own ethical obligations?

Justice Stephen Breyer, in his concurring opinion in Joiner, makes the case for this approach, citing Federal Rule of Evidence 706 and the availability of expert assistance from organizations such as the National Academy of Sciences and the American Association for the Advancement of Science.

Given the current state of the law, there may be no pat answer for today’s litigators. It is no longer sufficient to cite the advice of that great New York lawyer, Elihu Root, who once opined: About

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¹⁰⁸ See e.g., S. 400, 105th Cong. § 2 (1997); S. 79, 105th Cong. (1997).
¹⁰⁹ See supra text accompanying notes 18-19.
¹¹⁰ See supra note 19, at 56-58.
¹¹¹ See supra note 7.
¹¹³ Id.
half of the practice of the decent lawyer consists in telling would-be clients that they are damned fools and should stop. The rush of science and technology and post-*Daubert* confusion in the courts have robbed this admonition of much of its worth when it comes to claims based on scientific evidence.

I am bold to suggest, however, that there is a workable tripartite framework within which to approach the dilemma of the attorney in dealing with his obligations to the court and to his client in such cases. First, is the full recognition of the lawyer's professional obligation to carefully scrutinize the integrity of his own expert's proposed testimony within the limits of his capacity and resources? Second, is the concern legitimate that his opponent will perform a similar examination of the proposed evidence, keeping in mind the availability of Rule 11 sanctions as an inducement to oblige that he present only bona fide expert scientific theories in his case? Finally, as a cap to this process, the court should always reserve the right to refer disputes over alleged "junk science" to an independent panel of experts, not to decide the question in controversy, but to assess the quality of the expertise as required under the "gatekeeping" regimen of *Daubert*.

My own view, I must admit, is more tilted toward the solutions put forward by Judge Hand and Dr. Angell, but I recognize the commitment, long a part of our jurisprudence, to the sanctity of the jury, not the expert, as the ultimate finder of fact. This task is not eased by the following notation by the Supreme Court in *Daubert*:

"There are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly."  

What is required, I suggest, to best fulfill this task is that lawyers from both sides of a particular case, the judge and the experts, begin to take their obligations to juries and to the legal system, within which they all operate, much more seriously. In an era of vast and rapid scientific and technological advances, this is a necessary burden to be borne by all involved in advancing and preserving the rule of law.

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114. PHILIP C. JESSUP, ELIHU ROOT 1845-1909 133 (1938).
115. *Daubert*, supra note 89.
TO PROFIT OR NOT-TO PROFIT: AN EXAMINATION OF EXECUTIVE COMPENSATION IN NOT-FOR-PROFIT ORGANIZATIONS CONTRACTING WITH NEW YORK CITY *

A Staff Report to Hon. Thomas V. Ognibene

The Council of the City of New York

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* This report originally was published by the Office of Oversight and Investigation ("O&I"), Council of the City of New York. O&I first published the report in July, 1997 and published a revised version in September, 1997. The revised version, without appendices, appears here, having undergone only minimal editing to conform the report to Fordham Urban Law Journal stylistic standards. To obtain a copy of the report with appendices, call O&I at (212)788-6882.
Overview

Over the last several decades the number of not-for-profit ("NFP") organizations has grown substantially both in New York City and throughout the nation. With the rise in the number of NFPs has come a dramatic increase in the importance and impact these organizations have on our lives. Responding to continuing pressure to downsize, all levels of government have increasingly relied on contracts with NFP organizations to deliver many of the services that they once provided directly to their residents.

The organizations included in this report are reflective of some of the diverse functions performed by NFPs. They include nursing homes, child care centers, community service organizations and a provider of legal services. The increased reliance on non- or quasi-governmental entities to provide many essential services, particularly in the health and social service fields, presents government with important challenges. One of these is to ensure public accountability regarding the expenditure of public funds by NFP organizations providing public services. Toward this end, government must satisfy the public that the amount such organizations spend on operating costs, such as leases, purchase of supplies and equipment, and executive compensation, is adequately disclosed.
In light of the substantial increase in the number and value of the NFP contracts entered into by City agencies, Thomas V. Ognibene, Minority Leader of the New York City Council, requested that the Council's Office of Oversight and Investigation ("O&I") examine the compensation being paid to the executive directors of NFPs doing business with New York City. In addition, Council Member Ognibene asked O&I to review the public accessibility of financial records kept by NFPs. The study that followed had two goals:

First, Council staff sought to contrast the compensation being paid to the executive directors of NFPs that have large contracts with the City to provide social services with several commonly accepted measures used to determine "reasonableness." To accomplish this, Council staff reviewed 56 annual financial returns representing approximately half of the NFPs that held contracts worth $2 million or more with four City agencies in Fiscal Year ("FY") 1994. The four City agencies were the Department for the Aging ("DFTA"), the Department of Mental Health, Mental Retardation and Alcoholism Services ("DMH"), the Department of Social Services ("DSS"), and the Human Resources Administration ("HRA"). The compensation paid to executive directors of these NFPs, as listed on the annual financial returns, were contrasted with generally accepted criteria used to determine whether or not compensation is excessive.

Second, Council staff examined the potential accessibility of annual returns kept by NFPs and required to be available to the public under Federal law. Staff telephoned all of the NFPs included in the survey to determine whether this information would be available to members of the public from the NFPs.

Summary of Findings

O&I's detailed examination of Federal and State annual financial returns of 56 NFPs contracting with the City in FY 1994 revealed the following:

Compensation Comparisons to Other Not-for-Profits

- NFPs with less than $5 million in functional expenses paid their executive directors a median of $70,422 — 51% more than the national median of $46,535 for NFPs of similar size.

1. See discussion infra Part IV.A. The compensation comparisons are arranged by the size of the NFP (functional expenses).
NFPs with more than $25 million in functional expenses paid their executive directors a median of $161,141 — 22% more than the national median of $132,392 for NFPs of similar size. NFPs with functional expenses between $5 million and $10 million paid their executive directors a median of $82,390 — 3% more than the national median of $80,000 for NFPs of similar size. NFPs with functional expenses between $10 million and $25 million paid their executive directors a median of $103,035 — 1% less than the national median of $103,842 for NFPs of similar size.

**Compensation Comparisons to the Public Sector**

- Over 29% of all NFPs paid their executive directors more than the typical City Commissioner, who earned $110,000 in FY 1994.
- Sixteen percent (16%) of all NFPs paid their executive directors more than the Mayor, who earned $130,000 in FY 1994.
- Sixty-three percent (63%) of executive directors at NFPs with functional expenses of more than $25 million were paid more than New York City's Mayor in FY 1994.

**Compensation Comparisons within the Survey Sample**

- Compensation for executive directors at NFPs with functional expenses of less than $5 million ranged from a low of $28,284 to a high of $169,395, a difference of $141,111 (499%).
- Compensation for executive directors at NFPs with functional expenses between $5 million and $10 million ranged from a low of $43,770 to a high of $103,115, a difference of $59,345 (136%).
- Compensation for executive directors at NFPs with functional expenses between $10 million and $25 million ranged from a low of $70,321 to a high of $166,930, a difference of $96,609 (137%).
- Compensation for executive directors at NFPs with functional expenses of more than $25 million ranged from a low of $79,750 to a high of $245,802, a difference of $166,052 (208%).

**Access to the Annual Returns of Not-for-Profits**

- Ninety-two percent (34) of the 37 NFPs which completed the telephone access survey told callers that it was not possible to

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2. See discussion infra Part IV.B.
3. See discussion infra Part IV.C.
4. See discussion infra Part V.
write to and visit the NFP to obtain access to the organization's annual return.

- Eight percent (3) of the 37 NFPs which completed the telephone access survey told callers that it was possible to write to and visit the NFP to obtain access to the organization’s annual return.

- Detailed profiles on each of the 56 not-for-profit organizations included in the Council’s survey can be found in Appendix A of the originally published version of this report, on file with O&I. In addition to containing information on the amount and type of contract the organization held with the City, each profile compares the NFP's executive director’s compensation against several benchmarks.

I. Introduction

A. Government and the Not-for-Profit Sector: A Changing Landscape

The last twenty years have been a period of dramatic growth for the nation’s not-for-profit organizations (NFPs). During this period, the not-for-profit sector has grown both in number and overall economic clout. The total number of the nation’s NFPs increased by 27% from 1978 to 1990. In 1990, there were more than one million NFPs in the US.\(^5\) Concurrently, the assets of NFPs increased in real terms by more than 150% to well more than $1 trillion, and their revenues jumped by 225% to approximately $560 billion per year.\(^6\) By 1994, NFPs employed more than nine million people whose combined earnings exceeded $160 billion — accounting for nearly 20% of the total income of the entire US service economy.\(^7\)

The number of NFPs in New York City has dramatically increased as well. Growth in the NFP sector has surpassed most other sectors in the City. In contrast to the 10% drop in the New York’s overall job base from 1984 to 1994, employment by social

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service NFPs jumped by 60%, from approximately 55,000 to more than 150,000 — surpassing the number of persons employed on Wall Street in 1994.\(^8\)

Much of the expansion in the not-for-profit sector can be traced to the increasingly common trend of government entities at all levels to contract with NFPs to deliver many of the services that they once provided directly. In New York City, contracts with NFP providers have grown substantially in recent years. The total number of contracts awarded to NFPs by all City agencies in FY 1994 was 2,646. A majority of these contracts (1,573) were awarded by four agencies — the Department for the Aging ("DFTA"), the Department of Mental Health, Mental Retardation and Alcoholism Services ("DMH"), the Department of Social Services ("DSS"), and the Human Resources Administration ("HRA").\(^9\)

### B. Government Oversight of Not-for-Profit Organizations

For government, the contracting out of taxpayer-funded services can have a number of potential attractions. These include the ability to reduce the size of government bureaucracies, and the perception that such outsourcing can be less expensive than the direct provision of services.

Unfortunately, with the expansion of the not-for-profit sector there has also been an increase in reports of financial mismanagement and abuse. In 1992, the United Way of America appeared in newspaper headlines across the country as news of financial improprieties was revealed.\(^10\) Subsequently, the media reported incidents of suspected abuse involving questionable expenditures, excessive compensation, and failure to comply with Federal filing requirements at other not-for-profits. In New York City, additional examples of extremely generous compensation for some ex-

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9. Council staff obtained information on number of NFP contracts from the New York City Financial Information Services Agency ("FISA") which is responsible for centrally compiling and reporting financial data pertaining to the operation of New York City government.

ecutive directors were brought to light in the City Council's 1995 study of not-for-profit Business Improvement Districts ("BIDs").

As City agencies contract with not-for-profit organizations to provide an increasingly larger portion of their mandated services, they lose many of the control mechanisms that government traditionally employs to prevent abuses and ensure public accountability. In the absence of direct administrative control of NFPs, government oversight is often performed through enforcing Federal and State laws, regulations, and contractual provisions.

Charitable and social service organizations in New York State enjoy tax-exempt status because of Federal and State law. Under section 501 (c) (3) of the Federal Tax Code, organizations that are operated exclusively for charitable, testing, educational or recreational purposes are exempted from Federal taxation. These organizations also enjoy tax-free status under section 172 (9) of New York State's Not-for-Profit Corporation Law. In return for their tax exempt status, Federal law prohibits NFPs from using net earnings to augment the personal gain or profit of any shareholder or individual; only "reasonable compensation" is permissible. In addition, not-for-profit organizations must also file annual returns with the government as well as make this information available to the public.

In light of the number and value of the NFP contracts entered into by City agencies, Thomas V. Ognibene, Minority Leader of the New York City Council, requested that the Council's Office of Oversight and Investigation ("O&I"): 

- Examine the executive compensation and benefits being paid to the executive directors of NFPs doing business with New York City;
- Contrast such executive compensation with severally generally accepted measures used to determine "reasonableness;" and

11. See Staff Report to the New York City Council Finance Committee, Cities Within Cities: Business Improvement Districts and the Emergence of the Micropolis (Nov. 8, 1995).

12. The phenomenon of government's increasing reliance on not-for-profit and other non-governmental organizations has been the focus of a growing body of scholarly literature. For one overview, see Symposium on the Hollow State: Capacity, Control and Performance in Interorganizational Settings, 6 Journal of Public Administration Research & Theory (April 1996).

• Determine the extent to which annual financial returns filed by NFPs required to be available to the public by State and Federal Law, were accessible.

II. Methodology

A. Survey Sample Selection

In order to draw a sample for review in this study, O&I staff obtained a list of the total number of contracts let by the City with NFP organizations in FY 1994 from the City's Financial Information Services Agency ("FISA"). The resulting universe of 2,646 contracts was then reduced by applying two criteria: the City agency which let the contract and the contract's total dollar amount. Regarding the first criteria, since recent press reports concerned NFPs providing social, mental health and aging-related services, the Council included in its sample any NFPs that held contracts with the following agencies in FY 1994: the Department for the Aging ("DFTA"), the Department of Mental Health, Mental Retardation, and Alcoholism Services ("DMH"), the Department of Social Services ("DSS"), and the Human Resources Administration ("HRA").

These four agencies let the most contracts with not-for-profits, totaling 1,573 contracts in FY 1994 — 59% of all contracts let that year. With respect to the second criteria, the total dollar amount, the Council's review only included contracts with these four agencies of $2 million dollars or more. Application of this criteria reduced the number of organizations examined to 123. This selection process is illustrated in Figure 1.

14. At the time Council staff obtained the FISA information, FY 1994 was the most recent year for which such information was available. All information on NFPs in this report represents FY 1994 data unless noted.

15. Contracts were included in the Council's sample based on the Revised Max Amount as reported by FISA. Since some of the contacts span several years, the actual amount of funding received by a NFP in a particular year may be less than the total contract amount.
Detailed annual returns for each of these 123 organizations were requested from the New York State Attorney General’s Office of Charities. Under Federal law, not-for-profits required to file an annual return must report the compensation of its five highest paid employees on the Internal Revenue Service (“IRS”) Form 990 Schedule A. This information, along with the IRS Form 990 which provides basic financial information including the organization’s revenue, expenses, and compensation of officers, directors and trustees, is required by State law to be available for public inspection at the offices of the Attorney General.\footnote{According to 26 U.S.C. §§ 6033(b) and 501(c)(3), organizations required to file an annual return must furnish these key items: gross income; expenses attributable to such income; disbursements; a balance sheet; and the compensation and other payments made during the year to highly compensated employees.} Form 990 and Form 990 Schedule A are collectively referred to in this report as the
"annual return." The Attorney General’s Office supplied Form 990 and Schedule A documentation on 67 (54%) of the 123 organizations for which Council staff requested information.

According to the Attorney General’s Office, records were not available for the other 56 entities because these organizations had not submitted their annual returns, had filed a request for an extension, the entity was not required to file because it was in a category exempted by law (such as a hospital or an organization affiliated with a religious organization), or the annual return was unavailable for other reasons. Of the 67 annual returns received by the Council, 11 were dropped from further consideration because (i) data was missing (four cases), (ii) the data was illegible (one case), (iii) it was reported that the executive director received no financial compensation (five cases), or (iv) the NFP was not required to file (one case). The remaining 56 NFPs represent 46% of all organizations which held a contract of more than $2 million with DFTA, DMH, DSS, and HRA in FY 1994, and have contracts worth a combined total of $574,394,183.

1.4(1) of the New York State Estates, Powers and Trusts Law requires that ".. reports filed with the Attorney General shall be open to public inspection. . . ."

17. Throughout this report, the term “executive director” is used to signify a NFP’s principal executive. Sometimes NFPs included in the Council survey use other terms such as “president” or “chief operating officer” to describe this individual. The uniform term “executive director” was chosen to reduce confusion and improve the clarity of the narrative.

18. The 11 organizations dropped from further consideration included the following NFPs: missing data — 163rd Street Improvement Council, Hartley House, La Peninsula Community Organization, St. Dominic’s Home; illegible — National Association of Family Development Centers; executive director receives no compensation — Head Start Sponsoring Board, Jewish Association for Services for the Aged, Narragansett Housing Development Fund Corp, Ryer Avenue Housing Development Fund, St. Mary’s Children and Families Foundation; not required to file according to the Attorney general’s office — Bronx Lebanon Hospital Ladies Auxiliary.
Figure 2
Breakdown of FY 1994 Contracts Meeting Survey Criteria

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B. IRS Definition of Compensation

According to the instructions issued by the IRS for Form 990, the term "compensation" includes "salary, fees, bonuses, and severance payments paid."\(^\text{19}\) Also included are "current-year payments of amounts reported or reportable as deferred compensation in any prior year."\(^\text{20}\) \(\textit{Not included}\) in this amount are all forms of deferred compensation payments, future severance payments, contributions to Contributions to Employee Benefit Plans ("CEBP") and welfare benefit plans such as medical, dental, and life insurance, and fringe benefits or expense accounts.\(^\text{21}\)

Because this study is based on official IRS Form 990 filings, it is not possible to isolate an executive director’s base salary from any fees, bonuses or severance payments that a NFP might have paid in a reporting year. However, several sources suggest that, in most cases, the vast majority of what is reported in the Form 990 as “compensation” does consist of the executive director’s base salary. Both a national survey conducted by the consulting firm of Abbott, Langer and Associates ("ALA") and anecdotal informa-

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20. \textit{Id.}
21. \textit{See id.}
tion provided by the IRS support this view. However, since exceptions to this can and do occur, the Council study will present its findings in terms of “compensation” as defined by the IRS.

Data on the compensation paid to the executive director of a not-for-profit organization is generally found in two places in an NFP’s annual filing. The amount either appears under the heading “compensation” in part V, column C of Form 990 which requires information to be provided for “officers, directors, trustees, and key employees.” or part I, column C of Form 990, Schedule A which requires a listing of the five highest paid employees.

C. Selecting Comparison Criteria

Federal law permits a deduction for “reasonable” compensation of executives of not-for-profit organizations. However, the statute does not define what is meant by the term “reasonable.” In determining whether a particular compensation level is reasonable, the courts have considered a variety of factors including the extent and scope of the employee’s work; the size and complexity of the business; and the prevailing rates of compensation for comparable positions in comparable concerns. The IRS has established a generic definition of the term “reasonable compensation” as “the amount that would ordinarily be paid by like organizations for like services.” The IRS adopts a case-by-case approach to determine whether an organization meets the reasonable compensation standard. In light of the absence of a clear single standard by which to evaluate whether the compensation earned by NFP executive di-

22. A survey conducted by Abbott, Langer and Associates (ALA) in 1994 asked 1,832 NFP organizations nation-wide for information on both annualized base salaries and “total annual compensation” which ALA defined as base salary plus bonuses and or profit sharing received over the last fiscal year. A comparison of these categories revealed that the median for “total annual compensation” was only minimally higher (between 0-3%) than the median annualized base salary alone. See ABBOTT, LANGER & ASSOCIATES, COMPENSATION IN NONPROFIT ORGANIZATIONS (1994). The notion that, in most cases, the compensation paid to NFP executive directors is closely related to base salary was also confirmed in a telephone interview with the IRS staff.

23. For a discussion of one such exception, see infra note 54.

24. See Appendix B attached to the originally published version of this report, on file with O&I, for examples of each of these forms.


26. See Mayson Mfg. Co. v. Commissioner of Internal Revenue, 178 F.2d 115, 119 (6th Cir. 1949); see also, B.B. Rider Corp. v. Commissioner of Internal Revenue, 725 F.2d 945, 952 (3d Cir. 1984).

27. See H. CARL MCCAUL, STUDY OF EXECUTIVE COMPENSATION IN NOT-FOR-PROFIT CORPORATIONS, REPORT 93-D-29 6 (Feb. 7 1994) [hereinafter STUDY OF EXECUTIVE COMPENSATION IN NFP CORPORATIONS].
rectors was reasonable, the Council employed a combination of several standards with which to examine executive compensation.

In this report, comparisons are often described in terms of a median value. The median provides information on the middle value (a value with an equal number of observations above and below). The median is often used in studies where the total number of items being examined is relatively small and where a few extreme values (outliers) might unduly influence a simple arithmetic average.28

1. Comparison to Other Not-for-Profits

One method of determining whether compensation is reasonable is to compare compensation paid by other not-for-profits of similar size. Several surveys of executive compensation at not-for-profits at the state and national level have been conducted. A survey conducted by Abbott, Langer and Associates ("ALA"), an independent management consulting firm known for its surveys of NFPs across the country, was chosen. The ALA survey, selected because of its widespread use by compensation specialists and its comprehensive sample size, utilized data obtained from questionnaires provided by 1,832 NFP organizations nation-wide in the Spring of 1994.29

The ALA survey provides a considerable level of disaggregated information including analyses of average compensation by organizational size. This made comparisons between the NYC sample and the ALA findings possible.

2. Comparison to the Public Sector

To place executive compensation at the NFPs included in the Council survey in context, the compensation paid to the executive directors of these NFPs were also compared to the FY 1994 salaries30 received by the Mayor of New York City and the commis-

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28. For a more complete discussion on the use of these and other measures of central tendency, see Edwin Mansfield, Basic Statistics 46 (1986). For more on the use of medians in the specific context of evaluating not-for-profit compensation see, Non-Profit Coordinating Committee of New York, The Non-Profit Sector in New York (May 1992).
30. Since the Mayor and City Commissioners do not receive fees, bonuses and severance payments, their base salaries are used when comparing the amount received by these public officials to the compensation received by the NFP executive directors included in the study. See supra Part II.B., for further discussion of what is meant by the IRS definition of "compensation."
sioners of several City agencies.\textsuperscript{31} Comparison of not-for-profit compensation with the compensation paid by the public and private sector is an accepted practice as long as the function performed is roughly comparable.\textsuperscript{32} The Council viewed this comparison as appropriate since executive directors of NFPs reviewed in this survey and government officials such as the Mayor and agency commissioners are all responsible for delivering public services.

3. \textit{Comparison to the Council Sample}

A third method of comparison employed contrasts the compensation paid to executive directors by individual NFPs in the Council sample to the median compensation paid to executive directors of organizations of similar size. Additionally, a calculation of compensation as a percentage of the organization's total functional expenses was computed for each NFP included in the Council's survey.

III. \textit{Survey Sample Profile}

The 56 organizations included in the Council review represent a wide range of not-for-profits. In addition to covering the distinct fields of aging, mental health, and social services, the organizations had annual functional expenses which ranged in size from $1.6 to $165 million.\textsuperscript{33} This section presents descriptive profiles of the NFPs included in the Council survey detailing the total size of the organization's functional expenses and the amount of support received from government sources. The survey sample was disaggregated by the size of the organization's functional expenses in order to permit an analysis of "similarly situated organizations." Information on the percentage of support NFPs received from government sources is also provided to illustrate the considerable investment of public monies and the corresponding interest gov-

\textsuperscript{31} According to the 1993-94 \textit{Green Book: The Official Directory of the City of New York}, the majority of City Commissioners received $110,000 \textit{per annum}. Thus, for the purposes of this report $110,000 is considered the "typical" salary of a City Commissioner in FY 1994.

\textsuperscript{32} See Mayson Mfg. Co., 178 F.2d at 119.

\textsuperscript{33} The figures cited are approximate, and reflect line 44 of the organization's functional expenses as reported on Form 990 for fiscal year 1994. See Appendix B attached to the originally published version of this report, on file with the New York City Council, Office of Oversight and Investigation, for a sample Form 990. The time period covered by fiscal year 1994 as reported by the 56 NFPs included in the survey varied. The 1994 fiscal year for the government of New York City ran from July 1, 1993 to June 30, 1994.
government has in ensuring compliance with Federal and State laws concerning public disclosure of annual returns.

A. Organizational Size by Functional Expenses

All NFPs included in the study were assigned to one of four financial categories: less than $5 million; $5 to $10 million; $10 to $25 million; and more than $25 million. The NFPs were placed into a particular category based upon their total "functional expenses" as reported in the NFP's Form 990 filed for 1994. Functional expenses represent the **actual amount** spent by an organization during a fiscal year. Of the 56 organizations examined, 18 (32%) reported functional expenses of less than $5 million; 11 (20%) fell in the $5 million to $10 million category; 19 (34%) were included in the $10 million to $25 million group; and eight organizations (14%) reported expenses of more than $25 million. This distribution is reflected in Figure 3.

*Figure 3*

**NFPs Included in Sample**

**By Size of Functional Expenses**

![Chart showing the distribution of NFPs by size of functional expenses.](chart.png)

- **Less than $5-$10 Million**: 18 organizations
- **$10-$25 Million**: 19 organizations
- **More than $25 Million**: 8 organizations

Annual Functional Expenses (FY 1994)

34. With the exception of "less than $5 million," these categories were chosen to coincide with the corresponding categories used in the ALA survey. Given the fact that the smallest NFP included in the Council's sample had more than one and one half million dollars in functional expenses, staff did not mirror the ALA survey treatment of NFPs with less than $5 million in functional expenses which includes five separate categories starting with "less than $250,000." To allow for comparability, the statistics for each of these subgroups in the ALA survey were totaled to produce statistics for a "less than $5 million" category.

35. Percentages have been rounded to the next nearest whole number.
B. Amount of Support Received from Public Sources

Thirty-seven of the NFPs in the Council survey (66%) included required information about the amount of government support they received in FY 1994 in their 990 filing. Most of these NFPs received a substantial portion of the funds used to pay their annual functional expenses from the Federal, State or local government. A majority of these 37 NFPs (57%) received more than half of their actual total revenues from public funds in FY 1994. Just slightly fewer than half (49%) of these organizations relied on government monies for more than 75% of their overall functional expenses. Almost one third (32%) of the organizations providing this information derived more than 90% of the funds used to pay their functional expenses from such sources. Three organizations received more than 97% of their total revenue from governmental appropriations. The distribution of NFPs by level of government support can be seen in Figure 4.

![Figure 4](image_url)

**Figure 4**
NFPs Reporting Government Support

<table>
<thead>
<tr>
<th>Percent of NFP's in Sample</th>
<th>% of Functional Expenses Funded by Government</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-25%</td>
<td>8%</td>
</tr>
<tr>
<td>26-50%</td>
<td>14%</td>
</tr>
<tr>
<td>51-75%</td>
<td>30%</td>
</tr>
<tr>
<td>76-100%</td>
<td>49%</td>
</tr>
</tbody>
</table>

36. Information on the total amount of government contributions or grants received by NFPs was obtained from Question 1 C of Part I of each organization's Form 990 obtained from the Charities Bureau of the New York State Attorney General's Office. Eighteen organizations (32%) left the question blank and one organization reported that it received no government contributions or grants (Harlem Dowling-West Side Center for Children and Families).

37. Data was available for 37 (66%) of the NFPs reviewed. Accordingly, the numerical totals for each category are: zero to 25% (11); 25-50% (5); 51-75% (3); and 76-100% (18).

38. The three organizations are Concord Family Services (100%), Child Development Support Corporation (98.6%), and The Miracle Makers (97.6%).

39. Percentages in the chart may not total 100% due to rounding.
IV. Findings I: Compensation Analysis

A. Comparisons to Other Not-for-Profits

1. By Size of NFP (Functional Expenses)

- NFPs with less than $5 million in functional expenses paid their executive directors a median of $70,422 — 51% more than the national median of $46,535 for NFPs of similar size.
- NFPs with more than $25 million in functional expenses paid their executive directors a median of $161,141 — 22% more than the national median of $132,392 for NFPs of similar size.
- NFPs with functional expenses between $5 million and $10 million paid their executive directors a median of $82,390 — 3% more than the national median of $80,000 for NFPs of similar size. NFPs with functional expenses between $10 million and $25 million paid their executive directors a median of $103,035 — 1% less than the national median of $103,842 for NFPs of similar size.

In two of the four size categories, compensation paid to executive directors by NFPs included in the Council survey were substantially higher than the national median for similar organizations as reported in the ALA survey. Large disparities between the Council and the ALA survey were found in NFPs with total annual functional expenses of less than $5 million and those with more than $25 million. According to the ALA survey, nation-wide not-for-profits with expenses less than $5 million paid their executive directors a median compensation of $46,535. By contrast, the median compensation for executive directors in similarly sized organizations included in the Council survey was $70,422, a difference of $23,887 (51%) above the national figure.

A large disparity was also found in not-for-profits with functional expenses of more than $25 million. The median compensation for the top position in these organizations was $132,392 nationally. The executive directors at comparable organizations included in the Council study had a median of $161,141 — $28,749 (22%) more than the national median.

While the median compensation paid by NFPs with functional expenses between $5 million and $10 million included in the Council survey exceeded the national levels reported in the ALA survey, the difference was moderate, consisting of no more than three
thousand dollars. Not-for-profits with functional expenses between $10 million and $25 million included in the Council survey actually paid their executive directors a median compensation less than that reported nationally in the ALA survey.  

Figure 5
Median Compensation for Executive Directors
ALA vs. Council Survey

<table>
<thead>
<tr>
<th>Size Category</th>
<th>ALA Survey</th>
<th>Council Survey</th>
<th>$ Difference</th>
<th>% Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than $5M</td>
<td>$46,535</td>
<td>$70,422</td>
<td>$23,887</td>
<td>51%</td>
</tr>
<tr>
<td>Between $5M and $10M</td>
<td>$80,000</td>
<td>$82,390</td>
<td>$2,390</td>
<td>3%</td>
</tr>
<tr>
<td>Between $10M and $25M</td>
<td>103,842</td>
<td>$103,035</td>
<td>$-807</td>
<td>-1%</td>
</tr>
<tr>
<td>Over $25M</td>
<td>$132,392</td>
<td>$161,141</td>
<td>$28,749</td>
<td>22%</td>
</tr>
</tbody>
</table>

2. Accounting for the Impact of Regional Differences on Compensation Levels

One potential explanation for the existence of higher levels of compensation at NFPs included in the Council's survey over the national medians cited by the ALA survey, is that they reflect the higher cost associated with living and working in New York City. Since the IRS defines reasonable compensation in terms of compensation that would ordinarily be paid by “similarly situated organizations,” one would ideally want to compare the compensation paid to executive directors by NFPs included in the Council survey to those paid by other NFPs located in New York State and the Northeastern region. However, such a comparison must also take into account the size of the organization, something that the ALA survey unfortunately does not do for state and regional level data. In light of this limitation, other methods were used to approximate the degree to which the increased expenses associated

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40. Percentages in the accompanying chart have been rounded to the next nearest whole number.
41. See supra, notes 19-21.
42. The inclusion of information on the amount of a NFP's functional expenses is needed to control for the effect that organizational size has on the compensation of executive directors. Without this information, it is impossible to determine whether the 107 NFPs included in the ALA survey from New York State all had functional expenses less than $1 million, more than $100 million, or, as is likely, somewhere in between.
with living and working in New York City impacted the compensation paid by the NFPs included in the Council's survey.

While there is general agreement that the cost of living in New York City is higher than the national average, there is no widely accepted measure to quantify this difference. One method of estimating the impact of the higher cost of living on the compensation paid to executive directors of the NFPs in the Council survey is to examine the difference found in pay levels between New York City and the rest of the country for a range of occupations. The United States Bureau of Labor Statistics ("BLS") regularly monitors public and private pay levels throughout the country. Periodically BLS issues reports which express pay levels for various metropolitan reporting areas as a percentage of the national average pay level for several vocational categories. The survey collects data on 14 specific white collar occupations, which are divided into three general groups: Professional, Administrative and Technical. According to the 1994 BLS Compensation survey, the average pay for administrative occupations located in New York City was 9% higher than the national average. The difference in the professional occupations group was a more modest 5% above the average pay for the country as a whole.

The relatively modest pay differential between New York City and national pay rates for the occupations included in the BLS pay survey has two important implications for the Council's findings. First, it suggests that the two areas where large differences were found between the Council and ALA surveys — NFPs with func-

43. The most commonly used measure of changes in national and regional prices is the Consumer Price Index (CPI) compiled by the US Bureau of Labor Statistics. However, the CPI measures the change in consumer prices rather than the actual level of prices in a particular region or city. Because of this, the CPI can not be used to compare relative living costs or consumer prices for different areas. However, the CPI does show that consumer prices in the New York Metropolitan area have grown somewhat faster between 1987 and 1997 than in the nation as a whole. According to the CPI which tracks urban wage earners and clerical workers, the average for all US Cities increased by 47% from January 1987 to March 1997. During this same period, the CPI for New York City increased by 53.4%, a difference of 6.4% from the national average. It should be noted that the CPI only tracks the change in prices over time and provides no information on the relative value of actual costs. See Consumer Price Index: Frequently Asked Questions < http://www.bls.gov/cpifaq.htm>.


45. This survey data is used by the US Office of Compensation Policy when determining locality pay adjustments for the Federal general service (GS) pay scales.

tional expenses of less than $5 million and more than $25 million — cannot be solely attributed to increased costs associated with living in New York City. This is especially true with NFPs of less than $5 million included in the Council survey. Even if the difference were discounted by 9% to control for the generally higher pay received by administrative occupations in the City, the Council sample was still 39% above the national median.

Second, the application of a 9% regional pay differential means that the compensation paid to executive directors by NFPs in the $5 to $10 million and $10 to $25 million categories are actually lower than what one might expect. Roughly half of the NFPs surveyed by the Council pay their executive directors at rates lower than the ALA median compensation plus 9%, yet those directors are still subject to the increased costs associated with New York. This is the most compelling argument that the differences in pay can not simply be attributed to the expenses associated with living in the New York City metropolitan area. 47

Figure 6
Median Compensation for Executive Directors
ADJUSTED using the BLS 9% Pay Differential

<table>
<thead>
<tr>
<th>Size Category</th>
<th>ALA Survey+9%</th>
<th>Council Survey</th>
<th>$ Difference</th>
<th>% Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>LESS THAN $5M</td>
<td>$50,723</td>
<td>$70,422</td>
<td>$19,699</td>
<td>39%</td>
</tr>
<tr>
<td>BETWEEN $5M AND $10M</td>
<td>$87,200</td>
<td>$82,390</td>
<td>$4,810</td>
<td>-6%</td>
</tr>
<tr>
<td>BETWEEN $10M AND $25M</td>
<td>$113,188</td>
<td>$103,035</td>
<td>-$10,158</td>
<td>-10%</td>
</tr>
<tr>
<td>OVER $25M</td>
<td>$144,307</td>
<td>$161,141</td>
<td>$16,834</td>
<td>12%</td>
</tr>
</tbody>
</table>

B. Comparisons to the Public Sector

- Over 29% of all NFPs paid their executive directors more than the typical City Commissioner, who earned $110,000 in FY 1994.
- Sixteen percent (16%) of all NFPs paid their executive directors more than the Mayor, who earned $130,000 in FY 1994.
- Sixty-three percent (63%) of executive directors at NFPs with functional expenses of more than $25 million were paid more than New York City's Mayor.

47. Percentages in the accompanying chart have been rounded to the next nearest whole number.
A 1994 report, issued by the New York State Comptroller, on compensation of executive directors in nonprofit organizations with contracts from the New York State Office of Mental Health, noted that the amount of compensation paid to executive directors should be limited since part of the expectation of operating a not-for-profit is that the organization provides a public service.48

Compensation paid to executive directors at many NFPs included in the Council survey surpassed that paid to top public officials responsible for much larger organizations which often perform similar or related functions. The City’s DMH and DSS/HRA Commissioners49 both received a salary of $110,000 for managing complex organizations with respective annual expenditures of $245 million (270 employees) and $7.56 billion (23,203 employees) in FY 1994.50 The City’s DFTA Commissioner earned less, receiving $97,000 in 1994 for running an agency employing 336 workers and responsible for $162 million in annual expenditures.

All but one of the NFPs included in the survey fall far short of the size and complexity of these City agencies.51 Yet, the median compensation paid to executive directors at organizations with more than $25 million in functional expenses was $161,141. This is $51,141 more than the pay of the DMH and HRA commissioners and $64,141 more than that earned by the head of DFTA.

49. The positions of DSS Commissioner and HRA Administrator are held by the same person. This reflects the fact that HRA was created to supervise and coordinate DSS programs in several areas.
51. The one exception is The Legal Aid Society which had total functional expenses of approximately $165 million in FY 1994.
Figure 7
Median Compensation for Executive Directors of NFPs
(with Functional Expenses of More than $25 Million)
Compared to that of the Mayor and City
Commissioners in FY 1994

<table>
<thead>
<tr>
<th>Compensation (in Dollars)</th>
</tr>
</thead>
<tbody>
<tr>
<td>$0</td>
</tr>
</tbody>
</table>

- DFTA Head ($162M): $97,000
- HRA/DMH Heads ($7B/$245M): $110,000
- Mayor ($32B+): $130,000
- Exec. Dir., NFP's ($162M): $161,141

In fact, of the not-for-profits examined, 16 organizations (29%) paid their executive directors more than that earned by a typical city commissioner in FY 1994. An even greater contrast between financial compensation and job responsibility becomes apparent if executive director compensation is compared to the $130,000 earned by the Mayor of the City of New York. Despite the fact that the Mayor is responsible for the administration of the nation's largest city government with annual expenditures in excess of $32 billion, nine of the NFPs in the Council sample (16%) paid their executive directors more than the Mayor.

52. This figure reflects the Mayor's base salary during 1994, the latest year for which comparison data on all sources was available at the time the survey selection was conducted. In 1995, Local Law 92 amended the City Charter to increase the Mayor's salary to $165,000 effective July 1, 1995.
C. Comparisons within the Survey Sample

1. Comparing Compensation Amounts

- Compensation for executive directors at NFPs with functional expenses of less than $5 million ranged from a low of $28,284 to a high of $169,395, a difference of $141,111 (499%).
- Compensation for executive directors at NFPs with functional expenses between $5 million and $10 million ranged from a low of $43,770 to a high of $103,115, a difference of $59,345 (136%).
- Compensation for executive directors at NFPs with functional expenses between $10 million and $25 million ranged from a low of $70,321 to a high of $166,930, a difference of $96,609 (137%).
- Compensation for executive directors at NFPs with functional expenses of more than $25 million ranged from a low of $79,750 to a high of $245,802, a difference of $166,052 (208%).

A third method of analysis is provided by juxtaposing how the executive compensation paid by the individual not-for-profits examined in the Council survey compares against the median executive compensation paid by organizations of similar size included in the Council’s review. This measure, along with the ALA and pub-
lic sector comparisons is included in the individual organizational profiles provided for each not-for-profit included in the survey.53

The compensation paid to each of the organizations' executive directors was compared to the median for organizations with similar functional expenditures included in the Council survey. To facilitate this comparison, dollar differences between the compensation paid by each NFP included in the survey and the median paid by organizations in the same size category were calculated. This information, along with a ranking of the amount of compensation paid by each organization grouped by size, is found in the charts on the pages 25-28.

This analysis reveals the existence of large differences between the compensation paid to executive directors within size categories. As was the case with other measures discussed earlier in this report, the greatest disparities involved organizations with functional expenses of less than $5 million and more than $25 million. Compensation paid to executive directors at NFPs with functional expenses of less than $5 million included in the survey ranged from a low of $28,284 paid by the Association to Benefit Children, to a high of $169,395 at Inwood House.54 Three other organizations in this category paid their directors $25,000 or more above the Council survey median.

53. See Appendix A attached to the originally published version of this report, on file with O&I, for copies of these profiles.

54. Inwood House changed executive directors during FY 1994. Thus its Form 990 filing for this year was atypical. The organization actually listed two individuals under the title of executive director, both described as being full time employees, resulting in a grand total of $245,152 compensation paid for this position. The Form 990 lists one executive director, Natalia Ritter, as receiving $169,395, and the second executive director, Antiss Agnew, as receiving $75,757. In the interests of comparability, the protocols of the study call for the identification of the single individual most responsible for the leadership of the organization during the study time frame, FY 94. Since Ms. Ritter served as executive director for majority of FY 94 (retiring from this position eight months into the fiscal year), she was identified as Inwood House's executive director for the purposes of this study. Subsequent to this decision information was provided to the Council by Inwood House explaining that the compensation listed for Ms. Agnew, the incoming director, included monies paid to her in her role as deputy director under Ms. Ritter.

According to information later supplied by Inwood House, but not included in the organization's IRS Form 990 filing, Ms. Ritter's compensation of $169,395 consisted of a salary of $85,000, (pro-rated to Ms. Ritter's retirement on February 28, 1994 to be $58,966); compensation for accrued vacation days in the amount of $3,099; a contribution to a tax deferred account plan of $9,500; and retirement compensation of $97,830. According to Inwood House, the retirement compensation (a payment to Ms. Ritter in addition to her participation in Inwood House's pension plan) and the contribution to the tax deferred account plan, totaling $107,330, was drawn from Inwood House's endowment fund.
Large differences in compensation were also found in the largest NFPs in the Council survey. The compensation for executive directors at NFPs with functional expenses of more than $25 million ranged from a low of $79,750 paid by the Metropolitan NY Coordinating Council on Jewish Poverty to a high of $245,802 at NYSARC, a range of $166,052. NYSARC paid $84,661 above the median compensation for NFPs larger than $25 million. The organization offering the next highest compensation in this group, the Jewish Board of Family and Children Services, paid its executive director $177,308 in 1994, slightly more than $16,000 above the median for the category.

2. Comparing Total Compensation: Benefits and Expenses

In addition to compensation, the IRS requires NFPs to submit information in the 990 filing listing the amount paid to their executive directors as contributions to employee benefit plans ("CEBP") and the amount for expenses. Many of the NFPs included in the sample did not complete all portions of the Form 990 which requests detailed information regarding the NFP's CEBP and expense account contributions.

While this factor prevented staff from using total compensation (compensation plus CEBP and expenses) as its principal measure, an examination of total compensation, where possible, does offer some important advantages. By definition, an examination of total compensation provides a more accurate depiction of the total remuneration paid by NFPs. By examining total compensation, it is possible to report on organizations which may supplement compensation to their executive directors with large benefits packages. The following section of the report will briefly review the contributions made to executive directors benefits plans by those NFPs in the Council survey which reported having such programs in place.

a. Contributions to Employee Benefit Plans

Although NFPs are required to provide information on benefits on their Form 990, 27% (15) of the NFPs in the Council survey did

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55. NFPs are required to submit information on employee benefit plans and similar benefits in Part V, Column D of Form 990. This category covers medical, dental, life insurance and disability benefits among others. Also included in this category are all forms of deferred compensation and future severance payments. NFPs are required to submit the amount paid to their executive directors for expenses (taxable and non-taxable fringe benefits) in Part V, Column E of Form 990. See Internal Revenue Service, supra note 19, at 18.
not report this information.\textsuperscript{56} The number and value of benefits received by executive directors of the NFPs included in the Council's sample varied greatly. Twenty-eight of the 56 organizations reviewed (50\%) provided their executive director with some type of CEBP benefit. Ten organizations (18\%) reported that they did not provide their executive directors with any CEBP benefits.

\textbf{Figure 9}

\textbf{Average Value of Executive Director's CEBP}

\textbf{At NFPs with CEBP Programs, by Size of NFP}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{average_value_exec directors_cebp}
\end{figure}

Where paid, CEBP ranged from a high of $35,786 paid by the Jewish Board of Family and Children's Services to a low of $1,080 at Concord Family Services. The average CEBP went from $8,661 at NFPs with functional expenses of less than $5 million to $13,209 for organizations with functional expenses between $5-$10 million. This figure dipped slightly to $11,697 for NFPs with functional expenses of $10-$25 million and jumps to $20,219 for organizations with more than $25 million in annual functional expenses.

\textit{b. Expense Accounts}

Even fewer NFPs provided information on whether expense accounts were provided to their executive directors. Twenty-three of the 56 organizations (41\%) included in the Council survey left blank the section of the Form 990 which asks whether the NFP provided its executive director with money for expenses. Thirty NFPs (54\%) stated that they did not provide funds directly to their

\textsuperscript{56} In addition, three other NFPs — Graham Windham, The Legal Aid Society, and New Alternatives for Children — did not provide specific values for CEBP.
executive directors for expenses. The three organizations (5%) which provided their executive directors with payment for expenses included the Jewish Board of Family and Children Services ($10,249), the Miracle Makers ($4,000), and the East Side Settlement House ($2,206).

3. Comparing Compensation as a Percentage of Expenses

Examining executive compensation in terms of a percentage of the organization’s overall functional expenses offers another opportunity to compare an individual NFP against organizations of similar size in order to assess whether the compensation is reasonable. One would expect that this percentage would decrease as organizations increase in overall size. Therefore, comparisons are primarily limited to organizations within the same size category. Of the 56 organizations in the sample, one organization, Unique People Services, devoted an amount equivalent to over five percent of its functional expenses to executive director compensation.

The greatest amount of variation in the compensation/functional expense ratio existed among organizations with less than $5 million in functional expenses. Unique People Services, a provider of mental health services based in the Bronx, devoted the largest percentage of its functional expenses to the compensation of its executive director — 5.5%. This was more than nine times the 0.6% spent by the Association to Benefit Children, and more than double the average percentage (2.3%) spent by other NFPs in the same size category.

The $5-$10 million and $10-$25 million categories show considerably less variation in executive director’s compensation as a percentage of functional expenses. The highest paying NFP in both of these categories allocated no more than three times the amount spent by the NFP which devoted the lowest percentage of functional expenses to executive compensation. In the more than $25 million category, three organizations (including NYSARC which paid its executive director the highest compensation of all NFPs included in the survey) spent five times the percentage paid by The Legal Aid Society.
### Figure 10

<table>
<thead>
<tr>
<th>NFPs less than $5 million</th>
<th>FE*</th>
<th>NFPs between $10 - $25 million</th>
<th>FE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unique People Services</td>
<td>5.5%</td>
<td>South Bronx Mental Health Council</td>
<td>1.3%</td>
</tr>
<tr>
<td>Inwood House</td>
<td>4.8%**</td>
<td>Brooklyn Bureau of Community Service</td>
<td>.9%</td>
</tr>
<tr>
<td>Aging in America</td>
<td>3.9%***</td>
<td>Green Chimneys Children Services</td>
<td>.9%</td>
</tr>
<tr>
<td>Lower East Side Family Union</td>
<td>3.2%</td>
<td>Talbot Perkins Children’s Services</td>
<td>.9%</td>
</tr>
<tr>
<td>New Alternatives for Children</td>
<td>3.1%</td>
<td>Lakeside Family and Children’s Services</td>
<td>.8%</td>
</tr>
<tr>
<td>Associated YM-YWHAs of Greater New York</td>
<td>2.9%</td>
<td>The Richard Allen Center on Life</td>
<td>.8%</td>
</tr>
<tr>
<td>East Side House Settlement</td>
<td>2.5%</td>
<td>Louise Wise Services</td>
<td>.7%</td>
</tr>
<tr>
<td>Concord Family Services</td>
<td>2.3%</td>
<td>Brookwood Child Care</td>
<td>.7%</td>
</tr>
<tr>
<td>Coalition for Hispanic Services</td>
<td>2.2%</td>
<td>Abbott House</td>
<td>.6%</td>
</tr>
<tr>
<td>Alianza Dominicana</td>
<td>2.0%</td>
<td>Good Shepard Services</td>
<td>.6%</td>
</tr>
<tr>
<td>Rena Day Care Center</td>
<td>1.7%</td>
<td>Society for Seamen’s Children</td>
<td>.6%</td>
</tr>
<tr>
<td>Bedford Stuyvesant</td>
<td>1.6%</td>
<td>St. Christopher’s — Jennie</td>
<td>.6%</td>
</tr>
<tr>
<td>George Junior Republic Association</td>
<td>1.5%</td>
<td>Clarkson</td>
<td></td>
</tr>
<tr>
<td>Community Access</td>
<td>1.4%</td>
<td>Berkshire Farm Center Service for Youth</td>
<td>.5%</td>
</tr>
<tr>
<td>Fort Greene Senior Citizens Council</td>
<td>1.0%</td>
<td>The Children’s Village</td>
<td>.5%</td>
</tr>
<tr>
<td>Friends of Crown Heights Day Care</td>
<td>1.0%</td>
<td>Edwin Gould Services for Children</td>
<td>.5%</td>
</tr>
<tr>
<td>Yeled V’Yalda Early Childhood</td>
<td>1.0%</td>
<td>Episcopal Mission Society</td>
<td>.5%</td>
</tr>
<tr>
<td>Association to Benefit Children</td>
<td>0.6%</td>
<td>Harlem Dowling - West Side Center</td>
<td>.5%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>NFPs between $5 - $10 million</th>
<th>FE</th>
<th>NFPs more than $25 million</th>
<th>FE</th>
</tr>
</thead>
<tbody>
<tr>
<td>University Settlement Society of New York</td>
<td>1.7%</td>
<td>The Children’s Aid Society</td>
<td>0.5%</td>
</tr>
<tr>
<td>Ohel Children’s Home &amp; Family Services</td>
<td>1.6%</td>
<td>Graham - Windham</td>
<td>0.5%</td>
</tr>
<tr>
<td>The Hudson Guild</td>
<td>1.4%</td>
<td>NYSARC</td>
<td>0.5%</td>
</tr>
<tr>
<td>Transitional Services for New York</td>
<td>1.4%</td>
<td>Self-help Community Services</td>
<td>0.4%</td>
</tr>
<tr>
<td>Forestdale</td>
<td>1.3%</td>
<td>Leake and Watts Services</td>
<td>0.3%</td>
</tr>
<tr>
<td>Child Development Support Corporation</td>
<td>1.0%</td>
<td>Metropolitan New York</td>
<td>0.3%</td>
</tr>
<tr>
<td>Central Brooklyn Coordinating Council</td>
<td>0.9%</td>
<td>Coordinating Council</td>
<td>0.2%</td>
</tr>
<tr>
<td>Family Support Systems Unlimited</td>
<td>0.8%</td>
<td>Jewish Board of Family and Children</td>
<td>0.2%</td>
</tr>
<tr>
<td>Puerto Rican Association for Community Affairs</td>
<td>0.8%</td>
<td>The Legal Aid Society</td>
<td>0.1%</td>
</tr>
<tr>
<td>Colony South Brooklyn Houses</td>
<td>0.6%</td>
<td>Edwin Gould Academy</td>
<td>0.6%</td>
</tr>
</tbody>
</table>

* FE is an acronym for Functional Expense

** This organization’s compensation/FE ratio should be viewed with caution because the compensation amount reported in Inwood House’s Form 990 includes a large severance payment disbursed from the organization’s endowment rather than the general operating funds.

*** This organization’s compensation/FE ratio should be viewed with caution because the executive director of Aging in America also served as the head of an affiliated organization Morningside Nursing Home (MNH) which contributed to his salary. However, MNH filed its own Form 990, and thus under the protocols of this study is viewed as a separate organization.
V. Findings II: Public Access to NFP Annual Returns

The second major component of the Council's study of executive compensation consisted of an examination of the potential accessibility of NFP annual returns that are required to be available to the public by Federal law.

A. The Legal Requirements of Public Access to Annual Returns

Most organizations which are tax-exempt under section 501(c)(3) of the Federal Tax Code are required to file annual financial returns. Such returns are filed in lieu of tax returns submitted by for profit corporations and disclose a NFP's revenue, expenses and other financial information in some detail. Section 6104(e) of the Federal law requires that NFPs make their annual return available to the public. New York State law also requires that such information be filed with the State Attorney General's Office.\(^\text{57}\)

Prior to 1996, members of the general public who were interested in viewing an organization's annual return were required to either request the filing from the State\(^\text{58}\) or visit the principal office of the organization, where a copy of the return for the three most recent years was required to be made available for inspection.\(^\text{59}\) Under this inspection requirement NFPs were not obligated to provide the public with copies of their annual returns, but were required to make the information available for public viewing.

However, legislation passed by Congress in July of 1996 and signed by President Clinton, the "Taxpayer Bill of Rights 2,"\(^\text{60}\) substantially modified this requirement. This measure was designed to give the Federal government additional tools in the enforcement of the country's tax laws to curb excessive pay and other perceived problems at NFP organizations. The legislation, commonly known as the "intermediate sanctions law," instituted several additional prohibitions and controls concerning executive compensation including considerably more rigorous public disclosure requirements.\(^\text{61}\)

\(^{57}\) N.Y. EXEC. LAW § 172-b (McKinney 1993 & Supp. 1997-98); see also supra note 16.

\(^{58}\) See N.Y. EST. POWERS & TRUSTS LAW § 8-1.4(1) (McKinney 1992 & Supp. 1997-98); see also supra note 16.


In addition to preserving the inspection requirements under the prior law, the new law requires that all NFPs provide a copy of (not just access to) the organization's annual return to anyone who requests it. If the request is made in person, the NFP must provide a copy immediately. If the request is made in writing, the NFP has thirty days to comply.62 In addition to increasing the availability of an organization's annual returns, the new law also increased the penalties for failing to make this information available. Under the prior law, an organization which willfully failed to make its annual returns available for inspection was subject to a fine of $1,000 per application.63 The new law increased this penalty to $5,000 per application.64

B. Public Access Survey Methodology

Between March 18, 1997 and May 13, 1997, Council staff administered a telephone survey to all 56 NFPs included in the Council's compensation review. The aim of the survey was to assess whether the public might be able to access information contained in the NFP's 990 filing in person and through the mail. Callers asked whether it would be possible to visit the NFP's office to look at the organization's annual returns, and if the NFP would be willing to mail the 990 filing upon request.65 The Council's survey was not intended to be, nor should it be interpreted as, an attempt to determine compliance with the provisions of the Taxpayer Bill of Rights 2. That would have required visiting the offices of each NFP and making a written request to each organization.

As a result of responses to staff calls by representatives of the NFPs, each organization was assigned to one of three categories: (1) NFPs which told the caller that it was not possible to write to and visit the NFP to obtain access to the organization's annual returns; (2) NFPs which told the caller that the public was able to

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62. The new law permits NFPs to charge a “reasonable fee” to cover the expense of copying and mailing the annual return. The law also provides for two exceptions to the requirement that NFPs must provide copies of the annual return: (1) an organization is not required to provide copies of these documents if the NFP has already made the documents “widely available;” (2) an organization is not required to comply with this requirement if it is the subject of a “harassment campaign.” In both cases the NFP can seek an exemption from the IRS. See 26 U.S.C.A. § 6104 (c) (West Supp. 1998).


65. According to a representative from the Internal Revenue Service, the IRS is currently considering how to treat requests for annual returns made only over the telephone and expects to issue a statement concerning the issue this summer.
write to or visit the NFP to obtain this information from the NFP; and (3) NFPs for which staff was unable to obtain a definite answer about whether the organization would provide this information.

Despite repeated attempts, staff was unable to obtain definite answers from 19 of the 56 (34%) NFPs included in the Council survey. In most cases where the survey was not completed, the caller was either told to call back or they were referred to someone who was either repeatedly unavailable or who promised to call back and did not do so. In many cases, organizations which did not respond were called four or five times to no avail. The findings presented in this section concerning public access reflect the 37 NFPs which provided a definitive answer concerning whether the public could obtain the requested information directly from the NFP.

I. Survey Protocols

Staff followed standardized written protocols in which they stated that they were interested in gaining access to the organization's annual returns including information on the salary of the organization's executive director. In order to simulate the type of response that would be encountered by a member of the public, callers did not identify themselves as Council staff. Each organization's main telephone number was called. If the call was answered by a secretary or receptionist, staff asked to be connected to someone in the organization who could respond to the inquiries being made about the public's access to the NFP's annual returns. In those cases where the caller was told that the information was confidential or not available, the caller was instructed to state that he or she believed that the information was required to be made available to the public. If the representative of the NFP continued to insist that the information was confidential, the NFP was recorded as indicating that they would not provide access.

C. Public Access Survey Findings

- Ninety-two percent (34) of the 37 NFPs which completed the telephone access survey told callers that it was not possible to write to and visit the NFP to obtain access to the organization's annual return.

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66. In order to be considered as "completing" the access survey, a representative of a NFP had to provide the caller with a definitive answer about the availability of the organizations annual returns and information on the executive director's salary.
Eight percent (3) of the 37 NFPs which completed the telephone access survey told callers that it was possible to write to and visit the NFP to obtain access to the organization's annual return.

Of the 37 organizations which provided a response to questions concerning the availability of the organization's annual return 92% (34 NFPs) told callers that they do not provide the public with access to this information. This number included NFPs whose representative told the caller that this information was simply unavailable, as well as those who referred the caller to another source such as the State Attorney General's office but stated that the caller could not obtain this information by visiting the NFP directly or could not have such documents mailed to them. Only three of the 37 organizations answering our request (8%) told callers that they could visit the NFP's offices during business hours to obtain the NFP's annual returns or that a copy of the appropriate documents could be mailed to them.

1. Public Access to Annual Returns at 37 NFP Organizations

The Council's access survey provided numerous examples of callers that were told that information about the executive director's salary was not available. Responding to a request for information on how to obtain information on the salary paid to the executive director of the Society for Seamen's Children, the director of human relations replied: "I don't think that's any of your affair. I don't think that you need to know that information. I'm not willing to disclose it."

A representative from Leake and Watts Services also left a caller with the impression that the organization's annual returns were privileged and not available to the general public: "Our financial
information is not available to the public. [Caller: None of your financial information?] Not to the public. No. That's confidential information that's only distributed to certain people. Not to the public.”

Not all of the 34 NFPs that indicated that they would not provide access to the organization's annual returns responded to the requests for information in the same manner. Of this number, 19 organizations (56%) told callers that information on the NFPs executive director was “not available,” “confidential” or “extremely confidential” and did not refer the caller to any other source. Fifteen NFPs (44%) referred callers to another source such as the State Attorney General’s Office or the IRS. However, referrals often lacked specificity and in several cases the information was so general as to be of questionable use. Many of the NFPs falling in this group only told callers that the information was available from “the State.”

On other occasions, the information provided was simply inaccurate. For example, the comptrollers of several NFPs contacted informed staff that information on the executive director's salary was available under the Freedom of Information Law (“FOIL”). FOIL requests are typically used to obtain information from governmental entities. A FOIL request is not required to examine or obtain a NFP’s Form 990.

Callers were often questioned as to why they desired this information. A caller contacting the Ohel’s Children Home and Family Services was told he could not visit the NFP to obtain the executive director's salary without a better reason than just “personal interest.” In some cases, callers were disparaged for asking whether this information was available.
Figure 12
Access Survey
Direct Calls to NFP Providers
NFPs Stating it Was Not Possible to Write to and Visit the NFP to Obtain Access to the Organization’s Annual Return

34 NFPs:

- Abbott House
- Associated YM-YWHAS of Greater New York
- Association to Benefit Children
- Bedford Stuyvesant Early childhood Development Center
- Berkshire Farm Center Service for Youth
- Brooklyn Bureau of Community Service
- Colony South Brooklyn Houses
- Concord Family Services
- East Side House Settlement
- Edwin Gould Services for Children
- Episcopal Mission Society
- Jewish Board of Family and Children’s Services
- Family Support Systems Unlimited
- Forestdale
- Fort Greene Senior Citizens Council
- Friends of Crown Heights Day Care
- George Junior Republic Association
- Good Shepard Services
- Graham-Windham
- Inwood House
- Lakeside Family and Children’s Services
- Leake and Watts Services
- Lower East Side Family Union
- Ohel Children’s Home & Family Services
- Rena Day Care Center
- Sheltering Arms Children’s Service
- Society for Seaman’s Children
- South Bronx Mental Health Council
- St. Christopher’s - Jennie Clarkson Child Care Services
- The Children’s Aid Society
- The Children’s Village
- The Richard Allen Center on Life
- University Settlement Society of New York
- Yeled V’Yalda Early Childhood
Figure 13
Access Survey
Direct Calls to NFP Providers

NFPs Stating it *Was Possible* to Write to and Visit the NFP to Obtain Access to the Organization’s Annual Return

3 NFPs:
- The Hudson Guild
- The Legal Aid Society
- New Alternatives for Children

Figure 14
NFPs Which Did Not Provide a Definitive Answer Regarding Public Access

19 NFPs:
- Aging in America
- Central Brooklyn Coordinating Council
- Child Development Support Corporation
- Coalition for Hispanic Family Services
- Community Access
- Alianza Dominicana
- Edwin Gould Academy (a.k.a. The Gould Academy)
- Green Chimneys Children’s Services
- Harlem Dowling - West Side Center for Children and Family Services
- Louise Wise Services
- Metropolitan NY Coordinating Council on Jewish Poverty
- NYSARC
- Brookwood Child Care
- Puerto Rican Association For Community Affairs
- Self-help Community Services
- Talbot Perkins Children’s Services
- The Miracle Makers
- Transitional Services For New York
- Unique People Service
UNITED STATES V. O’HAGAN: THE SUPREME COURT ABANDONS TEXTUALISM TO ADOPT THE MISAPPROPRIATION THEORY

Amy E. Fahey*

Introduction

In United States v. O’Hagan,1 the United States Supreme Court held that a person who trades in securities for personal profit, using confidential information misappropriated in breach of a fiduciary duty to the source of the information, may be held liable for violating section 10(b) and Rule 10b-5.2 Before O’Hagan, the Court had limited the reach of section 10(b) of the Securities and Exchange Act of 19343 to the text of the statute, rather than expand it for policy reasons.4 On June 25, 1997, however, the Court looked beyond the plain language of section 10(b) and decided that the misappropriation theory5 would properly serve the underlying purpose

* The author wishes to thank Professor Jill Fisch, Fordham University School of Law, for her guidance, suggestions, and critiques.

2. See id. at 2207, 2214. Section 10(b) provides:
   It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . (b) [to] use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.
4. See infra Part II.B.
5. See O’Hagan, 117 S. Ct. at 2207. Under the misappropriation theory, a person commits fraud “in connection with” a securities transaction, and therefore violates section 10(b) and Rule 10b-5, when he misappropriates confidential information for
of the securities laws. This policy-based decision shocked and disappointed the many commentators awaiting the Supreme Court’s resolution of this matter.

Critics of the misappropriation theory argue that stretching criminal liability under section 10(b) and Rule 10b-5 is not the appropriate way of criminalizing this type of unlawful insider trading. Instead, Congress should enact a statute which explicitly prohibits insider trading and trading on misappropriated information in breach of a fiduciary duty. Until the legislature acts, however, section 10(b) should be construed narrowly to ensure consistency and fairness.

This Note argues that the misappropriation theory is inconsistent with the language of section 10(b) and Supreme Court precedent, and provides no guidance for lower courts regarding the application of liability under section 10(b) and Rule 10b-5. By holding that “a fiduciary’s undisclosed, self-serving use of a principal’s in-
formation to purchase or sell securities, in breach of a duty of loyalty and confidentiality, defrauds the principal” and violates section 10(b), the Court left many questions unanswered. Lower courts must now grapple with the extent to which liability can be imposed, the types of trust relationships sufficient to give rise to liability when a breach occurs, and the level of “connection” that is required between the fraud and the purchase or sale of securities.

This Note examines the development of the misappropriation theory and argues that its adoption by the Supreme Court in O’Hagan was erroneous because it cannot be reconciled with the language of section 10(b) or previous Supreme Court decisions, which strictly interpreted the text of the statute. Part I provides the background and legislative intent behind section 10(b), discusses insider trading and the misappropriation theory, and examines how the lower courts have attempted to reconcile the misappropriation theory with the language of section 10(b) and Rule 10b-5. Part II presents canons of statutory construction and the Supreme Court’s section 10(b) jurisprudence, focusing on the O’Hagan case. Part III analyzes the misappropriation theory and concludes that the Court’s use of policy in interpreting the statute, rather than the plain language of section 10(b), was improper because courts are not competent to make law in the securities markets and should instead defer this responsibility to Congress.

I. Section 10(b), Rule 10b-5, and the Prohibition of Unlawful Trading

While the federal securities laws do not expressly prohibit insider trading, the doctrine has evolved from Securities and Exchange Commission (“SEC”) and judicial interpretations of the general antifraud provisions of the federal securities laws, in particular, section 10(b) and Rule 10b-5.13

13. See Moss v. Morgan Stanley Inc., 719 F.2d 5, 10 (1983) (“It is well settled that traditional corporate ‘insiders’ – directors, officers and persons who have access to confidential corporate information – must preserve the confidentiality of nonpublic information that belongs to and emanates from the corporation.”) (internal citations omitted).
A. Section 10(b) and Rule 10b-5

After the stock market crash in 1929, and the depressed economy that followed, Congress enacted the Securities Act of 193314 ("1933 Act") and the Securities and Exchange Act of 193415 ("1934 Act") to regulate the troubled securities market.16 The purpose of the 1933 Act was to encourage full disclosure of information regarding public offerings of securities, to protect investors against fraud, and to promote ethical standards of honesty and fair dealing.17 Through the regulation of securities transactions, the 1934 Act was designed to protect investors against the manipulation of stock prices, and to impose regular reporting requirements on companies with stock listed on national securities exchanges.18

Pursuant to the 1934 Act, Congress created the SEC and equipped it with flexible enforcement powers to accomplish the statute's goals.19 Section 10(b) of the 1934 Act, which was designed as a catch-all clause to prevent fraudulent practices,20

16. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194-95 (1976); see also Steve Thel, The Original Conception of Section 10(b) of the Securities Exchange Act, 42 STAN. L. REV. 385, 407-08 (1990) ("[T]he central inspiration for the Act was the combination of the bull market of the 1920s and the dramatic collapse that ended it."); Timothy J. Horan, Comment, In Defense of United States v. Bryan: Why the Misappropriation Theory is Indefensible, 64 FORDHAM L. REV. 2455, 2457 (1996) ("Insider trading was one of the major abuses that Congress perceived as a cause of the 1929 crash.").
17. See Ernst & Ernst, 425 U.S. at 195.
18. See id. Senator Fletcher, who was the sponsor of the 1934 Act and the Chairman of the Senate Committee on Banking and Currency at the time, explained the Act's purpose:
Manipulators who have in the past had a comparatively free hand to befuddle and fool the public and to extract from the public millions of dollars through stock-exchange operations are to be curbed and deprived of the opportunity to grow fat on the savings of the average man and woman of America. Under this bill the securities exchanges will not only have the appearance of an open market place for investors but will be truly open to them, free from the hectic operations and dangerous practices which in the past have enabled a handful of men to operate with stacked cards against the general body of the outside investors. For example, besides forbidding fraudulent practices and unwholesome manipulations by professional market operators, the bill seeks to deprive corporate directors, corporate officers, and other corporate insiders of the opportunity to play the stocks of their companies against the interests of the stockholders of their companies. 78 CONG. REC. 2271 (1934) (statement of Sen. Fletcher), quoted in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 765 (1975).
19. See Ernst & Ernst, 425 U.S. at 195.
20. See Chiarella v. United States, 445 U.S. 222, 226 (1980). Notably, one of the drafters of the provision indicated:
empowers the SEC to make rules and regulations prohibiting the use of any manipulative or deceptive device in connection with the purchase or sale of any security. The SEC promulgated Rule 10b-5 in 1942, pursuant to a grant of authority under section 10(b). Rule 10b-5 makes it unlawful for any person to "employ any device, scheme, or artifice to defraud," or to engage in any act which operates as a "fraud or deceit . . . in connection with the purchase or sale of any security."

B. Insider Trading: The Traditional Theory

The traditional theory of insider trading liability provides that Rule 10b-5 is violated when a person buys or sells securities based on nonpublic information if:

1. he owes a fiduciary or similar duty to the other party to the transaction;
2. he is an insider of the corporation in whose shares he trades, and thus owes a fiduciary duty to the corporation's shareholders; or
3. he is a tippee who received his information from an insider of the corporation and knows, or should know, that the insider breached a fiduciary duty in disclosing the information to him.

The failure to disclose material information when under a fiduciary duty to do so, prior to trading, is a fraudulent omission, implicating liability under section 10(b) and Rule 10b-5 because these provisions explicitly prohibit deception and fraud in securities transac-

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Of course subsection (c) [section 9(c) of H.R. 7852 – later section 10(b)] is a catch-all clause to prevent manipulative devices. I do not think there is any objection to that kind of clause. The Commission should have the authority to deal with new manipulative devices.

Hearings on H.R. 7852 and H.R. 8720 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 115 (1934), quoted in Ernst & Ernst, 425 U.S. at 202-03.

21. See Chiarella, 445 U.S. at 225. Section 10(b) provides that it is unlawful to "use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j(b) (1997) (emphasis added).


24. Aldave, supra note 8, at 101-02. One commits Rule 10b-5 fraud only if he or she "fails to disclose material information prior to the consummation of a transaction . . . when he [or she] is under a duty to do so." Chiarella, 445 U.S. at 228. This duty "does not arise from the mere possession of nonpublic market information," but rather arises from "a fiduciary or other similar relation of trust and confidence" between the parties to the transaction. Id. at 235, 228.
Thus, the breach of the insider's duty to the shareholders constitutes the "deceptive device" required by the traditional theory of liability under section 10(b).²⁶

In 1961, in the seminal case of In re Cady, Roberts & Co.,²⁷ the SEC decided that a corporate insider must abstain from trading shares of the corporation for which he works, unless he has first disclosed all the material, inside information.²⁸ The SEC noted that the obligation to disclose stems, first, from the existence of a relationship giving access to information intended to be available only for a corporate purpose, and second, from the inherent unfairness that exists when a party takes advantage of such information.²⁹ This case essentially created the "disclose or abstain" requirement³⁰ which the Supreme Court subsequently followed.³¹

In Chiarella v. United States,³² the Supreme Court endorsed insider trading liability. The Court decided that a person who had access to confidential documents, and used this information to buy the stock of companies that were about to become targets of takeover bids, could be liable for violating section 10(b) if they failed to disclose the information prior to trading.³³ The defendant in Chiarella, however, was a "complete stranger" to the transaction because he worked for a financial printer and owed no fiduciary duty to the shareholders of the target companies.³⁴ The Court held that the failure to disclose material information prior to the consummation of a transaction constitutes fraud only when a duty to

²⁵ See Chiarella, 445 U.S. at 230 (noting that "administrative and judicial interpretations have established that silence in connection with the purchase or sale of securities may operate as a fraud actionable under § 10(b)").
²⁸ See id. at 911. In Cady, Roberts, the Board of Curtiss-Wright met to discuss, among other things, the reduction of a quarterly dividend. See id. at 909. Upon approving the reduction, the board authorized transmission of the information to the New York Stock Exchange. See id. However, there was a problem with the transmission which led to a delay of the announcement on the Dow Jones ticker tape. See id. During a recess in the board meeting after the dividend decision was made, one of the directors, J. Cheever Cowdin, contacted a selling broker and informed him of the dividend cut. See id. The broker entered sell orders, and traded shares of the Curtiss-Wright stock before the dividend announcement appeared on the Dow Jones tape. See id.
²⁹ See id. at 912.
³³ See id. at 224, 230.
³⁴ See id. at 224, 232-33.
disclose exists. Such a duty arises, according to the Court, "when one party has information 'that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.'" Because the lower courts failed to identify a relationship that could give rise to such a duty, the Court reversed the conviction in Chiarella.

Liability under the classical theory of insider trading is based upon the fraud that is committed when a corporate insider trades on nonpublic information, without prior disclosure, in breach of a duty to the corporation. Several years after its Chiarella decision, the Supreme Court addressed the scope of liability under the classical theory in Dirks v. SEC. There, the Court held that a tippee is liable for fraud when he knows or should have known that the tip he received constituted a breach of the insider's fiduciary duty to the shareholders of a corporation. Dirks, a securities analyst, obtained information about a fraud within an insurance company from a former officer of the company. Upon investigating and confirming the allegations, Dirks discussed this information with

35. See id. at 228.
36. Id. (quoting RESTATEMENT (SECOND) OF TORTS § 551(2)(a)(1976)).
37. See id. at 231-32. In its brief to the Court, the United States argued in the alternative that Chiarella should be convicted under the misappropriation theory. See id. at 235-36. The Court did not reject this argument, but noted that "[w]e need not decide whether this theory has merit for it was not submitted to the jury." Id. at 236. Chief Justice Burger, on the other hand, strongly objected to reversing Chiarella's convictions.

[T]he evidence shows beyond all doubt that Chiarella, working literally in the shadows of the warning signs in the printshop, misappropriated — stole to put it bluntly — valuable nonpublic information entrusted to him in the utmost confidence. He then exploited his ill-gotten informational advantage by purchasing securities in the market. In my view, such conduct plainly violates section 10(b) and Rule 10b-5.

Id. at 245 (Burger, C.J., dissenting).

Traditionally, the duty not to trade securities on the basis of material, nonpublic information concerning the issuer was premised upon the common law duty owed by a director, officer, or controlling shareholder of a corporation to the corporation's shareholders not to gain a personal advantage through the use of nonpublic information concerning the corporation's securities. Absent such a special relationship between the "insider" and the shareholders, there was no duty to disclose the information or abstain from trading while in possession of inside information.

Id.; see also Fisch, supra note 12 at 187-90.
40. See id. at 661-62.
41. See id. at 648-49.
clients and investors.\textsuperscript{42} The Court, however, found that no breach occurred because the insider did not personally benefit from his disclosure.\textsuperscript{43}

C. The Misappropriation Theory

The misappropriation theory is another way courts have applied insider trading liability pursuant to section 10(b) and Rule 10b-5. Although liability under the traditional theory tends to be limited to corporate insiders and tippees, liability pursuant to the misappropriation theory has been extended to outsiders who would not ordinarily be considered fiduciaries of the corporation in whose stocks they trade.\textsuperscript{44} Such outsiders include lawyers, stockbrokers, financial printers, newspaper reporters, family members, and psychiatrists.\textsuperscript{45}

Under the misappropriation theory, section 10(b) and Rule 10b-5 are violated when a person misappropriates material, nonpublic information by breaching a duty which arises out of a relationship of trust and confidence, and uses that information in a securities transaction, regardless of whether he owes any duty to the shareholders of the traded stock.\textsuperscript{46} Liability is based upon the principle that it is unfair to trade securities using information that was im-

\textsuperscript{42} See id. at 649. The SEC learned of the fraud after the stock price fell from $26 per share to less than $15, prompting their own investigation. See id. at 650. The SEC found that the analyst had aided and abetted violations of the securities laws, including section 10(b). See id.

\textsuperscript{43} See id. at 667. The Dirks Court, applying the Cady, Roberts analysis, recognized that the two elements for establishing a Rule 10b-5 violation are: "(i) the existence of a relationship affording access to inside information intended to be available only for a corporate purpose, and (ii) the unfairness of allowing a corporate insider to take advantage of that information by trading without disclosure." Id. at 653-54 (citations omitted). Although Dirks' exposure of the insurance company's fraud led to the liquidation of more than $16 million invested in the company, because the tipper acted in order to expose the fraud, and not to benefit personally, he breached no fiduciary duty, and therefore Dirks could not be held derivatively liable. Further, there was no expectation by Dirks' sources that he would keep their information in confidence, and Dirks did not misappropriate the information. See id. at 665.

\textsuperscript{44} See SEC v. Cherif, 933 F.2d 403, 409 (7th Cir. 1991) (holding that the defendant, who misappropriated and traded upon material information he acquired at a bank where he was previously employed, violated section 10(b) and Rule 10b-5 pursuant to the misappropriation theory).

\textsuperscript{45} See United States v. Bryan, 58 F.3d 933, 951 (4th Cir. 1995) (discussing the diverse relationships the misappropriation theory has been applied to in other courts, but ultimately rejecting the argument that convictions for securities fraud under section 10(b) and Rule 10b-5 could rest on the misappropriation theory).

\textsuperscript{46} See SEC v. Clark, 915 F.2d 439, 443 (9th Cir. 1990) (holding an employee liable for misappropriating nonpublic information regarding his employer's plan to acquire another company).
properly acquired or not intended to be used for personal gain.\textsuperscript{47} The focus, therefore, is on whether the insider breached a fiduciary duty to any lawful possessor of nonpublic information, rather than to the issuing company or its shareholders.\textsuperscript{48}

Moreover, unlike liability imposed under the traditional theory of insider trading, the misappropriation theory reaches persons who are neither insiders of the companies whose shares are being traded, nor tippees of such insiders.\textsuperscript{49} In fact, the misappropriation theory does not even require that the buyer or seller of the securities be defrauded.\textsuperscript{50} Instead, the victim of the "deceptive device" under section 10(b) must be a party to which the offending trader owed a fiduciary duty.\textsuperscript{51} "Deception through nondisclosure" to that party is what creates liability under the misappropriation theory.\textsuperscript{52}

The Supreme Court first discussed liability for misappropriating information in Chief Justice Burger's \textit{Chiarella}\textsuperscript{53} dissent when he opined that, pursuant to section 10(b) and Rule 10b-5, "a person who has misappropriated nonpublic information has an absolute duty to disclose that information or to refrain from trading."\textsuperscript{54} While the Chief Justice conceded that there generally is no duty to disclose unless the parties are in a fiduciary relationship, he argued that a duty arises when unlawful means are used to gain an informational advantage, and that the failure to disclose thus constitutes fraud.\textsuperscript{55}

1. \textbf{Reconciling the Misappropriation Theory with Section 10(b) and Rule 10b-5}

The underlying principle of the misappropriation theory is the extension of section 10(b) liability to outsiders who unlawfully ben-

\textsuperscript{47} See Michael P. Kenny & Teresa D. Thebaut, \textit{Misguided Statutory Construction to Cover the Corporate Universe: The Misappropriation Theory of Section 10(b),} 59 ALB. L. REV. 139, 144 (1995) ("The emotional impulse that vibrates the misappropriation theory seems to be a visceral dislike for asymmetric market information, especially if a person unfairly obtains such information.").

\textsuperscript{48} See \textit{Cherif}, 933 F.2d at 409.

\textsuperscript{49} See Aldave, \textit{supra} note 8, at 111-12.

\textsuperscript{50} See United States v. Chestman, 947 F.2d 551, 566 (2d Cir. 1991) (en banc).

\textsuperscript{51} See \textit{Cherif}, 933 F.2d at 409.

\textsuperscript{52} See, e.g., United States v. O'Hagan, 117 S. Ct. 2199, 2209 (1997) (explaining that full disclosure forecloses liability under the misappropriation theory, because with disclosure, "there is no 'deceptive device' and thus no § 10(b) violation").

\textsuperscript{53} 445 U.S. 222 (1980).

\textsuperscript{54} \textit{Id.} at 240 (Burger, C.J., dissenting).

\textsuperscript{55} See \textit{id.} at 239-40.
efit from material, nonpublic information, in order to protect the source of misappropriated information, rather than the market participants. Because the misappropriation theory is a source of liability pursuant to section 10(b) and Rule 10b-5, the prohibited conduct must consist of fraud in connection with the purchase or sale of securities.

a. The Fraud Requirement

The Second Circuit Court of Appeals was the first court to apply the misappropriation theory, in United States v. Newman, when it held that a securities trader may be held criminally liable for trading on a tip conveyed to him by two employees who misappropriated the information from their investment banking firms. Although the employees owed no duty to the company whose shares they traded, the court found the breach of fiduciary duty to their employer was enough to support a Rule 10b-5 conviction. Despite the Supreme Court’s holding that not every instance of fraud violates section 10(b) or Rule 10b-5, the Newman court held that the mere breach of an employment relationship was adequate. Beginning with this important decision, the Second Circuit helped develop the misappropriation theory, applying it to a variety of situations where there was some breach of trust and confidence.

57. See 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5.
58. 664 F.2d 12 (2d Cir. 1981).
59. See id. at 16.
60. See id. at 17. The Newman court noted that it “need spend little time on the issue of fraud and deceit” and went on to explain that “[b]y sullying the reputations” of the investment banking firms, Newman and his cohorts “defrauded those employers as surely as if they took their money.” Id.
62. See Newman, 664 F.2d at 17.
63. See generally, United States v. Bryan, 58 F.3d 933, 953-59 (1995). In Moss v. Morgan Stanley, 719 F.2d 5 (2d Cir. 1983), which involved the same defendants and arose out of the same conduct that gave rise to the criminal convictions in Newman but was brought by a target corporation shareholder, the court noted that “[n]othing in our opinion in Newman suggests that an employee’s duty to ‘abstain or disclose’ with respect to his employer should be stretched to encompass an employee’s ‘duty of disclosure’ to the general public.” Id. at 13. In construing Chiarella, the court found that section 10(b) liability could not be predicated on the misappropriation of confi-
Courts applying the misappropriation theory easily found the section 10(b) fraud requirement fulfilled where there was a breach of duty to an employer, but have extended the theory far beyond the employment context. For example, in United States v. Willis, a psychiatrist's use of information revealed by a patient was found to be a sufficient basis for section 10(b) liability. In addition, the

dential information without the breach of a fiduciary duty. See id. at 12. Later, in SEC v. Materia, 745 F.2d 197 (2d Cir. 1984), the court addressed facts similar to those in Chiarella, namely, that an employee at a financial printing firm learned the identity of tender offer targets in the course of his employment and traded on such information. Id. at 199. The court found Materia liable, holding that "one who misappropriates nonpublic information in breach of a fiduciary duty and trades on that information to his own advantage violates section 10(b) and Rule 10b-5." Id. at 203. Materia breached the duty he owed to his employer, thereby implicating the misappropriation theory, whereas the Moss court ruled that such a breach was insufficient to give rise to section 10(b) liability. See Moss, 719 F.2d at 13. The court reconciled Materia and Moss by distinguishing between a criminal action and a private action for damages. See Materia, 745 F.2d at 203.

The Second Circuit took the misappropriation theory even further in its decision in United States v. Carpenter, when it held that Rule 10b-5 was violated when a newspaper columnist from the Wall Street Journal misappropriated securities-related information that was scheduled to appear in the "Heard on the Street" column and traded upon information contained in these upcoming columns. See Carpenter, 791 F.2d 1024, 1026-27, 1034 (2d Cir. 1986). The court explained that while Dirks held that certain trading by insiders or quasi-insiders violated Rule 10b-5, that is not to say that other forms of misconduct do not implicate the Rule. See id. at 1029. Namely, the court established that the predicate act of fraud may be committed on the source of the nonpublic information, even though the source may be unaffiliated with the buyer or seller of securities. See id. at 1032. The Supreme Court granted certiorari and an equally divided Court affirmed the conviction without an opinion. See Carpenter v. United States, 484 U.S. 19, 24 (1987).

64. See, e.g., supra note 60 and accompanying text. See also SEC v. Clark, 915 F.2d 439, 449 (9th Cir. 1990) ("We find no linguistic reason not to apply this conception of fraud to the securities context . . . [and] conclude that the misappropriation theory fits comfortably within the meaning of 'fraud' in § 10(b) and Rule 10b-5.").

65. 737 F. Supp. 269 (S.D.N.Y. 1990) (denying a motion to dismiss an indictment charging Dr. Willis, a psychiatrist, of violating section 10(b) and Rule 10b-5 by purchasing securities based on business information confided in him by a patient for his diagnosis and treatment).

66. See id. at 274-75. Dr. Willis' patient was the wife of a corporate executive who confided in him about her husband's efforts to become CEO of BankAmerica. See id. at 271. Finding it "difficult to imagine a relationship that requires a higher degree of trust and confidence than the traditional relationship of physician and patient," the court held that, if proven, the allegations could subject Willis to the misappropriation theory of securities fraud. Id. at 272, 275. The court reasoned that by holding himself out "as her physician with recognized obligations of confidentiality for his patient's secrets," and failing to advise her of his intent to profit on this confidential information, Willis fraudulently induced her to confide in him in connection with his securities trading. Id. at 274. The court further found that the patient had a property interest in her psychiatric treatment, and by jeopardizing their relationship of trust and confidence, Willis put at risk the patient's financial investment in the treatment. Id.
misappropriation theory was extended to the family relationship in *United States v. Reed*,\(^6\) where the court held that a son's breach of his father's trust may give rise to liability under section 10(b).\(^6\)

While the expansion of liability under the misappropriation theory in the Second Circuit was significant, courts did not find the requisite fraud in every section 10(b) case. In *United States v. Chestman*,\(^6\) for example, the breach of confidence between a husband and wife was not sufficient to impose liability.\(^7\) The court went to great lengths analyzing what constitutes a fiduciary relationship and its equivalent, noting that it must be cautious in extending the misappropriation theory to new relationships.\(^7\)

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68. See *id.* at 705. The court held that:

A person who receives confidential information from another and misappropriates it for personal benefit is deemed to hold the proceeds of the misappropriation in a constructive trust for the benefit of the entrusting party. The misappropriator thus becomes the *trustee ex maleficio*, or quasi-fiduciary, of the entrustor. In the context of the securities laws, it does not matter for purposes of assessing liability whether the recipient of the information is actually trading in the securities issued by the source of the information. Rather, the duty is breached by the misappropriation and resulting profit, and a constructive trust attaches.

*Id.* at 700 (citations omitted).

69. 947 F.2d 551 (2d Cir. 1991) (en banc).

70. See *id.* at 571. Keith Loeb, the husband of a member of the Waldbaum family, was told by his wife that the company was being sold and was cautioned not to tell anyone so as not to risk ruining the sale. *See id.* at 555. However, Loeb told his stockbroker, Chestman, who traded on that information, knowing of Loeb's relation to the Waldbaum corporation. *See id.* In the *Chestman* opinion, the court recognized that it broke ranks with its *Carpenter* decision, since it was the first fact pattern it considered that "is clearly beyond the pale of the traditional theory of insider trading." *Id.* at 566-67. In the end, the court concluded that there was not enough evidence to establish a fiduciary relationship or a similar relationship of trust and confidence between Loeb and the Waldbaum family, and therefore held that he did not defraud them by disclosing the information to Chestman. *See id.* at 570-71. Because Loeb had committed no fraud, Chestman could not be held derivatively liable as Loeb's tippee or as an aider and abettor under the misappropriation theory. *See id.* at 571.

71. See *id.* at 567-71. In evaluating what constitutes a fiduciary relationship, the *Chestman* court looked first to associations that the common law has recognized as inherently fiduciary:

Counted among these hornbook fiduciary relations are those existing between attorney and client, executor and heir, guardian and ward, principal and agent, trustee and trust beneficiary, and senior corporate official and shareholder.

*Id.* at 568. Noting that this is not an exhaustive list, the court held that a breach of a similar relationship of trust and confidence, which must share the same qualities of a fiduciary relationship, also implicates the misappropriation theory. *See id.* at 658. Analyzing the characteristics of a fiduciary relationship, the *Chestman* court found that "at the heart of the fiduciary relationship' lies 'reliance, and de facto control and
b. The “In Connection With” Requirement

Not only must fraud exist for the misappropriation theory to apply, but the fraud must be “in connection with” the purchase or sale of securities. When the Supreme Court addressed this issue with respect to traditional insider trading, it rejected the notion that every fraud or breach of fiduciary duty by a corporate insider to shareholders constituted securities fraud. Nevertheless, when discussing this element in United States v. Newman, the Second Circuit easily found satisfied the “in connection with” requirement of Rule 10b-5 because Newman’s fraud “touched” the securities transaction. Generally, once courts identify fraud sufficient to give rise to section 10(b) liability, they also find the “in connection with” requirement satisfied due to the self-evident nexus that exists between the two components in these cases.

Although the Second Circuit has the most experience interpreting section 10(b) and Rule 10b-5, other circuits have addressed the issue of whether the misappropriation theory is consistent with the statute. By the time the issue reached the Supreme Court, the Fourth and Eighth Circuits had held that criminal liability under section 10(b) may not be predicated on the misappropriation the-

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72. See, e.g., SEC v. Clark, 915 F.2d 439, 449 (9th Cir. 1990) (“Section 10(b) and Rule 10b-5 do not proscribe all frauds occurring in the business world, but only those ‘in connection with the purchase or sale of any security.’ In other words, the fraud must somehow ‘touch’ upon securities transactions.”).

73. See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737-38 (1975) (holding that defrauded investors who did not trade because of a misrepresentation do not have standing to bring a private damage action under Rule 10b-5).

74. 664 F.2d 12 (2d Cir. 1981).

75. See id. at 18 (citing Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6, 12 (1971)). The Newman Court improperly characterized the “purchaser or sellers” portion of the text as a mere standing requirement. See id. at 17.

76. See, e.g., Clark, 915 F.2d at 449 (“Purely as a matter of linguistic construction, we have little trouble concluding that there is” some nexus between the misappropriation and the subsequent trading); United States v. Carpenter, 791 F.2d 1024, 1032 (2d Cir. 1986). See also SEC v. Cherif, 933 F.2d 403, 410 (7th Cir. 1991) (“We agree that buying or selling securities ‘in connection with’ fraud perpetrated on an employer to obtain material non-public information constitutes a violation of Rule 10b-5”); SEC v. Materia, 745 F.2d 197, 203 (2d Cir. 1984) (finding the suggestion that the fraud was not “in connection with” the purchase or sale of securities is “inimical to the letter and spirit of the expansive scheme created to combat fraud in the securities markets. The information Materia stole has no value whatsoever except ‘in connection with’ his subsequent purchase of securities.”).

77. See, e.g., United States v. O’Hagan, 92 F.3d 612, 615 (8th Cir. 1996); United States v. Bryan, 58 F.3d 933, 943 (4th Cir. 1995); Cherif, 933 F.2d at 408; Clark, 915 F.2d at 442; Rothberg v. Rosenbloom, 771 F.2d 818, 822 (3d Cir. 1985).
ory, while the Second, Seventh, and Ninth Circuits held that it could.

II. Interpreting Section 10(b)

Statutes are typically written in general terms because they are invariably products of political compromise. As a result, it is often up to the judiciary to determine the legislative intent and meaning of statutes in a particular case. Principles of statutory interpretation fix the limits of a statute's reach, and thus the outcome of a particular decision depends a great deal upon which canon of statutory interpretation a court employs.

A. Canons of Construction

When courts look to a statute to determine the scope of liability, they often use tools of statutory interpretation and construction to ascertain the meaning of the language. The four main schools of statutory interpretation are: textualism, intentionalism, purposivism, and the dynamic theory. While the Supreme Court has almost consistently interpreted section 10(b) using a textual or plain language approach, the other canons of construction are also acceptable methods of interpreting statutes.

1. Textualism

Textualism requires courts to rely strictly on the language of a statute to ascertain its meaning. Proponents of this method con-

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78. See O'Hagan, 92 F.3d at 617; Bryan, 58 F.3d at 944.
79. See United States v. Chestman, 947 F.2d 551, 566 (2d Cir. 1991); Cherif, 933 F.2d at 410; Clark, 915 F.2d at 453. The Third Circuit has also seemingly adopted the misappropriation theory. See Rothberg, 771 F.2d at 822 (finding that one "violates the insider trading rule when he uses insider information in violation of the fiduciary duty owed to the corporation to which he owes a duty of confidentiality.").
80. See Kenny & Thebaut, supra note 47, at 140.
81. See id.
82. See Steven A. Meetre, Textualist Statutory Interpretation Kills Section 10(b) "Aiding and Abetting" Liability, 63 DEF. COUNS. J. 58, 60 (1996) ("Often it is a court's interpretation of the [statute's] language that determines the application and effect of legislation.").
83. See id.
84. See William N. Eskridge, Jr., Dynamic Statutory Interpretation 10 (Harvard University Press ed. 1994). These statutory tools are not mutually exclusive.
85. See infra Part II.B.
86. See Eskridge, supra note 84, at 14.
87. See Karen M. Gebbia-Pinetti, Statutory Interpretation, Democratic Legitimacy and Legal-System Values, 21 SETON HALL LEGIS. J. 233, 237 (1997) ("‘Textualists’ contend that the only democratically legitimate source of meaning is the actual statu-
tend that the plain meaning of the text is a reasonable indication of the legislature’s intent. This approach requires a court interpreting a statute to confine itself to a literal reading of the text, unless the text is ambiguous on its face, or such a reading would lead to an “absurd” or “bizarre” result.

Critics of the plain language approach to interpreting section 10(b), like Melvin Aron Eisenberg, argue that the approach is intellectually incoherent because of the difficulty in identifying canonical statutory text. Eisenberg explains that strict textualists do not necessarily confine the canonical text to the statutory provisions at issue and, as a result, widen the text to include the entire law or even all statutes adopted by the relevant legislature. Moreover, even if strict textualism were coherent, Eisenberg argues that judges have an obligation to be faithful servants of the legislature, and using this methodology violates the obligation.

Despite these criticisms, most courts rely on textualism in interpreting section 10(b). In addition, the Supreme Court generally interprets all statutes based upon their plain meaning. The Supreme Court has emphasized that where the language of the statute is plain, the sole function of a court is to enforce a statute according to its terms. Although the legislative history of a statutory text, not any underlying ideas, intentions or purposes that have not cleared the hurdles of democratic lawmaking.

88. See Meetre, supra note 82, at 60.
90. See id. at 14, 22.
91. See id. at 22-23. Eisenberg explains that because the particular provision at issue is often part of a larger statute, or is in a statute that is one of a group of related statutes, “strict textualism cannot sensibly restrict the relevant text to the statutory provision directly at issue. Once that fateful line is crossed, however, there is no logical stopping point until the limit of the text of all law is reached.” Id. He further argues that if the relevant text is the text of all law, then strict textualism makes the outrageous suggestion that the legislature must have had the text of all law in mind when it enacted the particular provision. See id. at 23.
92. See id. at 37. “[I]n the domain of federal law Congress is the master and the Court is merely a servant.” Id. Accordingly, “like any servant, a court is bound to give the instructions it receives from its master—statutes—a reasonable interpretation . . . which] always depends on all the contextual circumstances, not just on a literal reading of the text.” Id.
93. See infra Part II.B.
94. See infra notes 95-98 and accompanying text.
95. See West Virginia Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 98-99 (1991). In addressing the argument that the congressional purpose of enacting a statute must prevail over the ordinary meaning of the statutory terms, the Court held that when a statute “contains a phrase that is unambiguous – that has a clearly accepted meaning in both legislative and judicial practice – we do not permit it to be expanded or contracted . . .”
ute may clarify ambiguous provisions, “courts have no authority to enforce alleged principles gleaning solely from legislative history that has no statutory reference point.”96 Thus, the Court has held that statutory construction must always begin with the language of the statute.97 When the language is clear, judicial inquiry into the statute’s meaning, in all but the most extraordinary circumstances, is finished.98 According to this view, a court’s limited role is simply to apply a statute because Congress alone has the authority to make law.99

2. Intentionalism

A second tool of statutory interpretation is intentionalism. This method treats a statute as a static text, and “asks how the legislature originally intended the interpretive question to be answered, or would have intended the question to be answered had it thought about the issue when it passed the statute.”100 To ascertain intent, the court may look beyond the text to the statute’s legislative history.101 Proponents of the misappropriation theory often apply intentionalism, arguing that the policies underlying the theory are consistent with the intent of the legislators who enacted section 10(b).102

97. See Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1922) (using textualism to hold that forfeiture provisions of a statute apply to a worker whose employer is neither paying compensation nor is subject to an order to pay under the statute at the time the worker settles with a third party).
98. See id.
99. See, e.g., West Virginia Univ. Hosp., 499 U.S. at 101 (“[I]t is our role to make sense rather than nonsense out of the corpus juris.”).
101. See Eskridge, supra note 84, at 14. Despite this inquiry into intent, the actual legislative intent is rarely brought to light from the historical record. See id. at 16.
102. See, e.g., SEC v. Clark, 915 F.2d 439, 451 (9th Cir. 1990) (finding that while “it would be disingenuous to suggest that in 1942 the SEC sanctioned or even foresaw the use of the misappropriation theory.... its apparent understanding that Congress empowered it to draft a rule to address unforeseen species of fraud squares with our reading of § 10(b)’s contemporaneous legislative history.”); United States v. Carpenter, 791 F.2d 1024, 1030 (2d Cir. 1986) (justifying the broad-reaching legislative intent of the 1934 Act in adopting the misappropriation theory); SEC v. Materia, 745 F.2d 197, 201 (2d Cir. 1984) (noting that the antifraud provision of the 1934 Act was intended to be broad in scope, and was not “aimed solely at the eradication of fraudulent trading by corporate insiders.”).
3. Purposivism

Another alternative is purposivism, which allows a court to consider the congressional purpose or policy behind the statute’s enactment.¹⁰³ Using this approach, the purpose or objective of the statute must first be identified, then the statutory ambiguities can be resolved by determining which interpretation is most consistent with that purpose or goal.¹⁰⁴ Purposivism looks to Congress’ intent in regulating an area, rather than its intent in enacting a particular statute.¹⁰⁵ As opposed to intentionalism, purposivism allows a statute to evolve to address new issues, while maintaining a connection with the original legislative expectations.¹⁰⁶ Notwithstanding this broader inquiry, it remains difficult under either approach to identify the purpose of a statute because legislatures do not always set forth the reasons for a law’s enactment.¹⁰⁷ Moreover, because statutes are products of compromise, legislative histories often support divergent intentions.¹⁰⁸ Finally, this method calls for courts rather than Congress to make policy judgments,¹⁰⁹ and may ignore the plain meaning of a statute.¹¹⁰

4. The Dynamic Theory

The dynamic theory is a tool of statutory interpretation that has received considerable scholarly debate in recent years.¹¹¹ The dynamic theory suggests that courts should consider current policies and societal values in rendering decisions.¹¹² Proponents of this

¹⁰³. See Meetre, supra note 82, at 60; see generally Eskridge, supra note 84, at 25-34.
¹⁰⁵. See Roger Colinvaux, What Is Law? A Search for Legal Meaning and Good Judging Under a Textualist Lens, 72 Ind. L.J. 1133 (1997). In distinguishing the canons of construction, this commentator noted:
A purposivist judge finds law by measuring a statute’s language against the statute’s purpose. For the task of discerning purpose, legislative history is a common choice. An intentionalist finds law by reconstructing congressional intent, also frequently relying on legislative history. Intentionalism differs from purposivism because a statute can be interpreted to have a broader purpose beyond the one intended.

¹¹². "Under dynamic theory, 'the court's role is to reach the best result, formally
too arguethat “[i]nterpretation is not an archeological discovery, but a dialectic creation.”113 Statutes should not be treated as static texts because gaps and ambiguities always exist.114 Instead, statutes should be interpreted dynamically, allowing them to evolve with current policies and perspectives.115

B. Interpreting Section 10(b)

In interpreting the language of section 10(b), the Supreme Court has generally employed textualism, reading the plain language of the statute to determine the meaning of the text.116 Ernst & Ernst v. Hochfelder117 is an exemplary case in which the Court decided whether section 10(b) reaches negligent conduct, or whether a defendant must act with an intent to deceive, manipulate, or defraud.118 Relying on the language of section 10(b), specifically the words “manipulative or deceptive” used in conjunction with “device or contrivance,” the Court held that the scope of section 10(b) liability does not extend to negligent conduct.119 Accordingly, the Court refused to consider any policy arguments in reaching its decision.120

unconstrained (though perhaps influenced or persuaded) by the statute's text and legislative history.” Meetre, supra note 82, at 61 (quoting William N. Eskridge, Jr., Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation, 74 V.A. L. Rev. 275 (1988)).
113. Eskridge, supra note 100, at 1482 (citation omitted).
114. See id. at 1480.
115. See id. at 1483.
116. See infra notes 117-25 and accompanying text.
118. Id. at 187-88 (1976). Ernst & Ernst involves an accounting firm charged with negligence for allegedly failing to conduct proper audits of a company keeping fraudulent escrow account. See id. at 190.
119. See id. at 197-98.
120. See id. at 198-99. Declining to entertain the policy concerns expressed by the SEC, the Court noted that “apart from where its logic might lead, the Commission would add a gloss to the operative language of the statute quite different from its commonly accepted meaning.” Id. On the contrary, the Court steadfastly refused to partake in judicial legislation. The Supreme Court has echoed this sentiment several times in the past. See, e.g., Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 367 (1991) (Stevens, J. dissenting) (“Congress, rather than the Federal Judiciary, has the responsibility for making the policy determinations. . . ”); Ernst & Ernst, 425 U.S. at 214 (“When a statute speaks so specifically in terms of manipulation and deception, and of implementing devices and contrivances—the commonly understood terminology of intentional wrongdoing—and when its history reflects no more expansive intent, we are quite unwilling to extend the scope of the statute to negligent conduct.”); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 748 (1975) (“[T]he Judiciary may not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability.”).
In *Santa Fe Industries, Inc. v. Green*, the Supreme Court again employed textualism and declined to extend liability based on policy considerations because "[t]he language of § 10(b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception." Therefore, the Court held that a breach of a fiduciary duty without any deception, misrepresentation, or nondisclosure does not give rise to liability under section 10(b) or Rule 10b-5.

Similarly, the Court strictly interpreted section 10(b) in its recent *Central Bank of Denver v. First Interstate Bank of Denver* decision. Addressing the seemingly resolved issue of whether a private right of action for aiding and abetting could be brought pursuant to section 10(b), the Court held that because the statute's plain language did not create or impose such liability, it did not exist.

121. 430 U.S. 462 (1977). In *Santa Fe*, the Court considered a section 10(b) suit brought by minority shareholders against majority shareholders and a firm which had appraised the value of a stock for purposes of a Delaware short-form merger. See id. at 466-67. Because the minority shareholders could either accept the price offered or reject it and seek appraisal in the Delaware Court of Chancery, the transaction was neither deceptive nor manipulative and therefore did not violate section 10(b) or Rule 10b-5. See id. at 474.

122. Id. at 473.

123. 511 U.S. 164, 173 (1994) ("With respect . . . [to] the scope of conduct prohibited by § 10(b), the text of the statute controls our decision.").

124. The dissenting opinion noted that "[i]n hundreds of judicial and administrative proceedings in every Circuit in the federal system, the courts and the SEC have concluded that aiders and abettors are subject to liability under § 10(b) and Rule 10b-5." Id. at 192 (Stevens, J., dissenting) (emphasis in original). However, the Court was not persuaded by the fact that all eleven courts of appeals had recognized aiding and abetting liability. See id. Acknowledging that aiding and abetting should be actionable in certain circumstances, the Court would not budge. "The issue . . . is not whether imposing private civil liability on aiders and abettors is good policy but whether aiding and abetting is covered by the statute." Id. at 177. The Court declared that "[p]olicy considerations cannot override our interpretation of the text and structure of the Act, except to the extent that they may help to show that adherence to the text and structure would lead to a result 'so bizarre' that Congress could not have intended it." Id. at 188 (quoting Demarest v. Manspeaker, 498 U.S. 184, 191 (1991)).

Similarly, when the Fourth Circuit was confronted with the policy justifications for adopting the misappropriation theory, it responded:

"[I]n securities law, as in all areas of the law, our perceptions of what is wise or fair are ultimately of no relevance. In the end, we, as judges, no less than anyone else, are bound by the actual prohibitions enacted by Congress. It is adherence to this fundamental limitation on our own authority that leads us to conclude that, as ignoble as Bryan's conduct was, it simply was not conduct that is prohibited by section 10(b) of the Securities Exchange Act of 1934."


125. See *Central Bank*, 511 U.S. at 177. Because the language of section 10(b) does
In all of these cases, the Supreme Court determined the scope of section 10(b) by analyzing the language of the statute and its relatively sparse legislative history. Until United States v. O'Hagan, the Court focused solely on the plain meaning of the statute and consistently held that fraud is the critical component of section 10(b) liability. In O'Hagan, the Court’s steadfast refusal to expand the scope of the statute beyond what the language permits ended.

C. United States v. O'Hagan

The Supreme Court directly discussed the validity of the misappropriation theory in O'Hagan. The Court decided that James O'Hagan, a lawyer, violated section 10(b) and Rule 10b-5 when he traded stocks using confidential client information he learned while working as a partner at a law firm. Following an investigation by

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not mention aiding and abetting, the Court held that “[i]t is inconsistent with settled methodology in § 10(b) cases to extend liability beyond the scope of conduct prohibited by the statutory text.” Id. Rather, “ascertainment of congressional intent with respect to the scope of liability created by a particular section of the Securities Act must rest primarily on the language of that section.” Id. at 175 (quoting Pinter v. Dahl, 486 U.S. 622, 653 (1988)). Based upon this straightforward analysis, the Court found that there can be no aiding and abetting liability under section 10(b). See id. at 177. The Court went on to note that if the statute itself does not resolve the case, as it did here, it must attempt “to infer ‘how the 1934 Congress would have addressed the issue had the 10b-5 action been included as an express provision in the 1934 Act.’” Id. at 178 (quoting Musick, Peeler & Garrett v. Employers Insurance, 508 U.S. 286, 294 (1993)).

126. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 202 (1976) (“Neither the intended scope of § 10(b) nor the reasons for the changes in its operative language are revealed explicitly in the 1934 Act . . . .”).

127. See Chiarella v. United States, 445 U.S. 222, 234-35 (1980) (“Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud.”); Santa Fe Indus. v. Green, 430 U.S. 462, 473 (1977) (“The language of § 10(b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception.”).


129. See id. at 2205. James O'Hagan was a partner at the law firm of Dorsey & Whitney. See id. at 2205. In July 1988, Grand Metropolitan PLC (“Grand Met”) retained Dorsey & Whitney as local counsel regarding a potential tender offer for the common stock of the Pillsbury Company, headquartered in Minneapolis, Minnesota, a transaction which did not involve O'Hagan. See id. The firm, which was also located in Minneapolis, severed the relationship with Grand Met in September, in light of its policy against representing a company involved in a hostile takeover of a local corporation. See id. In August 1988, while Dorsey & Whitney still represented Grand Met, O'Hagan began purchasing call options for Pillsbury stock, and by the end of September, he had gathered 2,500 Pillsbury call option contracts, and owned approximately 5000 shares of Pillsbury common stock. See id. On October 4, 1988, Grand Met announced its tender offer for Pillsbury stock, and the price per share immediately increased from $39 to $60. See id. O'Hagan subsequently purchased the stock
the SEC and other federal law enforcement agencies, O'Hagan was charged and convicted of fifty-seven counts of mail fraud, securities fraud, and money laundering, and sentenced to forty-one months' imprisonment.\textsuperscript{130} On appeal, the Eighth Circuit reversed O'Hagan's convictions, holding that the misappropriation theory is not a valid basis upon which to impose criminal liability under section 10(b).\textsuperscript{131}

I. The Eighth Circuit's Analysis

The Eighth Circuit, in \textit{O'Hagan}, found that the misappropriation theory was at odds with the explicit language of section 10(b).\textsuperscript{132} Relying on the Supreme Court's prior readings of the statute, the Eighth Circuit defined deception as the making of a material misrepresentation or nondisclosure of material information in violation of a duty to disclose.\textsuperscript{133} The court then decided that deception was critical to section 10(b) liability and, therefore, the misappropriation theory was problematic because it did not require any misrepresentation or nondisclosure in breach of a duty.\textsuperscript{134} Moreover, the court reasoned that although the misappropriation theory does not require deception as mandated by section 10(b), even if it did, "it renders nugatory the requirement that the 'deception' be 'in connection with the purchase or sale of any security.'\"\textsuperscript{135}

\textsuperscript{130} See \textit{id.}

\textsuperscript{131} See \textit{id.} at 2206.

\textsuperscript{132} See United States v. O'Hagan, 92 F.3d 612, 618 (8th Cir. 1996) ("By its very definition . . . [the misappropriation theory] does not require either a material misrepresentation or nondisclosure."). The court borrowed heavily from the Fourth Circuit's decision, in \textit{United States v. Bryan}, 58 F.3d 933 (4th Cir. 1995), which concluded that "neither the language of section 10(b), Rule 10b-5, the Supreme Court authority interpreting these provisions, nor the purposes of these securities fraud prohibitions, will support convictions resting on the particular theory of misappropriation adopted by our sister circuits." \textit{Id.} at 944.

\textsuperscript{133} See \textit{O'Hagan}, 92 F.3d at 617.

\textsuperscript{134} See \textit{id.} (relying on \textit{Santa Fe Industries, Inc. v. Green}, 430 U.S. 462, 470-76 (1977), the court noted that the Supreme Court had already rejected a lower court's reading of section 10(b) which required no misrepresentation or nondisclosure); see also \textit{Central Bank of Denver v. First Interstate Bank of Denver}, 511 U.S. 164, 177 (1994), cited in \textit{O'Hagan}, 92 F.3d at 618 (reiterating this principle); see also supra notes 123-25.

\textsuperscript{135} O'Hagan, 92 F.3d at 617. In \textit{Bryan}, the Fourth Circuit found that the misappropriation theory "artificially divides into two discrete requirements — a fiduciary breach and a purchase or sale of securities — the single indivisible requirement of deception upon the purchaser or seller of securities, or upon some other person intimately linked with or affected by a securities transaction." \textit{Bryan}, 58 F.3d at 950 (emphasis in original). Further developing this analysis, the \textit{O'Hagan} court explained
2. The Supreme Court’s Analysis

The Supreme Court rejected the Eighth Circuit’s argument that the misappropriation theory did not satisfy section 10(b)’s deception requirement. The Court explained that the duty breached under the misappropriation theory is a duty which runs to the source of information.136 In addition, the O’Hagan Court limited liability under the misappropriation theory by holding that full disclosure will foreclose the liability of someone who breaches a relationship of trust.137 If the fiduciary discloses his plans to trade on

that the misappropriation theory improperly “permits liability for a breach of duty owed to individuals who are unconnected to and perhaps uninterested in a securities transaction, thus rendering meaningless the ‘in connection with . . . ’ statutory language.” O’Hagan, 92 F.3d at 618. Thus, “the Misappropriation Theory separates the inseparable . . . [and] disregards the specific statutory requirement of deception, in favor of a requirement of a mere fiduciary breach[.]” David Cowan Bayne, S.J., Insider Trading: The Demise of the Misappropriation Theory – And Thereafter, 41 St. Louis U. L.J. 625, 637 (1997); see also Brodsky & Kramer, supra note 38, at 138.

Brodsky and Kramer argue:

By severing the link between the fraud (breach of duty) and the securities trade at issue, the misappropriation theory brings within its scope parties who have no connection with issuers or their shareholders and is premised upon breaches of duty that have nothing to do with securities markets. It creates irrational distinctions, where some familial, employment or professional relationships creates a duty to disclose or refrain from trading, whereas others (ones where the expectations of trust are deemed diminished) do not.

Id. However, the Supreme Court’s decisions in Chiarella, Dirks and Central Bank show that these requirements cannot be separated. The breach must be to parties in a relationship of trust and confidence in order to give rise to section 10(b) liability. See O’Hagan, 92 F.3d at 618. In Chiarella, the Court held that a duty to disclose arises only “from a relationship of trust and confidence between parties to a transaction.” Chiarella v. Unites States, 445 U.S. 222, 230 (1980). Similarly, in Dirks, the Court stated that “[a] duty [to disclose] arises from the relationship between parties . . . and not merely from one’s ability to acquire information because of his position in the market.” Dirks v. SEC, 463 U.S. 646, 657-58 (1983) (quoting Chiarella, 445 U.S. at 231-32 n.14).

136. See United States v. O’Hagan, 117 S. Ct. 2199, 2207 (1997). “A fiduciary who ‘[pretends] loyalty to the principal while secretly converting the principal’s information for personal gain,’ . . . ‘dupes’ or defrauds the principal.” Id. at 2208 (quoting Brief for the United States 17). The Court did not adopt the version of the theory originally proposed by Chief Justice Burger in Chiarella, which would impose a disclosure obligation to all those with whom the misappropriator trades, but rather limited the disclosure obligation to the source of information. See id. at 2208 n.6. Under Burger’s version of the theory, “a person who has misappropriated nonpublic information has an absolute duty to disclose that information or to refrain from trading.”

Chiarella, 445 U.S. at 240 (Burger, C.J., dissenting).

137. See O’Hagan, 117 S. Ct. at 2209. The Court noted that:

full disclosure forecloses liability under the misappropriation theory: Because the deception essential to the misappropriation theory involves feigning fidelity to the source of information, if the fiduciary discloses to the
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the nonpublic information to the source of the information, then there exists neither any purported fidelity to the source nor a "deceptive device" to give rise to section 10(b) liability.\(^\text{138}\)

The Supreme Court also found satisfied the requirement that the misappropriator's deceptive use of information be "in connection with the purchase or sale of a security," because the fraud occurs only when securities are bought or sold in the market.\(^\text{139}\) The Court reasoned that if the fiduciary used the nonpublic information in ways not involving trading on the securities market, no section 10(b) violation would exist.\(^\text{140}\)

III. O'Hagan Dissected

The Supreme Court disagreed with the Eighth Circuit's interpretation that \textit{Chiarella},\(^\text{141}\) \textit{Dirks},\(^\text{142}\) and \textit{Central Bank}\(^\text{143}\) held that section 10(b) liability cannot be predicated on a duty owed to the source of nonpublic information.\(^\text{144}\) Attempting to distinguish

source that he plans to trade on the nonpublic information, there is no 'deceptive device' and thus no § 10(b) violation ...

\textit{Id.}

138. \textit{See id.} at 2209. However, "the fiduciary-turned-trader may remain liable under state law for breach of a duty of loyalty." \textit{Id.}

139. \textit{Id.} ("[T]he fiduciary's fraud is consummated not when [he learns the] information, but when, without disclosure to his principal, he uses [it] to purchase or sell securities.").

140. \textit{See id.} "The theory does not catch all conceivable forms of fraud involving confidential information; rather, it catches fraudulent means of capitalizing on such information through securities transactions." \textit{Id.} Asserting that this is another limitation on the forms of fraud section 10(b) reaches, the Court gave an example of a situation where the misappropriation theory would not apply: a person who defrauded a bank into giving him a loan or embezzled cash from another, and then used the proceeds from the fraud to purchase securities would not give rise to section 10(b) liability since "the proceeds would have value to the malefactor apart from their use in a securities transaction, and the fraud would be complete as soon as the money was obtained." \textit{Id.} (quoting Brief for United States at 24 n.13, \textit{O'Hagan}). The dissent found this analysis to be very troubling. "[I]t becomes plain that the majority's explanation of how the misappropriation theory supposedly satisfies the 'in connection with' requirement is incomplete. The touchstone required for an embezzlement to be 'use[d] or employ[ed], in connection with' a securities transaction is not merely that it coincide with, or be consummated by, the transaction, but that it is necessarily and only consummated by the transaction." \textit{Id.} at 2222 (Thomas, J., dissenting) (emphasis in original). The Court concluded that the misappropriation theory squares with the language of section 10(b) requiring deception "in connection with the purchase or sale of any security." \textit{See id.} at 2210.

141. 445 U.S. 222 (1980); \textit{see supra} notes 32-37 and accompanying text.

142. 463 U.S. 646 (1983); \textit{see supra} notes 39-43 and accompanying text.

143. 511 U.S. 164 (1994); \textit{see supra} notes 123-25 and accompanying text.

144. \textit{See United States v. O'Hagan}, 92 F.3d 612, 619 (8th Cir. 1996) ("Against this venerable body of law, the misappropriation theory, which allows the imposition of
these cases, the Court stated that although it declined to find liability on "so broad a theory" in Chiarella, its decision did not limit liability to the relationship between a corporation's insiders and shareholders. 145 Similarly, the Dirks decision did not foreclose liability under the misappropriation theory because the information at issue was not improperly acquired or misused. 146 Finally, under its Central Bank decision, the Supreme Court held that there is no private right of action for aiding and abetting liability under section 10(b), but cautioned that secondary actors may still be liable under section 10(b) and Rule 10b-5 for certain conduct. 147 Accordingly, the Court found no inconsistencies between the misappropriation theory and its previous decisions. 148

Rather than continue to limit the reach of section 10(b) and Rule 10b-5, the O'Hagan Court extended the prohibition of trading on material, nonpublic information. However, if the O'Hagan decision is consistent with previous cases, as the Court suggests, why is this result so different? The answer lies in the canon of construction employed by the O'Hagan Court. The majority was persuaded that the misappropriation theory is "well-tuned to an animating purpose of the Exchange Act: to insure honest securities markets and thereby promote investor confidence." 149 The O'Hagan decision, therefore, was not reached using textualism, but rather, purposivism:

In sum, considering the inhibiting impact on market participation of trading on misappropriated information, and the congressional purposes underlying § 10(b), it makes scant sense to hold a lawyer like O'Hagan a § 10(b) violator if he works for a law firm representing the target of a tender offer, but not if he works

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145. See O'Hagan, 117 S. Ct. at 2211-12 (noting that the Court declined to find the defendant liable because the misappropriation theory had not been submitted to the jury, but in fact, four Justices found merit in it).

146. See id. at 2213; see supra note 43 and accompanying text.

147. See O'Hagan, 117 S. Ct. at 2213. In Central Bank, the Court stated: "Any person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5, assuming . . . the requirements for primary liability under Rule 10b-5 are met." Central Bank, 511 U.S. at 191 (emphasis added). The O'Hagan Court explained that the Eighth Circuit improperly understood this passage to mean that only deceptive statements or omissions on which purchasers, sellers, and perhaps other market participants, rely are covered by section 10(b). O'Hagan, 117 S. Ct. at 2213.


149. Id. at 2210.
for a law firm representing the bidder.\footnote{150}{Id. at 2210-11 (emphasis added).}

A. The Methodology of Purposivism in O'Hagan

By the time it considered \textit{O'Hagan}, the Supreme Court had addressed the scope of liability under section 10(b) and Rule 10b-5 in a number of cases using a textualist approach.\footnote{151}{See supra Part II.B.} The \textit{O'Hagan} Court, however, rendered its decision based on policy reasons, using a purposivist approach. Although it arguably may be proper to impose liability on those who misappropriate confidential information, the misappropriation theory is not the proper means because it requires an overly broad interpretation of the language of section 10(b). Moreover, when a statute is written in vague and uncertain terms, it should be construed as narrowly as possible, to avoid inconsistent results.\footnote{152}{See Grundfest, supra note 8, at 42-45.}

1. Proponents of the Misappropriation Theory Advocate a Purposivist Approach

After the Supreme Court's decision in \textit{Central Bank},\footnote{153}{511 U.S. 164 (1994).} the misappropriation theory received a great deal of scholarly debate, with many judges and commentators advocating both intentionalism and purposivism as approaches to interpreting section 10(b).\footnote{154}{See United States v. Carpenter, 791 F.2d 1024, 1029 (2d Cir. 1986) ("[W]e think that the application of the misappropriation theory herein promotes the purposes and policies underlying section 10(b) and Rule 10b-5"); Aldave \textit{supra} note 8, at 122 ("The misappropriation theory... comports well with our intuition about what is wrong with trading on nonpublic information.").} The misappropriation theory has gained judicial favor because our country values so highly the securities market that courts will go to great lengths to protect people's confidence in it.\footnote{155}{See Spencer Derek Klein, Note, \textit{Insider Trading, SEC Decision-Making, and the Calculus of Investor Confidence}, 16 \textit{Hofstra L. Rev.} 665 (1988) (discussing the nexus between insider trading and investor confidence).}

Proponents argue that the misappropriation theory is consistent with the underlying purpose behind the securities laws.\footnote{156}{The securities laws were created in order to regulate the troubled securities markets and to restore peoples confidences in them. See Thel, \textit{supra} note 16, at 425; Aldave, \textit{supra} note 8, at 122-23 (stating that in order to maintain the integrity of the securities market, it must remain fair, as "no one likes to play a game with an opponent who has a loaded dice."). Aldave, whose analysis the Supreme Court relied on in \textit{O'Hagan}, explained that "[w]e think that those who have special access to information, because of employment or other relationships, should be barred from using that...".}
Congress enacted section 10(b) of the Securities and Exchange Act, it did so for the purpose of protecting purchasers and sellers of securities. Thus, proponents urge that the misappropriation theory is in accord with the statute's goal, because "Congress chose to enact a comprehensive yet open-ended statutory scheme, capable of ongoing adaptation and refinement." The misappropriation theory may also be accepted under purposivism because it advances the policy of basic fairness.

2. Purposivism Is Not the Appropriate Tool for Interpreting Section 10(b)

The Supreme Court's purposivist approach in O'Hagan is not an appropriate method of interpreting section 10(b). Instead, courts should rely on textualism alone because liability under section 10(b) and Rule 10b-5 risks being expanded without limit, leaving investors as well as the courts without a clear understanding of prohibited conduct.

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158. SEC v. Materia, 745 F.2d 197, 203 (2d Cir. 1984). The repeated use of the word "any" evidences the intention of Congress to draft the rule broadly. See Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972). In fact, when it passed the Insider Trading Sanction Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264, and the Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. 100-704, 102 Stat. 4677, Congress found the misappropriation theory to be consistent with section 10(b) and Rule 10b-5. See SEC v. Clark, 915 F.2d 439, 452 (9th Cir. 1990). Section 10(b) was intended to be broad in scope, encompassing all "manipulative and deceptive practices which have been demonstrated to fulfill no useful function." S. REP. NO. 792, at 6 (1934).
159. In United States v. Carpenter, the Second Circuit explained that "the application of the misappropriation theory herein promotes the purposes and policies underlying Section 10(b) and Rule 10b-5." United States v. Carpenter, 791 F.2d 1024, 1029 (2d Cir. 1986).
160. See Grundfest, supra note 8, at 41-43. Grundfest compares poorly drafted statutes, particularly section 10(b), to an inkblot in a Rorschach test, which is a series of inkblots used in psychiatric analysis, where the patient describes the images evoked by the inkblots and the analyst interprets the patients descriptions. The inkblots themselves have no intrinsic meaning. See id. "When a statute presents itself as an inkblot, it should be construed as narrowly as practicable lest it become a breeding ground for competing judicial imaginations." Id. at 42. Grundfest found the federal
The Court may find it necessary to interpret the securities laws flexibly because regulating the securities industry has become increasingly difficult as technological advances and communication systems have become more sophisticated.\textsuperscript{161} Unfortunately, Congress has not been able to keep up with new problems as they have evolved. Thus, by using a purposivist approach to interpret section 10(b), the Court can remedy any problems by advancing the underlying purpose of the securities laws, which is to promote ethical standards in the securities market and to protect investors from fraud.\textsuperscript{162}

Purposivism creates a problem, however. First, it permits courts to legislate on a case-by-case basis without the benefit of congressional hearings, or the accountability of elected legislative officials. This, of course, offends the traditional role of the courts, which is limited to interpreting the laws that the legislature enacts. Although courts certainly have considerable discretion in interpreting statutes, judicial activism without deference to Congress is not appropriate.

Second, there will be no limit to the scope of liability under section 10(b) if courts can look to merely the purpose of enacting the securities law, and in particular section 10(b), to be extremely ambiguous, thereby enabling judges who strongly oppose fraud in the securities markets to extend the language of section 10(b) without limit. See id. at 44. He found the great ambiguity to be evidenced by the number of times the Court has split 5-4 in cases interpreting federal securities law. See id. at 45, 48-55. Grundfest criticizes the intentionalist approach to interpreting section 10(b), given the instability of congressional intent over time. See id. at 57.

Intentionalists thus confront the uncomfortable problem that, if they look to the intent of the Congress that in 1934 enacted section 10(b) they find no guidance, but if they look to the intent of subsequent Congresses they can infer sharply conflicting guidance depending on where their intentionalist time machines stop along the way.

\textit{Id.} at 58.

161. See Bevis Longstreth, \textit{The SEC After Fifty Years: An Assessment of its Past and Future}, 83 \textit{COLUM. L. REV.} 1593, 1610 (1983) ("The growing internationalization of the securities markets will pose another challenge for the Commission in the coming years. As advances in communications technology make the situs of trading in securities less important, the Commission will face increasing difficulty in ensuring that its investor protections reach all transaction in world class securities effected by or for the benefit of U.S. citizens."); Lewis D. Solomon & Louise Corso, \textit{The Impact of Technology on the Trading of Securities: The Emerging Global Market and the Implications for Regulation}, 24 \textit{J. MARSHALL L. REV.} 299, 328 (1991) (book review) ("Advances in technology will continue to increase the globalization of the securities markets. . . .[a]nd [t]he globalization of securities creates new challenges for securities regulators around the world.").

162. See \textit{supra} text accompanying notes 17-18.
law. Given the broad purposes and goals of the 1934 Act,\textsuperscript{163} it is obvious that a purposivist approach may be overreaching.\textsuperscript{164} Further, interpreting the statute in such a way will have the effect of making liability for trading securities unpredictable.

While the issue of statutory interpretation is certainly unresolved, it is anomalous for the Court suddenly to shift gears after using textualism to interpret section 10(b) for over twenty years.\textsuperscript{165} The Court's sudden shift in its method of interpreting section 10(b) may be explained by the fact that fairness is a particularly important principle in securities trading, and as many tools as possible are needed to protect the markets. The purposivist argument\textsuperscript{166} is understandable when applied to the facts of \textit{O'Hagan} because, if a strict textual reading of section 10(b) would free someone as culpable as O'Hagan, then textualism must be improper. This argument is unconvincing, however, because it enables courts, instead of Congress, to make laws, which is a clear violation of the separation of powers.\textsuperscript{167}

The Supreme Court should refrain from policy-making, and interpret section 10(b) according to its plain language.\textsuperscript{168} By finding that liability under this statute may be predicated on the misappropriation theory, the Court contradicted its own precedent, and substituted its own policy judgments for the letter of the law.\textsuperscript{169}

\textsuperscript{163} See id.

\textsuperscript{164} For example, under a purposivist approach, Dirks would probably have been found guilty of violating section 10(b), despite the absence of a breach of duty, because a court would likely find that his conduct conflicted with the goal of promoting ethical standards in the market despite his effort to expose a fraud. See \textit{Dirks v. SEC}, 463 U.S. 646 (1983); \textit{supra} notes 39-43 and accompanying text.

\textsuperscript{165} See \textit{supra} Part II.B. In \textit{Ernst & Ernst v. Hochfelder}, the Court held that "[i]n addressing the question of whether negligent conduct is a basis for 10(b) liability, we turn first to the language of § 10(b), for 'the starting point in every case involving construction of a statute is the language itself.'" \textit{Ernst & Ernst v. Hochfelder}, 425 U.S. 185, 197 (1976) (quoting \textit{Blue Chip Stamps v. Manor Drug Stores}, 421 U.S. 723, 756 (1975)).

\textsuperscript{166} See \textit{supra} notes 103-110 and accompanying text.

\textsuperscript{167} See, e.g., \textit{New York Times Co. v. United States}, 403 U.S. 713, 742 (1971) ("It would ... be utterly inconsistent with the concept of separation of powers for this Court to use its power ... to prevent behavior that Congress has specifically declined to prohibit.") (Marshall, J., concurring).

\textsuperscript{168} See Joseph J. Humke, Comment, \textit{The Misappropriation Theory of Insider Trading: Outside the Lines of Section 10(b)}, 80 MARQ. L. REV. 819, 835 (1997) ("Simply stated, absent a well-articulated legislative record specifically addressing the provision and question at issue, which is simply not the case with respect to insider trading under section 10(b), textualism directs judicial interpretation of the securities laws.").

\textsuperscript{169} As proponents of the misappropriation theory suggest, Congress enacted section 10(b) in order to proscribe a broad range of fraudulent conduct in connection
B. The Misappropriation Theory is Inconsistent with Section 10(b)

The misappropriation theory, as adopted by the Supreme Court in *O'Hagan*, permits liability absent the requisite "fraud" and "in connection with" requirements of section 10(b). Despite the Court's policy arguments, the misappropriation theory, as a matter of law, does not satisfy the statutory requirements.

1. The Misappropriation Theory Permits Liability Absent Fraud

First, the misappropriation theory does not satisfy the fraud requirement of section 10(b) and Rule 10b-5. Many commentators and judges suggest that the misappropriation theory does not fit easily into a traditional fraud analysis because the breach is not between an insider and the shareholders of a corporation.\(^{170}\) While the Supreme Court in *O'Hagan* found that liability under this theory is limited when a fiduciary discloses the information,\(^{171}\) in many cases, "early disclosure of the misappropriated information would have only further harmed the person or entity to whom the duty was owed."\(^{172}\)

Although many courts have adopted the misappropriation theory,\(^{173}\) the Eighth Circuit is not alone in its unfavorable interpretati-
tion of it. The Supreme Court itself has ordered that the concept of fraud in the securities context not be expanded beyond what the words of the 1934 Act permit. It has also established that section 10(b) and Rule 10b-5 do not remedy every instance of undesirable conduct involving securities, and that "[t]he language of § 10(b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception."

2. Misappropriation Theory Permits Liability Absent the "In Connection With" Requirement

Generally, the courts that adopted the misappropriation theory were also very lenient with respect to the requirement that the fraud be committed "in connection with the purchase or sale of any security." The Supreme Court, in O'Hagan, explained that the fraud is complete only when the information has been used in a securities transaction. Because the fraud is not consummated when the fiduciary gains the confidential information, but rather, occurs when he uses it to purchase or sell securities without disclosure, the nexus is necessarily present.

This principle, however, is a radical departure from the Court’s recent strict interpretation of the language of section 10(b) and Rule 10b-5 where it held that the “in connection with” requirement was satisfied only when the fraud affects the financial marketplace.

174. See supra note 78 and accompanying text. The Fourth Circuit was the first jurisdiction to break ranks and find that the misappropriation theory is irreconcilable with Supreme Court precedent. See Bryan, 58 F.3d at 944. The court found it troublesome that the “fraud” requirement is met when a person misappropriates material, nonpublic information in breach of some special duty, even if the source of the information is neither a purchaser or seller of securities, nor in any way connected to the purchase or sale of securities. See id.


177. See supra notes 121-22 and accompanying text for a discussion of Santa Fe.

178. See, e.g., Clark, 915 F.2d at 449 ("[T]he question here is whether there is some nexus between [the defendant’s] misappropriation of . . . confidential information and any securities transaction."). For example, in United States v. Newman, even though the fraud was not against a purchaser or seller of securities, the court held that the “in connection with” requirement was met since Newman’s “sole purpose” in misappropriating the information was to purchase stock in the target companies. United States v. Newman, 664 F.2d 12, 18 (2d Cir. 1981); see supra notes 74-76 and accompanying text.

179. See O'Hagan, 117 S. Ct. at 2209.

180. See id.
and the victim is a defrauded purchaser or seller. As the dissent in O'Hagan pointed out, the misappropriation theory should not cover cases involving fraud on the source of information where the source has no connection with the other participant in a securities transaction.

3. Congress Should Intervene with a Statute

Few would argue that James O'Hagan's behavior was not reprehensible and should go unpunished. The misappropriation theory, however, may not be so easy to accept when the conduct amounts to no more than a breach of an employment contract, breach of the psychiatrist-patient confidence, failure to keep nonpublic business information within the family, or basic theft and burglary. The appeal for redress is understandable when information is misappropriated and used to trade on the securities markets. Although there may be a need for federal standards to protect investors against the mishandling of material, nonpublic information, the Supreme Court has instructed that such standards "should not be supplied by judicial extension of § 10(b) and Rule 10b-5 to 'cover the corporate universe.'"

Instead, Congress should intervene to finally resolve this issue by creating a statute which clearly and directly addresses liability for insider trading. Professor Jill Fisch offers a unique proposal that

181. See Fisch, supra note 12, at 195 (analyzing Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 755 (1975)).
182. See O'Hagan, 117 S. Ct. at 2223 (Thomas, J., dissenting). Justice Thomas noted that O'Hagan could have done a number of things with the information he acquired: "He could have sold it to a newspaper for publication, he could have given or sold the information to Pillsbury itself, or he could even have kept the information and used it solely for his personal amusement, perhaps in a fantasy stock trading game." Id. (internal citations omitted). The fact that he chose to purchase securities based on the information "is thus no more significant here than it is in the case of embezzling money used to purchase securities." Id.; see supra note 140 and accompanying text.
183. In addition to purchasing securities based on information he had access to through his employment at the law firm, O'Hagan allegedly used the profits gained through this unlawful trading to conceal his previous embezzlement and conversion of unrelated client trust funds. See O'Hagan, 117 S. Ct. at 2205.
187. See SEC v. Cherif, 933 F.2d 403, 411 (7th Cir. 1991).
188. Santa Fe Indus. v. Green, 430 U.S. 462, 480 (1977) (internal citation omitted).
would replace the concept of regulation based on the trader's fiduciary duties with a system of regulation based on insider status. Specifically, Fisch's proposed statute defines two groups with insider status: "primary insiders" and "secondary insiders," and restricts these insiders from trading on information obtained by virtue of their status.

By regulating the unlawful trading in the securities market through explicit legislative action, Congress could respect the doctrine of the separation of powers. In addition, a congressional statute, such as the one proposed by Professor Fisch, can better resolve the problems of unlawful trading because it equips the courts with a clear standard that can easily be applied whenever there in an allegation of unlawful trading.

The misappropriation theory, adopted by O'Hagan, shifts the focus of section 10(b) from protecting investors in the securities market to protecting the sources of confidential information. Even the scant evidence of legislative history makes clear that this was not the purpose of the statute. Therefore, the misappropriation theory not only goes beyond the text of the statute, but it also reaches beyond the underlying purpose of the statute.

Moreover, the misappropriation theory makes potential liability less predictable under section 10(b), and the O'Hagan decision does nothing to alleviate the problem. When addressed with this problem in the past, the Supreme Court has emphasized that the

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190. Primary insiders include those who have "(1) the ability to affect the content and timing of corporate disclosure; (2) regular access to information on significant corporate events; and (3) the ability to affect the decisionmaking process about such events." Id. at 240-41. "Secondary insiders are those who by virtue of an employment or other contractual relationship receive nonpublic information relating to the issuer or its securities for the purpose of advising or rendering services to the corporation or its management." Id. at 241. Under her proposed statute, primary insiders who, due to their status as an insider, possess material, nonpublic information relative to any security, are prohibited from taking advantage of that information by tipping or trading. See id. at 242. Secondary insiders are prohibited from taking advantage of material, nonpublic information relative to any security, obtained by their relationship with the corporation. See id. Further, "tippee trading would be regulated indirectly by requiring tippers to be responsible for the economic consequences of tippee trading." Id. at 247-48.
191. See Bryan, 58 F.3d at 951 ("It would be difficult to overstate the uncertainty that has been introduced into the already uncertain law governing fraudulent securities transactions through adoption of the misappropriation theory, with its linchpin the breach of a fiduciary duty."); see also Chestman, 947 F.2d at 567, ("Our Rule 10b-5 precedents under the misappropriation theory . . . provide little guidance with respect to the question of fiduciary breach, because they involved egregious fiduciary breaches arising solely in the context of employer/employee associations.").
securities market "'demands certainty and predictability,'"\textsuperscript{192} and that it is "essential . . . to have a guiding principle for those whose daily activities must be limited and instructed by the SEC's insider-trading rules."\textsuperscript{193} While it is not difficult to argue that James O'Hagan breached a fiduciary duty, in several cases where courts have imposed liability under the misappropriation theory, the breach has not been so clear.\textsuperscript{194} Unlike the misappropriation theory, a congressional statute would provide the certainty and predictability needed to regulate this area.

Finally, although Professor Fisch argues that insider trading should not be criminalized,\textsuperscript{195} civil penalties alone will not provide sufficient deterrence for those with access to valuable market information. If insiders are required merely to disgorge profits when they are caught illegally taking advantage of material, nonpublic information, it may be worth their risk to continue such unlawful activity. Rogue investors attempting to trade on misappropriated information will have an incentive to keep trying until they eventually are successful. Accordingly, there should be criminal penalties for this type of unlawful insider trading, consisting of harsh fines and imprisonment.

\textbf{Conclusion}

The Supreme Court should interpret section 10(b) based on its plain language in order to respect the role of Congress as lawmaker, and its own role as interpreter of the law. In \textit{O'Hagan}, the Court improperly extended liability under section 10(b) to reach a culpable defendant whose conduct was not covered by the language of the statute or the rule. The courts, however, simply are not competent to regulate in the complicated area of securities law.

\textsuperscript{193} Dirks v. SEC, 463 U.S. 646, 664 (1983).
\textsuperscript{194} For instance, the Second Circuit, in \textit{Chestman}, struggled to define a line to establish the necessary fiduciary relationship. See \textit{Chestman}, 947 F.2d at 567-71. \textit{O'Hagan} merely condoned the theory, without directing the courts as to the limits of its application. The \textit{Bryan} Court, which championed the fight against the misappropriation theory, stated that "although fifteen years have passed since the theory's inception, no court adopting the misappropriation theory has offered a principled basis for distinguishing which types of fiduciary or similar relationships of trust and confidence can give rise to Rule 10b-5 liability and which cannot." \textit{Bryan}, 58 F.3d at 951.
\textsuperscript{195} See Fisch, \textit{supra} note 12, at 237-38 (suggesting that because "insider trading cannot readily be equated with either stealing or lying . . . classifying such trading as criminal and penalizing it with stiff prison sentences should be reconsidered."). Instead, Fisch suggests insider trading be enforced by civil disgorgement. See \textit{id.} at 251.
Instead, Congress alone is responsible for making laws that will punish people like James O'Hagan. Thus, Congress should draft a statute that will protect market participants, rather than the sources of market information, thereby serving the underlying purpose of section 10(b).
QUESTIONING THE ADMISSIBILITY OF NONSCIENTIFIC TESTIMONY AFTER DAUBERT: THE NEED FOR INCREASED JUDICIAL GATEKEEPING TO ENSURE THE RELIABILITY OF ALL EXPERT TESTIMONY

Kristina L. Needham*

Introduction

How can the jury judge between two statements each founded upon an experience confessedly foreign in kind to their own? It is just because they are incompetent for such a task that the expert is necessary at all.¹

The use of experts in both criminal and civil trials is widespread,² and has grown considerably in recent years.³ Because experts have specialized knowledge and experience, judges and juries rely upon them to clarify and illuminate complex issues that arise in trials.⁴ Indeed, a jury's ability to come to a reasoned judgment often hinges on the testimony of an expert who, in passing on general truths gathered from specialized experience, enables the jury to fully comprehend the facts of a case.⁵ Problems arise, however, when juries must construe contradictory testimony from two people who testify before them as "experts" on the same subject mat-

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5. See Hand, supra note 1, at 54.
At the crux of this issue is the importance of reliable expert testimony.

The increased reliance on expert testimony in trials has led to a controversy among judges and litigators regarding the admissibility of specialized, but nonscientific, expert testimony, and the appropriate standard for ensuring reliability. In 1993, the United States Supreme Court clarified the admissibility of scientific evidence in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, and resolved a split among the federal circuits by creating guidelines for applying the Federal Rules of Evidence to scientific expert testimony.

Scientific testimony, however, is only one type of expert testimony proffered, and by addressing only this type of testimony, the Supreme Court left open significant questions regarding the admissibility of testimony that is not "scientific." While the recent

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6. See United States v. Amarel, 488 F.2d 1148, 1152 (9th Cir. 1973) (stating that juries are easily swayed by expert testimony as a result of "its aura of special reliability and trustworthiness"); see also Polentz, *supra* note 2, at 1203 (stating that expert testimony can be a powerful tool that has the potential to sway a decision one way or another).

7. See Perrin, *supra* note 2, at 1391.

8. Rule 702 of the Federal Rules of Evidence addresses not only scientific testimony but also that which is based on "technical or other specialized knowledge." The rule provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *Fed. R. Evid.* 702. Nonscientific testimony based upon "specialized" or "technical" knowledge comes from skilled witnesses who are trained in a particular area or who have acquired specialized knowledge through experience. See *infra* notes 32-45 and accompanying text (providing examples of skilled witnesses).


11. The circuits were split over whether Rule 702 superseded the common law "general acceptance" standard of admissibility of scientific expert testimony articulated in *Frye*. Compare United States v. Williams, 583 F.2d 1194 (1978) (stating that Rule 702 superseded *Frye*) with Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 1110-12 (5th Cir. 1991) (stating that Rule 702 and *Frye* coexist). See *infra* note 48 and accompanying text (discussing the circuit split). *Daubert* ultimately resolved this split by developing a multi-factor test to ensure the reliability of scientific testimony. See *infra* Part I.C.

12. See *Daubert*, 509 U.S. at 589 (holding that *Frye* was no longer the applicable standard and that Rule 702 superseded *Frye*).

13. See *Fed. R. Evid.* 702 (listing specialized and technical knowledge in addition to scientific knowledge as potential bases for admissible testimony).

fear of "junk science"\(^{15}\) in the courtroom is primarily associated with scientific testimony, substantial risks are created by limiting the focus of reliable testimony in trials to scientific inquiries.\(^{16}\) Evidentiary problems are exacerbated when courts are faced with the elusive concept of nonscientific expert testimony.\(^{17}\)

This Note examines the impact of the \textit{Daubert} decision on nonscientific testimony and proposes a standard for determining the admissibility of such evidence. Part I describes the various legal standards applied to determine the admissibility of scientific testimony, including the common law test,\(^{18}\) Federal Rule of Evidence 702\(^{19}\) ("Rule 702"), and the \textit{Daubert} factors.\(^{20}\) Part II illustrates the split in the federal circuits regarding the application of \textit{Daubert} to nonscientific testimony and shows how courts, in recent years, have grappled to ensure the reliability of such testimony. Part III advocates the need to scrutinize the reliability of nonscientific testimony and analyzes proposals for applying \textit{Daubert} to nonscientific testimony, extending \textit{Daubert}'s reliability requirement, and amending Rule 702. This Note concludes by proposing an amendment to Rule 702 that provides courts with the necessary framework to incorporate a reliability requirement into the decision whether to admit nonscientific expert testimony.


\(^{16}\) See Edward J. Imwinkelried, \textit{The Next Step After Daubert: Developing A Similarly Epistemological Approach To Ensuring The Reliability Of Nonscientific Expert Testimony}, 15 CARDozo L. REV. 2271, 2273 (1994) (stating that there are doubts about the reliability of nonscientific expert testimony which may prove to be less soluble and more troublesome than the doubts about "junk science"); Laser, supra note 14, at 1379; see also \textit{Daubert}, 509 U.S. at 600 (Rehnquist, C.J., concurring in part and dissenting in part) (expressing concern about how courts would apply \textit{Daubert} when faced with expert testimony based on nonscientific knowledge).

\(^{17}\) See Berry v. City of Detroit, 25 F.3d 1342, 1348 (6th Cir. 1993).

\(^{18}\) See Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

\(^{19}\) FED R. EVID. 702; see infra notes 26-34 and accompanying text.

\(^{20}\) \textit{Daubert}, 509 U.S. at 600.
I. Background

A. The Frye Common Law Approach

_Frye v. United States_21 established the common law standard for determining the admissibility of scientific expert testimony.22 _Frye_ set forth a framework for trial judges, which became known as the "general acceptance" test,23 whereby scientific testimony was not admissible unless the methodology used by the expert was accepted in the general community of scientists.24 _Frye_ provided a two-step analysis for evaluating scientific testimony in which trial judges: (i) identified the scientific field of the testimony; and, (ii) determined whether the principle was generally accepted by scientists in the same field.25

Under _Frye_, judges did not examine the reliability of such testimony, but rather they looked to the general community of scientists to see if there was substantial agreement that the methodology the expert employed was sound.26 Thus, a judge was required to understand only enough about a scientific principle to gauge whether it was generally accepted within the relevant community.27 The _Frye_ test was overly conservative, however, because expert testimony based upon a newly developed methodology was rendered

21. 293 F. 1013 (D.C. Cir. 1923).

22. See _Daubert_, 509 U.S. at 585 ("In the 70 years since its formulation in the _Frye_ case, the 'general acceptance' test has been the dominant standard for determining the admissibility of novel scientific evidence."). _Frye_ involved a murder trial in which the defendant sought to admit the result of a systolic blood pressure deception test as exculpatory evidence. See _Frye_, 293 F. at 1013. The defense's theory was that "conscious deception or falsehood, concealment of facts, or guilt of crime, accompanied by fear of detection when the person is under examination, raises the systolic blood pressure." _Id_. The scientist who conducted the test was not allowed to testify nor was he allowed to administer the test to _Frye_ in front of the jury. See _id_.

23. _Id_. at 1014; see also _Daubert_, 509 U.S. at 585-86 (discussing the _Frye_ test).

24. See _Frye_, 293 F. at 1013. Before _Frye_, the general rule with regard to expert testimony was that testimony offered by a qualified witness and which was relevant to an issue was admissible and courts left the consideration of the weight of the testimony to the jury. See, e.g., _Carbonero Reading Co. v. Munson_, 122 F. 753, 755 (1st Cir. 1903); _Golden Reward Min. Co. v. Buxton Min. Co._, 97 F. 413, 416 (8th Cir. 1899); _St. Louis, I.M. & S. Ry. v. Edwards_, 78 F. 745, 746 (8th Cir. 1897); _Edward P. Allis Co. v. Columbia Mill Co._, 65 F. 52, 57 (8th Cir. 1894).


26. See _Frye_, 293 F. at 1014.

27. See _Kesan, supra_ note 3, at 1991 (asserting that the _Frye_ test survived for over half a century because it was "intrinsically well-suited" to the judiciary).
inadmissible if it was not yet generally accepted. Frye also was criticized because it did not clearly define "general acceptance," causing courts to experience difficulty in ascertaining scientific validity.

B. Federal Rule of Evidence 702 and Alternative Tests

The application of Frye came into question after the enactment of Federal Rule of Evidence 702 in 1975, which allows judges to admit the testimony of a qualified expert if the testimony helps the jury understand the evidence. Rule 702 applies to expert testimony requiring technical knowledge, specialized knowledge, and scientific knowledge. Technical knowledge is knowledge of anything "pertaining to or connected with the mechanical or industrial arts and the applied sciences." Specialized knowledge refers to any knowledge focused on a particular area of study, profession, or experience. Examples of the myriad of experts who base testimony on technical and specialized knowledge include police officers, accountants, bankers, lawyers, economists, etc.

28. See Frye, 293 F. at 1014; Kesan, supra note 3, at 2017-18. Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. . . .

29. See United States v. Downing, 753 F.2d 1224, 1233 (3d Cir. 1985) (maintaining that Frye was inconsistent with Rule 702). Frye did not explain how courts were to determine "general acceptance." See Kesan, supra note 3, at 1991.

30. Fed. R. Evid. 702; see Daubert 509 U.S. at 587 n.5. (citing the circuit split over whether Rule 702 superseded Frye); see also supra note 8 and accompanying text (discussing Rule 702).

31. Fed. R. Evid. 702. According to Rule 702, an expert witness is qualified as an expert by "knowledge, skill, experience, training, or education." And, as such, the expert may give testimony containing "scientific, technical, or other specialized knowledge" which would be helpful to the trier of fact. Id.

32. See id.


34. See id.

35. See Berry v. City of Detroit, 25 F.3d 1342 (6th Cir. 1994).

36. See Frymire-Brinati v. KPMG Peat Marwick, 2 F.3d 183 (7th Cir. 1993).
farmers, mechanics, engineers, social psychologists, experts in drug trafficking, and real estate appraisers.

Scientific knowledge differs from technical and specialized knowledge because it is based on the concept of "Newtonian Science," which refers to the process of formulating a hypothesis, and then engaging in experimentation or observation to verify or falsify that hypothesis. Rule 702's inclusion of scientific knowledge caused a split among the federal circuits regarding the appropriate standard to be applied for determining the admissibility of scientific testimony. Partly because the rule and its legislative history did not mention the "general acceptance test," after 1975, some courts concluded that Rule 702 superseded Frye. Other courts, however, maintained that "general acceptance" was still a requirement for the admissibility of scientific testimony.

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37. See Den Norske Bank AS v. First Nat'l Bank of Boston, 75 F.3d 49 (1st Cir. 1996).
38. See United States v. Sinclair, 74 F.3d 753 (7th Cir. 1996).
39. See Marcel v. Placid Oil Co., 11 F.3d 563 (5th Cir. 1994).
42. See Roback v. V.I.P. Transp. Inc., 90 F.3d 1207 (7th Cir. 1996).
44. See United States v. Cordoba, 104 F.3d 225 (9th Cir. 1997).
46. See Imwinkelried, supra note 16, at 2276.
47. See Daubert v. Merrell Dow Pharm., 509 U.S. 579, 589 (1993). Justice Blackmun referred to Newtonian Science in phrasing the admissibility standard in Daubert, stating that a proposition supported by appropriate scientific methodology is considered scientific knowledge. See id. How conclusions were reached rather than what the conclusions stated was the relevant inquiry. "The focus, of course, must solely be on principles and methodology, not on the conclusions that they generate." Id. at 595; see also Alburey Castell, An Introduction to Modern Philosophy 170, 197 (2d ed. 1963).
49. See Fed. R. Evid. 702; Gianelli, supra note 25, at 1999 (noting the omission of Frye from advisory committee notes, congressional committee reports and Federal Rules Hearings).
50. See, e.g., United States v. Downing, 753 F.2d 1224, 1234 (3d Cir. 1985) (finding that the Frye test was inconsistent with Rule 702's broad scope of relevance); United States v. Williams, 583 F.2d 1194 (2d Cir. 1978) (stating that the Federal Rules of Evidence superseded Frye).
Several courts, in rejecting *Frye*, developed alternative admissibility standards such as the "substantial acceptance" test. This test diverged from *Frye* because it allowed testimony based upon a scientific principle or technique to be admitted if it was accepted by a substantial minority of experts in that area.

Courts and commentators also developed multi-factor reliability tests. Such tests required the court to consider the following factors: the potential rate of error; the existence of standards; how clearly the technique and its results could be explained; any analogous relationship with other scientific techniques usually admitted into evidence; falsifiable characteristics; the experts' qualifications; general acceptance in the scientific community; the novelty of the technique or principle; and the extent to which the technique or principle relied on the subjective interpretation of the expert. These tests suggested that trial judges play a more significant role in evaluating the reliability of the testimony offered in their courtrooms. Moreover, in providing a "gatekeeping" role for judges, these tests were precursors to the Supreme Court's multi-factor reliability standard presented in *Daubert*.

53. United States v. Williams, 443 F. Supp. 269, 273 (S.D.N.Y 1977), aff'd, 583 F. 2d 1194 (2d Cir. 1978). The substantial acceptance test required that the scientific principle advanced be accepted by a "substantial section of the scientific community." *Id.* at 273.
54. See id. This approach, while adhering to the notion that acceptance within the community is the key indicator of reliability, was more liberal than the "general acceptance" test because it allowed more testimony to be heard in court. See Kesan, *supra* note 3, at 1992.
56. See McCormick, *supra* note 55 at 911; see also United States v. Williams, 583 F.2d 1194, 1198-99 (2d Cir. 1978).
59. See *id*.
61. See *id*.
62. See *id*.
63. See *id*.
65. See Kesan, *supra* note 3, at 1996.
C. The Daubert Decision

In order to resolve a split in the federal circuits, the Supreme Court granted certiorari, in Daubert, to decide the issue of the admissibility of expert testimony after Rule 702. In Daubert, the Court explicitly rejected Frye and adopted a more liberal standard for determining the admissibility of scientific testimony. The Daubert Court held that Rule 702 superseded the Frye “general acceptance” test, and found the Frye test “rigid and not comporting with the ‘liberal thrust’ and ‘permissive backdrop’ of the Federal Rules.”

The Court set forth new criteria by which a court should evaluate the admissibility of scientific testimony. The nonexclusive, nondispositive Daubert factors are: (i) the existence of a falsifiable methodology; (ii) whether the theory or technique has been subject to

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68. See Daubert, 509 U.S. at 585. Daubert involved a suit by two children, Jason Daubert and Eric Schuller and their parents against Merrell Dow Pharmaceuticals, alleging that Bendectin, a drug marketed by Merrell Dow to combat morning sickness had caused their birth defects when ingested by their mothers during pregnancy. See id. at 579. The trial court ruled that the plaintiff’s expert testimony was inadmissible to establish causation because it failed to satisfy the “general acceptance” test from Frye. Daubert v. Merrell Dow Pharm., 727 F. Supp. 570, 572 (S.D. Cal. 1989). The plaintiffs based causation on animal studies, the similarity in chemical structure between Bendectin and drugs which induce abnormal embryologic development, and statistical reanalysis of previously published studies. See id. On appeal, the Ninth Circuit affirmed. Daubert v. Merrell Dow Pharm., 951 F.2d 1128 (1991). The Ninth Circuit noted that other courts considering the risks of Bendectin were reluctant to admit a reanalysis of epidemiological studies that had not been published or subject to peer review stating that the unpublished testimony proffered by the plaintiffs was “particularly problematic in light of the massive weight of the original published studies supporting the defendant’s position, all of which has undergone full scrutiny from the scientific community.” Id. at 1130.

69. Id. at 593-94. The Court stated:

Nothing in the text of this Rule establishes “general acceptance” as an absolute prerequisite to admissibility. Nor does respondent present any clear indication that Rule 702 of the Rules as a whole were intended to incorporate a “general acceptance” standard. The drafting history make no mention of Frye, and a rigid “general acceptance” requirement would be at odds with the “liberal thrust” of the Federal Rules and their “general approach of relaxing the traditional barriers to ‘opinion testimony.’”

Id. at 588.

70. The requirement of a falsifiable methodology compels judges to look for objective standards in the expert’s testimony so that it might be tested and proven. See id. at 579.
peer review and publication;\textsuperscript{71} (iii) the known or potential rate of error analysis and the existence and maintenance of controls of the technique's operation;\textsuperscript{72} and (iv) the degree to which the theory has been generally accepted\textsuperscript{73} in the scientific community.\textsuperscript{74} Thus, while "general acceptance" was still a factor in the test for admissibility, it no longer was the only way scientific evidence could get into the courtroom.\textsuperscript{75} Moreover, \textit{Daubert} imposed a reliability requirement in the form of a gatekeeping function for trial judges. Pursuant to \textit{Daubert}, courts were to assess the scientific validity of scientific expert testimony by screening for unreliable evidence rather than simply relying on "general acceptance" within the relevant community.\textsuperscript{76} The \textit{Daubert} Court expressly stated that it was only addressing the reliability of scientific expert testimony and left open the question of nonscientific testimony.\textsuperscript{77}

\textsuperscript{71} Peer review refers to the common practice of publishing scientific revelations and subjecting conclusions to review and criticism from the scientific community. \textit{See id.}

\textsuperscript{72} This requirement ensures that the expert's methodology is employed the same way every time and that the expert's conclusions are not based on a methodology that has a high rate of error. \textit{See id.}

\textsuperscript{73} This is the same "general acceptance" advanced in \textit{Frye}. \textit{See id.; Frye, 293 F. 1013, 1013; see also supra, notes 21-29 and accompanying text (discussing Frye's "general acceptance" test). However, the \textit{Daubert} court merely listed "general acceptance" as one of the factors to be considered rather than the entire basis. \textit{See Daubert, 509 U.S. at 593. In addition, the \textit{Daubert} court stated that courts should focus on the expert's principles and methodology rather than the conclusions they generate. \textit{See id. at 595. But see General Electric Co. v. Joiner, 118 S. Ct. 512, 518 (1997) (stating that the trial judge might need to examine an expert's conclusions to determine whether the data supports the conclusions which the testimony is based on). In \textit{Joiner}, the Supreme Court addressed a split in the circuits regarding the standard of review of the admission of scientific expert testimony. The Eleventh Circuit had applied a "particularly stringent" standard of review in reversing the district court's exclusion of expert testimony, maintaining that its gatekeeping role was limited. Joiner v. General Electric Co., 78 F.3d 523, 529-30 (11th Cir. 1996). The Eleventh Circuit suggested that \textit{Daubert} altered the standard of appellate review when it held that Rule 702 superseded the "austere" \textit{Frye} test. General Electric v. Joiner, 118 S. Ct. 512, 517 (1997). Holding that the "abuse of discretion" standard applied to the District Court's decision to exclude the scientific evidence, the Supreme Court reversed. In doing so, the Court reiterated the significance of the judge's role as gatekeeper noting that although \textit{Daubert} did not address the standard of appellate review, it did state "the fact that Rule 702 displaced the \textit{Frye} test does not mean that the Rules do not place limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence." \textit{Id. at 516 (citing Daubert v. Merrell Dow Pharm. 509 U.S. 579, 589 (1993))}.

\textsuperscript{74} \textit{See id. at 593-94.}

\textsuperscript{75} \textit{See id. at 593.}

\textsuperscript{76} \textit{See id.}

\textsuperscript{77} The Court stated that \textit{Daubert} "is limited to the scientific context because that is the nature of the expertise offered here." \textit{Id. at 590 n.9. Thus, the Court did not}
In his dissent, Chief Justice Rehnquist expressed concerns about the Daubert majority's interpretation of Rule 702 and its application to other types of testimony. He questioned whether Daubert would apply to "technical or other specialized knowledge," and if there was a distinction between this type of testimony and the scientific testimony addressed in the case. Indeed, the Chief Justice's statement was a harbinger of the future uncertainty that Daubert created.

II. The Divided Circuits

The federal circuits are now split on whether Daubert should apply to nonscientific expert testimony. The various standards applied for admissibility of nonscientific testimony range from a literal application of Daubert to a restrictive approach eliminating any use of Daubert in the area of nonscientific testimony.

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78. See Daubert, 509 U.S. at 600 (Rehnquist, C.J., concurring in part and dissenting in part).

Does all of this dicta apply to an expert seeking to testify on the basis of technical or other specialized knowledge — the other types of expert knowledge to which Rule 702 applies — or are the general observations limited only to scientific knowledge? What is the difference between scientific knowledge and technical knowledge?

79. Id. Rehnquist also stated that the majority opinion failed to distinguish "scientific" from "technical" knowledge. See id.

80. Compare Compton v. Subaru of Am., Inc., 82 F.3d 1513 (10th Cir.), cert. denied, 117 S. Ct 611 (1996) (finding that Daubert does not apply to nonscientific testimony because it is based upon experience or training rather than methodology or technique) and Den Norske Bank AS v. First Nat'l Bank of Boston, 75 F.3d 49 (1st Cir. 1996) (relying on Daubert's reliability requirement and judicial "gatekeeping" function to assess the validity of nonscientific testimony) with Berry v. City of Detroit, 25 F.3d 1342 (6th Cir. 1994) (applying Daubert's four factors directly to nonscientific testimony). See Laser, supra note 14, at 1388 (noting that courts are clearly in conflict on this issue and discussing the various approaches to evaluating the scope of Daubert and its application to nonscientific testimony).

81. See Berry, 25 F.3d at 1349. This suggests applying the four Daubert factors, falsifiable methodology; peer review and publication; rate of error and controls; and general acceptance, to nonscientific testimony. See infra Part III.A.2. (noting that the nature of nonscientific testimony may preclude the application of the four Daubert factors).

82. See, e.g., Compton v. Subaru of Am., Inc., 82 F.3d 1513 (10th Cir. 1996), cert. denied, 117 S. Ct. 611 (1996); United States v. Arevalo-Gamboa, 69 F.3d 545 (9th Cir. 1995); Thomas v. Newton Int'l Enters., 42 F.3d 1266 (9th Cir. 1994); Iacobelli Constr., Inc. v. County of Monroe, 32 F.3d 19 (2d Cir. 1994); United States v. Amuso, 21 F.3d 1251 (2d Cir. 1994); United States v. Muldrow, 19 F.3d 1332 (10th Cir. 1994).
A. Refusing to Extend the Application of *Daubert* To Nonscientific Testimony

Several circuits hold that the application of *Daubert* is limited to scientific testimony. In narrowing the scope of *Daubert*, these courts have declared that the special concerns associated with scientific testimony do not arise with expert testimony that is based on technical or specialized knowledge or skill.

In *Compton v. Subaru*, the Tenth Circuit emphasized that *Daubert* “had little bearing” on nonscientific testimony based on an expert’s experience and training, and that applying *Daubert* was inappropriate when the testimony was based on general principles gathered from years of experience. In precluding the use of *Daubert*, the Tenth Circuit reasoned that the *Daubert* factors apply only when an expert relies upon a particular principle or methodology, and held that the four factors do not apply when the expert is merely relying on experience or training.

Similarly, the Ninth Circuit limits the application of *Daubert* to the evaluation of scientific testimony. It maintains that *Daubert*

83. See, e.g., *Compton v. Subaru of Am.*, 82 F.3d 1513 (10th Cir. 1996), cert. denied, 117 S. Ct. 611 (1996); United States v. Arevalo-Gamboa, 69 F.3d 545 (9th Cir. 1995); Thomas v. Newton Int’l Enters., 42 F.3d 1266 (9th Cir. 1994); Iacobelli Constr., Inc. v. County of Monroe, 32 F.3d 19 (2d Cir. 1994); United States v. Locascio, 6 F.3d 924 (2d Cir. 1993).

84. See *McKendall v. Crown Control Corp.*, 122 F.3d 803, 807 (9th Cir. 1997); United States v. Cordoba, 104 F.3d 225, 228 (9th Cir. 1997); *Compton*, 82 F.3d at 1519; *Thomas*, 42 F.3d at 1270; *Iacobelli*, 32 F.3d at 25.

85. 82 F. 3d 1513 (10th Cir. 1996), cert. denied, 117 S. Ct. 611 (1996).

86. See *Compton*, 82 F.3d at 1519. *Compton* involved a products liability action against Subaru in which the plaintiff’s engineering expert testified to the defective design of the roof support structures in the car because they permitted excessive roof crush. See *id.* at 1516. In *Compton*, the court maintained that it did not need to inquire into the reliability of the testimony because it was based on general engineering principles gathered from the expert’s twenty-two years of experience as an automotive engineer rather than any particular methodology. See *id.* at 1519. The court limited the inquiry to a strict Rule 702 analysis as to the issues of relevancy, qualifications and helpfulness to the jury. See *id.* at 1520.

87. See *id.* at 1519.

88. See *id.* The court found that although the trial judge erred in relying on *Daubert*, the expert testimony was admissible nonetheless in that it satisfied the requirements of Rule 702. See *id.*

89. See *McKendall v. Crown Control Corp.*, 122 F.3d 803 (9th Cir. 1997). In reaching its conclusion that *Daubert* should not be applied, the *McKendall* court closely associated itself with the decision in *Compton*, saying it found the decision “instructive.” *Id.* at 806. The court rejected a lower court’s striking of a design expert in a product liability case, holding that *Daubert* should never have been applied because the testimony proffered was not sufficiently scientific in nature. See *id.* at 807. The court maintained that the expert’s experience, training and knowledge of forklifts made his testimony admissible under Rule 702 and that was the appropriate standard
does not apply to nonscientific evidence, such as modus operandi testimony, because it is based on specialized, rather than scientific, knowledge.

The Second Circuit also has refused to apply Daubert to nonscientific testimony, finding that reliance on Daubert is "misplaced" when the expert testimony does not "present the kind of junk science problem that Daubert meant to address." The Second Circuit is reluctant to apply Daubert to nonscientific testimony, such as descriptions of the operations of organized crime families and payroll review by an accountant, because applying Daubert to these types of testimony would be inconsistent with Rule 702's inclusion of testimony based upon "knowledge, skill, experience, training or education." The Second Circuit maintains that because Rule 702 pertains to technical and specialized knowledge, testimony based upon such knowledge is sufficiently addressed by the requirements of the rule.

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See id. In a footnote, the court hinted that the reliability requirement of Daubert may be extended to apply to all expert testimony. See id. at 806 n.1. The court stated, "[i]f one views Daubert in a broader context, the Daubert Court is giving strong advice to district courts: in ruling on the admissibility, trial judges are the gatekeepers and should pay particular attention to the reliability of the expert and his or her testimony," and "in that sense, Daubert applies to all expert testimony." Id. But see Thomas v. Newton Int'l Enters., 42 F.3d 1266, 1270 n.3 (9th Cir. 1994) (explaining that Daubert was clearly confined to the evaluation of scientific expert testimony because the special concerns associated with scientific testimony were not at issue when evaluating testimony based on specialized knowledge and skill).

90. Modus operandi is a term used by police and prosecutors to describe the particular method of a criminal's activity. It refers to a distinct pattern of behavior so that separate crimes or conduct are recognized as the work of the same person. See Black's Law Dictionary 1004 (6th ed. 1990).

91. See United States v. Cordoba, 104 F.3d 225 (9th Cir. 1997). In Cordoba, an expert was to testify that sophisticated drug traffickers do not entrust 300 kilograms of cocaine to someone unaware of what they are carrying. The court admitted the testimony under Rule 702, rejecting the defendant's argument that it should be excluded under Daubert, stating "Daubert applies only to the admission of scientific testimony." Id. at 230.

92. Iacobelli Constr., Inc. v. County of Monroe, 32 F.3d 19, 25 (2d Cir. 1994) (finding that Daubert could not be applied to the testimony of an underground construction consultant). But see F.D.I.C. v. Suni Assoc., 80 F.3d 681 (2d Cir. 1996) (finding a methodology whereby an expert used direct sales comparison and income capitalization valuations).

93. See United States v. Locasio, 6 F.3d 924, 936 (2d Cir. 1993).


95. See id.; Locascio, 6 F.3d at 936.

96. See Locascio, 6 F.3d at 936; see also infra, note 118-120 and accompanying text (noting the inconsistent logic with the Second Circuit's position because Rule 702 addresses scientific testimony, yet Daubert is applied as an extra precaution to verify the reliability of the testimony).
B. Applying Daubert's Reliability Requirement To Nonscientific Testimony

The First, Third, and Fifth Circuits have imposed Daubert's "gatekeeping" function on trial judges reviewing nonscientific expert testimony, requiring them to carefully screen both the competency of the expert and the reliability of the testimony in question. In assessing the reliability of nonscientific expert testimony, these courts usually determine whether the testimony in question is based on a particular methodology. If the method can be explained, and is found to be reliable by the judge, the testimony is admitted.

In Watkins v. Telsmith, the Fifth Circuit recently maintained that the Daubert factors are relevant in evaluating other types of expert testimony for which a particular methodology cannot be identified. The Watkins court stated that the decision of the

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97. See Den Norske Bank AS v. First Nat'l Bank of Boston, 75 F. 3d 49, 57-58 (1st Cir. 1996) (applying Daubert in evaluating the reliability of testimony from a banker who throughout his forty year career had become familiar with the types of agreements in question and noting the trial court's gatekeeping function in determining the competency of the expert and the reliability of the testimony); Habecker v. Clark Equipment Co., 36 F.3d 278, 290 (3d Cir. 1994) (excluding the testimony of an accident simulation expert following Daubert's requirement of a preliminary assessment of the validity of the expert's methodology, while not inquiring into the peer review, general acceptance, testability or error rate requirements of Daubert); see also United States v. Kayne, 90 F.3d 7 (1st Cir. 1996) (finding an expert's testimony on the valuation of rare coins reliable because the methods used were clearly explained); United States v. 14.38 Acres of Land, 80 F.3d 1074 (5th Cir. 1996); Pedraza v. Jones, 71 F.3d 194 (5th Cir. 1995); United States v. Velasquez, 64 F.3d 844 (3d Cir. 1995) (finding Daubert's reliability requirement helpful in the admission of handwriting testimony because the methodology underlying handwriting analysis could be examined); Marcel v. Placid Oil Co., 11 F.3d 563 (5th Cir. 1994).

98. See Velasquez, 64 F.3d at 845 n.2 (finding that a handwriting expert based her conclusions on a clear methodology).

99. See id.; United States v. 14.38 Acres of Land, 80 F.3d 1074 (5th Cir. 1996) (admitting the testimony of a civil engineer because the court believed the testimony to be reliable as it was based upon a thorough inspection of the property in question as well as maps and photographs); Marcel v. Placid Oil Co., 11 F.3d 563 (5th Cir. 1994) (excluding the testimony of an economist because the expert did not base his conclusions on sufficient data, thereby rendering the testimony unreliable).

100. See Watkins v. Telsmith, Inc., 121 F.3d 984 (5th Cir. 1997).

101. The Watkins court stated that the view asserted by the Tenth Circuit, in Compton, that Daubert is completely inapplicable to nonscientific testimony is untenable. See id. at 991. The court stated that this assertion leads to the proposition that, experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique. The moral of this approach would be, the less factual support for an expert's opinion, the better.
Tenth Circuit, in Compton,102 was untenable because it allows experts who rely on general principles and practical experience to escape screening simply because their conclusions were not reached by any particular methodology, and thus not scientific enough to warrant a Daubert inquiry.103 The Watkins court demanded judicial gatekeeping for all types of expert testimony, regardless of whether the expert’s conclusions rest on a methodology or technique.104

C. Applying Daubert Inconsistently

The Sixth,105 Seventh,106 and Eighth107 Circuits have applied Daubert inconsistently. Although the Sixth Circuit is the only court to apply the Daubert test literally to nonscientific testi-

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Id. Loretta Watkins brought this suit after her husband was killed when a wire rope supporting a conveyor belt snapped and the conveyor fell on him. She sought to admit the testimony of Marcus Dean Williams who had received a degree in civil engineering, was a B-17 pilot in World War II and worked in an engineering and tool design facility for Boeing. In addition, Williams taught drafting, surveying, structural design and engineering at a junior college. See id. at 984-87. However, despite these credentials, the court maintained that William’s testimony “lacked the requisite indicia of reliability to derive from scientific, technical, or other specialized knowledge” because the methodology he used to determine the existence of alternative designs. See id. at 991. The flawed methodology included the lack of testing of any of the proposed alternatives rendering the testimony inadmissible. See id. at 990. Thus, while the court implemented the Daubert’s reliability standard to exclude the testimony, it also considered the other aspects of Daubert-like methodology and applied it to technical, rather than strictly scientific knowledge. See id.

102. See Compton v. Subaru of Am., 82 F.3d 1513, 1519 (10th Cir. 1996) (stating that Daubert is completely inapplicable to nonscientific testimony because it is not based on a methodology or technique); supra notes 85-88 and accompanying text.

103. See Watkins, 121 F.3d at 991 (“[I]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique.”).

104. See id.

105. Compare United States v. Kremser Jones, 107 F.3d 1147 (6th Cir. 1997) (admitting testimony using only a Rule 702 analysis without any Daubert inquiry) with Berry v. City of Detroit, 25 F.3d 1342 (6th Cir. 1994) (excluding testimony because it failed to meet the four Daubert factors).

106. Compare Deimer v. Cincinnati Sub-Zero Prods., Inc., 58 F.3d 341 (7th Cir. 1995) (excluding an expert witness’s testimony because it lacked reliability as required by Daubert) with United States v. Williams, 81 F. 3d 1434, 1441-42 (7th Cir. 1996) (admitting testimony pursuant to a Rule 702 analysis without making any Daubert inquiry as to the reliability of the testimony).

107. Compare United States v. Johnson, 28 F.3d 1487 (8th Cir. 1995) (admitting testimony because it satisfied Rule 702 rather than making a Daubert reliability inquiry) with Ventura v. Titan Sports, 65 F.3d 725 (8th Cir. 1995) (applying Daubert’s reliability requirement and finding the testimony to be reliable because it was based on a sound methodology).
mony,\textsuperscript{108} it also has limited the extension of the \textit{Daubert} factors when the proffered testimony was nonscientific.\textsuperscript{109} Similarly, the Seventh Circuit has stated that courts should always assess the reliability of an expert's methodology,\textsuperscript{110} while failing to make \textit{Daubert} inquiries in several cases.\textsuperscript{111} The Eighth Circuit also has inconsistently applied \textit{Daubert} to nonscientific testimony. In some instances, it has followed only the requirements of Rule 702,\textsuperscript{112} while inquiring into the reliability of the testimony in other cases.\textsuperscript{113} Within each circuit, whether \textit{Daubert} is applied to non-

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\textsuperscript{108} See \textit{Berry}, 25 F.3d at 1342. In \textit{Berry}, the expert testimony came from a retired sheriff who had a degree in sociology and four years work experience at the Department of Justice. \textit{See id.} at 1348. He was called to testify to whether a police department's failure to discipline officers was the proximate cause of a police officer shooting a victim. \textit{See id.} The court applied \textit{Daubert}, and found that the testimony failed because there was no indication that the expert's theory had been formally tested, published and subjected to peer review, or accepted by other experts in the field. \textit{See id.} at 1350-51. The \textit{Berry} court noted that the proper foundation for a technical expert is the demonstration of "first hand familiarity" with the subject and that the use of empirical examples is one way to establish familiarity. \textit{Id.}

\textsuperscript{109} See United States v. Kremser Jones, 107 F.3d 1147 (6th Cir. 1997). In \textit{Kremser Jones}, the court rejected a request to treat a handwriting expert's testimony as scientific testimony, citing the \textit{Daubert} Court's assertion that it was "quite convinced that handwriting examiners do not concentrate on proposing and refining theoretical explanations about the world, but instead use their knowledge and experience to answer the extremely practical question of whether a signature is genuine or forged." \textit{Id.} at 1157 (citing \textit{Daubert}, 509 U.S. at 590). The court also noted the lack of empirical evidence in handwriting analysis. \textit{Id.} \textit{But see} United States v. Velasquez, 64 F.3d 844, 845 (3d Cir. 1995) (concluding that \textit{Daubert} is helpful to assist the court in evaluating the reliability of the methodology underlying handwriting analysis). The \textit{Kremser Jones} court admitted the testimony using a Rule 702 analysis, reasoning that "\textit{Daubert} does not create a new framework" for technical or specialized testimony and that if \textit{Daubert} were extended outside the realm of scientific testimony, "many types of relevant and reliable expert testimony — that derived substantially from practical experience — would be excluded." \textit{Id.} at 1158.

\textsuperscript{110} See, e.g., Roback v. V.I.P. Transp. Inc., 90 F.3d 1207 (7th Cir. 1996) (finding an engineering expert's testimony reliable because it was based upon a technique which was subject to verification); \textit{Deimer}, 58 F.3d at 343-45 (finding that a product design expert was unreliable because he did not support his conclusions with a reliable methodology); Frymire-Brinati v. KPMG Peat Marwick, 2 F.3d 183, 186-87 (7th Cir. 1993) (stating the importance of analyzing the validity of the witness's reasoning as required by \textit{Daubert}).

\textsuperscript{111} See, e.g., United States v. Williams, 81 F.3d 1434, 1441-42 (7th Cir. 1996) (affirming the admission of testimony by a witness familiar with a street gang's code using a traditional Rule 702 evaluation without any reliability inquiry); United States v. Sinclair, 74 F.3d 753, 757-58 (7th Cir. 1996) (finding that \textit{Daubert's} reliability requirement had no relevance to the admissibility of a legal expert's testimony).

\textsuperscript{112} See \textit{Johnson}, 28 F.3d at 1496-97 (admitting testimony of a drug trafficking expert on the grounds that it was helpful to the jury rather than any inquiry into the reliability of the testimony).

\textsuperscript{113} See \textit{Ventura}, 65 F.3d at 733 (admitting testimony of an expert testifying to the market rate of royalties for licensing intellectual property on the grounds that the
scientific testimony often rests on whether the expert has relied upon a methodology or technique, thereby classifying the testimony as more or less scientific, and more or less subject to a Daubert inquiry. 114

III. The Reliability of Nonscientific Testimony Must Be Ensured

A. Implications of Daubert: Why There Is a Need to Ensure the Reliability of Nonscientific Testimony

Although Daubert clarified the framework for determining the admissibility of scientific testimony, significant ambiguity remains with respect to the standard for admitting nonscientific expert testimony. 115

The application of Rule 702 to nonscientific testimony 116 is problematic because the rule lacks a reliability requirement. 117 The reliability of scientific testimony is protected by the Daubert standard 118 and the requirements of Rule 702, 119 but no such judicial standard exists to govern the admissibility of nonscientific evi-

114. Courts are more likely to apply Daubert when the expert demonstrates a particular methodology. Compare Johnson, 28 F.3d at 1496-97 (making no reliability inquiry into the testimony of a drug trafficking expert whose conclusions were not based upon any explanatory methodology) and Carmichael v. Samyang Tire, Inc., 131 F.3d 1433 (11th Cir. 1997) (finding that the testimony of an expert on tire failure was not "scientific" and thus was not subject to a Daubert inquiry) with Ventura, 65 F.3d at 733 (finding that an economist's testimony regarding the market rate for licensing royalties was admissible because the expert used a sound methodology) and Peitzmeier v. Hennessy Indus., Inc., 97 F. 3d 293 (8th Cir. 1996) (applying the Daubert factors to exclude a design engineering expert's testimony on alternative safety devices because the expert had not subjected his conclusions to testing and peer review). See Tyus v. Urban Search Management, 102 F.3d 256 (7th Cir. 1996) (holding that Daubert's framework for assessing scientific expert testimony applies to the social sciences in which testimony is commonly grounded in a particular methodology); infra Part III.A. (discussing that engineering testimony is more suited to a Daubert inquiry because it is often based on a methodology which can be falsified whereas the testimony like that from legal expert or an expert on drug trafficking cannot always be similarly falsified).

115. See supra Part II (discussing the circuit split with respect to the standard for admission of nonscientific testimony).

116. FED. R. EVID. 702 (requiring the trial judge to simply screen for a qualified expert who can help the jury with relevant subject matter without screening for the reliability of the testimony); see supra Part II.B.

117. See infra Part III.C. (proposing an amendment to Rule 702 to resolve this dilemma).

118. See supra notes 68-77 and accompanying text.

119. See supra notes 30-34 and accompanying text.
Although courts have limited the application of *Daubert*, judges should not examine less rigorously the specialized knowledge underlying nonscientific testimony, or abdicate their role as gatekeeper when making a Rule 702 evaluation.  

1. **Distinguishing Scientific Knowledge From Specialized and Technical Expertise**

How courts are to distinguish between the scientific knowledge defined in *Daubert* and technical or other specialized knowledge mentioned in Rule 702 remains a central question in determining the admissibility of nonscientific testimony. *Daubert* did not explain how courts were to make this differentiation. Moreover, the Supreme Court did not specify how judges would be able to place specific areas of expertise into these “presumably distinguishable” categories. The *Daubert* Court attempted to provide some guidance on this issue by resting the key inquiry as to whether

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120. See supra Part II (discussing circuit split with respect to the standard for admitting nonscientific testimony).

121. See supra notes 83-96 and accompanying text (discussing the circuit courts refusing to apply *Daubert* to nonscientific testimony).

122. See United States v. Starzecpyzel, 880 F. Supp. 1027, 1042 (S.D.N.Y. 1995) (“The fact that *Daubert* does not apply to nonscientific expertise does not suggest that judges are without an obligation to evaluate proffered expert testimony for reliability.”); see also United States v. Jose Farias Ochoa 116 F.3d 487 (9th Cir. 1997).

123. That is, conclusions based on testing and experimentation as defined by “Newtonian Science.” See supra notes 46-47 and accompanying text.

124. See supra notes 32-34 and accompanying text.

125. Indeed this was Judge Rehnquist’s concern in his dissent. See Daubert v. Merrell Dow Pharm., 509 U.S. 579, 600 (1993) (Rehnquist C.J., concurring in part and dissenting in part); supra notes 78-79 and accompanying text.

126. See supra note 8.

127. Diana K. Sheiness, Note and Comment, *Out of the Twilight Zone: The Implications of Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 69 WASH. L. REV. 481, 491 (1994) (discussing the risk that courts may develop their own criteria for applying *Daubert* which will be inconsistent as some courts apply *Daubert* narrowly and others may extend the standard beyond its intended reach). See also Carmichael v. Samyang Tire, Inc., 131 F.3d 1433, 1436. The Carmichael court provided an interpretation of the differences between scientific and nonscientific testimony using the example of an auto mechanic analyzing a burned out spark plug.

Given a proper foundation, a mechanic with years of experience with spark plugs might be able to identify for a jury burns or other marks on a spark plug that he believes disclose whether the plug burned out because of normal wear or some defect; an experienced mechanic may recognize patterns of normal and abnormal wear on an auto part even though he has no knowledge of the principles of physics or chemistry that might explain why or how a spark plug works. Such a mechanic's testimony would be non-scientific, while the testimony of another expert on the nature and effects of combustion (applied to spark plugs) would be scientific.

*Id.* at 1436.
proffered testimony was scientific on the ability to confirm the theory through experimentation and testing. The Daubert factors, therefore, were tailored to suit the specific methods used in reaching a scientific conclusion. Moreover, any conclusions reached in a manner other than through a particular methodology are not considered scientific within the purview of Rule 702, and thus are arguably not subject to the Daubert factors because the Daubert Court did not address non-scientific expert testimony.

Experience is to non-scientific experts what experimentation is to scientists. That a non-scientific expert's basis for conclusion cannot be tested because it is based upon individual experience should not warrant less scrutiny of the reliability of the testimony. Scientific testimony may be validated through duplication of the expert's methodology, whereas it is seldom possible to duplicate a non-scientific expert's subjective experience.

For example, an expert testifying to the causation of various ailments resulting from exposure to toxins may use a dose-response

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128. *See Daubert*, 509 U.S. at 593 ("Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested."); *see also* Sheiness, *supra* note 127, at 490 ("If an expert derives authority from a field susceptible to testing but offers an opinion that eludes empirical confirmation, the testimony should be excluded. However, a requirement of empirical testing for testimony whose sources are not susceptible to verification would be too restrictive.").

129. *See Daubert*, 509 U.S. at 593 (stating the factors which bear significance when assessing the validity of scientific methodologies); *see also infra* notes 151-64 (discussing how the Daubert factors are better suited to assess the reliability of scientific rather than non-scientific testimony).

130. *See Laser, supra* note 14 at 1405; *see also* Sheiness, *supra* note 127, at 492 (noting the potential for dilemmas for judges when they are confronted with testimony based on areas of expertise that could apply scientific methods but typically do not, and citing Hawthorne Partners v. AT&T Technologies, Inc., 831 F. Supp. 1398 (N.D. Ill. 1993), as resolving this dilemma by presuming the validity of testimony when others in the same field used a similar method).

131. *See Daubert*, 509 U.S. at 590 n.8 (stating that the Court's discussion is limited to the scientific context because that was the nature of the expertise offered in the case).


135. Presumably, individual experts will have varying experiences throughout their respective careers and thus, it follows that one expert may not always be able to verify the conclusions another draws from his or her own particular experience.
analysis in which the expert evaluates the dosage of the toxins plaintiffs allegedly received as well as the toxin levels of the alleged source. Another expert may obtain data from the plaintiffs and the alleged source, and perform the same methodology to conclude that plaintiffs had been subjected to an exposure high enough to cause their ailments. With respect to either expert, there will be hard data to prove or disprove the reliability of the expert’s conclusions. Conversely, the testimony of an expert on the modus operandi of a drug dealer cannot be confirmed or refuted simply because another witness maintains to have seen a particular type of drug deal conducted in a dissimilar manner. Thus, subjective variations can be implemented in nonscientific testimony, yielding a greater need to ensure its reliability.

Today, a jury faced with nonscientific testimony must base the analysis of an expert on his or her credibility and whether the testimony appears to be sound. No safeguards exist, however, to ensure that the testimony actually is sound. Pursuant to Daubert, the trial judge screens scientific testimony for relevance and the expert’s qualifications, as well as the reliability of the expert’s conclusions. If judges do not fulfill a gatekeeping function for determining the admissibility of nonscientific testimony, then it is simply being presumed that experts’ conclusions are reliable because the experts are qualified. Establishing that an expert is

136. See Cordoba, 104 F.3d at 229; Perrin, supra note 2 at 1457-58.
137. See Perrin, supra note 2 at 1455 (“[n]onscientific expert testimony deserves even greater skepticism because there is often no ability to test the technical expert’s theories or techniques or to prove false the expert’s underlying premise”). But see Jonathan R. Schofield, Note, A Misapplication of Daubert: Compton v. Subaru of America Opens The Gate For Unreliable and Irrelevant Expert Testimony, 1997 B.Y.U.L. REV. 489, 507-08 (stating that any expert opinion, including nonscientific opinions, “should be logically founded upon some methodology, reasoning, or principle,” and that, “otherwise the opinion would be merely unsupported speculation”).
138. FED. R. EVID. 702. Judges assess the qualifications of the witness and whether the testimony will be helpful to the jury. See id. However, absence of any reliability requirement in Rule 702 places the burden of evaluating the reliability of the expert’s conclusions on the jury.
139. See Daubert, 509 U.S. at 596. Those courts which maintain that Rule 702 sufficiently covers nonscientific testimony simply because the rule refers to “specialized” and “technical” knowledge ignore the fact that Rule 702 also mentions “scientific” knowledge, yet there is an additional reliability requirement for scientific testimony. See also United States v. Locascio, 6 F.3d 924, 936 (2d Cir. 1993) (stating that testimony based on specialized knowledge is sufficiently addressed by the requirements of Rule 702).
140. See Oh, supra note 9, at 563 (arguing that an emphasis on credentials is “misdirected,” and that, “unlike assessing the methodologies and principles underlying a field, examining an individual’s background provides no assurance that the expert will present valid views”); John William Strong, Language and Logic In Expert Testimony:
well qualified does not necessarily prove a correlation between the expert’s knowledge and the matter at issue in a case.\textsuperscript{141} Consequently, a uniform standard must be applied that will require that judges ensure the reliability of all testimony.\textsuperscript{142}

2. Deburning The Notion That Nonscientific Testimony Requires Less Scrutiny

Many courts and commentators reason that scientific testimony requires a heightened standard of scrutiny because the nature of such evidence is complex and beyond the comprehension of most jurors.\textsuperscript{143} Courts may give less scrutiny to nonscientific testimony because they believe the cost of erroneously admitting this type of testimony is low.\textsuperscript{144} The jury is better able to evaluate the non-scientific expert’s credibility because the information is more common to them.\textsuperscript{145} Thus, if the risk of misinterpretation is less, then less scrutiny is required. This argument presents two problems.

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Limiting Expert Testimony By Restrictions of Function, Reliability, and Form, 71 OR. L. REV. 349, 363 (1992) (stating that the result of the traditional approach to admitting expert testimony is that the question of reliability of the testimony is “conveniently subsumed under the question of the qualification of the expert witness”).
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\textsuperscript{141} See Oh, supra note 9, at 563.

\textsuperscript{142} See Part III.B.5. (proposing a uniform standard).

\textsuperscript{143} See Reed v. State, 391 A.2d 364, 370 (Md. 1978); Gianelli, supra note 25, at 1237 (stating that scientific evidence has a potential danger of misleading the jury because “an aura of scientific infallibility may shroud the evidence”); Strong, supra, note 137, at 367 (stating that a distinction is needed between scientific and other types of experts because “propositions perceived as “scientific” by the jury possess an unusually high degree of persuasive power) (citing United States v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974) (noting that testimony from scientific experts may “assume a posture of mystic infallibility in the eyes of jury of laymen”)).

\textsuperscript{144} See Perrin, supra note 2, at 1425 (discussing the “relationship between the standard for admitting and excluding expert testimony and the testimony’s perceived effect on the jury”).


The trial court’s role as gatekeepers is not intended to serve as a replacement for the adversary system. Vigorous cross-examination presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

\textit{Id.}
First, nonscientific expert testimony is still expert testimony, implying knowledge beyond the average juror.\textsuperscript{146} Science is often accorded more scrutiny because of the disparity in expertise between the jury and the expert.\textsuperscript{147} That an expert has been called, however, indicates that he or she has some special knowledge that the jury may benefit from.\textsuperscript{148} It is no less important, therefore, that judges guarantee the reliability of nonscientific testimony so that the jury is not confused and does not give undue weight to unreliable testimony.\textsuperscript{149}

Varying degrees of the risk of misinterpretation should not dictate whether or not the testimony is reliable.\textsuperscript{150} Nonscientific testimony should be just as reliable as scientific testimony if jurors are to make well informed decisions. Furthermore, it should not be assumed that a jury, without judicial gatekeeping, will necessarily have an easier task in assessing the reliability of nonscientific expert testimony simply because an expert does not use a complicated methodology to reach his or her conclusion.\textsuperscript{151} A jury may be as confused when evaluating the testimony of an expert in banking or legal standards of care as they are when hearing DNA testimony.\textsuperscript{152}

\textsuperscript{146} By definition an expert, scientific or nonscientific, helps the jury understand something of which they do not possess sufficient knowledge. See \textsc{Black's Law Dictionary} 578 (6th ed. 1990) (defining expert as "one who by reason of education or special experience has knowledge respecting a subject matter about which persons having no particular training are incapable of forming an accurate opinion or making a correct deduction"). But see supra note 143 (discussing the view that scientific testimony is different than technical and specialized expert testimony because of the "aura of infallibility" surrounding scientific evidence in the eyes of the jury).

\textsuperscript{147} The argument follows that a juror is more likely to question testimony on a familiar topic because the juror possesses sufficient knowledge to do so whereas with complex, scientific knowledge, a juror is more likely to assume the truth of the testimony. See supra note 143 and accompanying text.

\textsuperscript{148} See supra note 143 and accompanying text.

\textsuperscript{149} See \textsc{Tyus v. Urban Search Management}, 102 F.3d 256, 263 (7th Cir. 1996) (stating the obligation of the district court to ensure that it is dealing with an expert in all cases including when the expertise is based on experience or training).

\textsuperscript{150} See id. ("A trial court is not compelled to exclude expert testimony 'just because the testimony may, to a greater or lesser degree, cover matters that are within the average juror's comprehension'.") (citing United States v. Hall, 93 F.3d 1337, 1342 (7th Cir. 1996)).

\textsuperscript{151} See \textsc{Laser}, supra note 14, at 1407.

\textsuperscript{152} See id.; Berry v. City of Detroit, 25 F.3d 1342, 1349 (6th Cir. 1994) (stating that the difficulties associated with the admissibility of expert testimony "are exacerbated when courts must deal with the even more elusive concept of nonscientific testimony"). The \textsc{Berry} court provided the example of an expert testifying how a bumblebee is able to fly to illustrate the differences between scientific and nonscientific testimony and to support the view that nonscientific experts offer knowledge beyond that of the average juror which must be as well founded as scientific testimony. Id.
Secondly, if nonscientific testimony is subjected to a lower standard of reliability, parties will be able to mold expert testimony to fit into a nonscientific category simply to escape Daubert's heightened scrutiny. The circuit split has resulted partly because courts have attempted to categorize various types of nonscientific testimony as more or less suited to the four Daubert factors. The more an expert arrives at his or her conclusions through some objective standard, the closer courts examine the reliability of the testimony, often applying the Daubert factors. Therefore, the reliability requirement mandated by Daubert may be circumvented simply by stating that an expert's conclusions are based on experience or education rather than any particular methodology. The

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If one wanted to explain to a jury how a bumblebee is able to fly, an aeronautical engineer might be a helpful witness. Since flight principles have some universality, the expert could apply general principles to the case of the bumblebee. Conceivably, even if he had never seen a bumblebee, he still would be familiar with its component parts. On the other hand, if one wanted to prove that bumblebees always take off into the wind, a beekeeper with no scientific training at all would be an acceptable expert witness if a proper foundation were laid for his conclusions. The foundation would not relate to his formal training, but to his firsthand observations. In other words, the beekeeper does not know any more about flight principles than the jurors, but he has seen a lot more bumblebees than they have. See id. See also Imwinkelried, supra note 16, at 2279 (noting that the reliability of nonscientific expert testimony is just as suspect as that of scientific testimony).

153. See United States v. Kremser Jones, 107 F.3d 1147, 1156 (6th Cir. 1997) (rejecting appellant's argument that handwriting analysis constitutes scientific evidence, and therefore subject to Daubert scrutiny); United States v. Starzecpyzel, 880 F. Supp. 1027, 1036-37 (S.D.N.Y. 1995) (rejecting opposing party's attempt to cast forensic document expertise as scientific knowledge to warrant greater reliability scrutiny); see also supra note 141 and accompanying text.

154. Real estate appraisal is a good example of nonscientific testimony that is often admitted under Daubert because the expert is able to demonstrate a clear methodology. See F.D.I.C. v. Suni Assoc., 80 F.3d 681, 686 (2d Cir. 1996) (admitting the testimony of a real estate appraiser upon finding the testimony reliable because the expert used sound valuation methodologies); Ventura v. Titan Sports, Inc., 65 F.3d 725, 733 (8th Cir. 1995) (same); see also Ohio v. Louis Trauth Dairy Inc., 925 F. Supp. 1247, 1252 (S.D. Ohio 1996) (applying the peer review and general acceptance Daubert factors to an economists testimony).

155. See Compton v. Subaru of Am., 82 F.3d 1513, 1518 (10th Cir. 1996) (holding that Daubert's reliability requirement is not necessary when an expert does base his conclusions on a particular methodology).

156. See Carmichael v. Samyang Tire, Inc., 131 F.3d 1433, 1434 (11th Cir. 1997). In Carmichael, the plaintiff-appellants argued that the district court should not have relied on Daubert's heightened scrutiny to exclude a tire failure expert because the testimony was not “scientific.” Id. at 1434; see also Schofield, supra note 134, at 490 (stating that the Compton court, in holding that Daubert was inapplicable to an expert who based his opinion on experience, “created a gaping loophole” by which parties could avoid Daubert's reliability scrutiny and, “as a result opened the gate for the admissibility of unreliable and irrelevant testimony”).
question remains, however, as to how courts are to evaluate the reliability of nonscientific experts when such experts are "experientially qualified." 157

B. Potential Standards For The Admissibility Of Nonscientific Testimony

1. Reviving Frye

One proposed standard for the admissibility of nonscientific testimony suggests reviving the *Frye* "general acceptance" test. 158 In its application, the *Frye* test excludes any testimony in which the expert arrives at his or her conclusions in a manner different than that generally accepted by people in that area of expertise. 159

The same problems that *Frye*’s restrictive test presented with regard to scientific testimony apply to the nonscientific arena. 160 Consider the testimony of a design engineering expert who develops a cutting edge safety latch for a product. 161 Under *Frye*, testimony that a manufacturer could have implemented such a device would be excluded because it is not yet generally accepted in the relevant community. 162 This is problematic because nonscientific experts often replace methodology with experience, 163 and nonscientific experts can rarely establish a generally accepted methodology because testimony based on subjective experience may not be generally accepted by other experts who have not had the same experience. Therefore, courts should not apply the *Frye* test to nonscientific testimony.

157. Strong, *supra* note 137, at 368; see Imwinkelried, *supra* note 16, at 2292 (stating that the reliability of a nonscientific expert increases when an expert has had substantial experience in the field).
158. *Frye*, 293 F. at 1014; see Imwinkelried, *supra* note 16, at 2284; see also *supra* notes 21-25 (discussing the *Frye* test).
159. See *supra* notes 21-25 and accompanying text.
160. See *supra* note 28 and accompanying text.
161. See Peitzmeier v. Hennessy Indus., Inc., 97 F.3d 293, 297 (8th Cir. 1996) (excluding the testimony of a design engineering expert, who testified that the defendant could have used an alternative safety device on a tire changer, because the expert had not tested any of the proposed devices or subjected them to peer review).
162. See *supra* note 25 and accompanying text.
163. See *supra* note 132 and accompanying text.
2. Literal Application of the Daubert Factors to Nonscientific Testimony

The Sixth Circuit's literal application of the Daubert test to nonscientific testimony\(^\text{164}\) presents glaring problems because not all nonscientific testimony can be subject to Daubert's four factors.\(^\text{165}\) For example, the "falsifiable experimental testing"\(^\text{166}\) and "rate of error"\(^\text{167}\) requirements are applicable only when the expert relies on some kind of methodology,\(^\text{168}\) and thus have little bearing on the reliability of an expert who is testifying on general principles gathered from years of experience in a particular area. Moreover, expert testimony based on personal experience cannot always be evaluated on the basis of "peer review"\(^\text{169}\) or "general acceptance,"\(^\text{170}\) although such testimony may be as valuable to the trier of fact as those opinions that are easily gauged in such terms. Therefore, the Daubert factors are not tailored to suit the specific concerns that arise when determining whether to admit nonscientific expert testimony.

The first Daubert factor is perhaps the most inapplicable to nonscientific testimony.\(^\text{171}\) Falsifiable experimental testing is employed to check scientific testimony for the presence of objective standards.\(^\text{172}\) However, nonscientific testimony is often subjective.\(^\text{174}\)

With years of experience in a particular field that is not based on

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\(^{164}\) See Berry v. City of Detroit, 25 F.3d 1342, 1350-51 (6th Cir. 1994); supra note 108 and accompanying text.

\(^{165}\) See Lisa M. Agrimonti, Note, The Limitations of Daubert and Its Misapplication to Quasi-Scientific Experts, A Two-Year Case Review Of Daubert v. Merrell Dow Pharmaceuticals, 35 Washburn L.J. 134, 144 (stating that applying the Daubert factors to nonscientific evidence is, "at best, absurd" and demonstrating through a hypothetical situation how the Daubert factors are ill suited to assess the reliability of nonscientific testimony); infra notes 173-187 and accompanying text (discussing that the Daubert factors are tailored to the specific concerns associated with scientific testimony and are not well suited to address the reliability of nonscientific testimony).

\(^{166}\) See supra note 70.

\(^{167}\) See supra note 72.

\(^{168}\) See Daubert v. Merrell Dow Pharm., 509 U.S. 579, 593 (1993); supra notes 46-47 and accompanying text (defining scientific testimony as that in which the expert's conclusions are grounded in sound methodology); supra, note 77 and accompanying text (noting that the Daubert court limited the discussion to the scientific context).

\(^{169}\) See supra note 71.

\(^{170}\) See supra note 73.

\(^{171}\) See Agrimonti, supra note 165, at 144 (demonstrating the difficulty in applying the Daubert factors to nonscientific expert testimony).

\(^{172}\) See Sheiness, supra note 127, at 490 (noting that the requirement of empirical testing for experts whose sources are not susceptible to verifications is too restrictive).

\(^{173}\) See Daubert, 509 U.S. at 593 (citing C. Hempel, Philosophy of Natural Science 49 (1966) and K. Popper, Conjectures and Refutations: The Growth of Scientific Knowledge 35 (5th ed. 1989)).
Newtonian Science, an expert may be able to provide useful information without demonstrating a particular methodology, and thus a way must be found to uniformly gauge the reliability of the expert's testimony.

**Daubert's** rate of error factor is similarly inapplicable to non-scientific testimony. The purpose of the rate of error requirement is to ensure that the methodology is employed the same way every time. Thus, if a consistent methodology is not applied each time the theory is proffered, there can be no evaluation of rate of er-

174. *See supra* note 134-37 and accompanying text (demonstrating through a hypothetical example how a non-scientific expert's testimony can be subjective).

175. *See supra* notes 46-47 and accompanying text (defining the concept of Newtonian Science).

176. A recent Second Circuit case, *Stagl v. Delta Airlines, Inc.*, 117 F.3d 76 (2d Cir. 1997), illustrates this principle. The *Stagl* court vacated the trial court's exclusion of the testimony of a mechanical engineer whose expertise was in the area of human-machine interaction. *See id.* at 82. The expert suggested that the interaction between the baggage claim system employed by Delta and the passengers trying to claim their baggage caused the plaintiff's injury when she was knocked to the ground, breaking her hip, by a passenger retrieving a bag from the carousel. *See id.* at 78. While the district court concluded that the expertise offered was too general, the Second Circuit found value in the testimony despite its lack of methodology stating that, "Where, as here, well-trained people with somewhat more general qualifications are available, it is error to exclude them." *Id.* at 82. A hypothetical example of this is the FBI agent who is called to testify to a drug dealer's modus operandi. He or she may confidently say just by looking at a particular scenario that it is indicative of the way drug deals are usually performed. According to the first prong of **Daubert**, unless the FBI agent's theory had been tested, it would be deemed unreliable. Such was the case in *Berry*, in which the Sixth Circuit applied **Daubert** to a police officer's testimony that the Detroit Police Department's failure to properly discipline officers was the proximate cause of an office shooting the victim. *See Berry v. City of Detroit*, 25 F.3d 1342, 1347 (6th Cir. 1994). The *Berry* court applied the first prong of **Daubert**, inquiring whether or not the officer's discipline theory had been tested. *See id.* at 1350. Clearly the court would want to make sure the officer's testimony has some basis in either observations or calculations. However, because the officer was testifying to a behavioral theory, experimental testing would not be as feasible. *See Laser*, *supra* note 14, at 1411 (noting that it is doubtful that any single experiment could conclusively show the effects of a failure to discipline police officers over a period of time). Accordingly, the Sixth Circuit found that the theory had not been tested and this factor went to the exclusion of the expert when in fact the testimony may have been reliable. *See Berry*, 25 F.3d at 1350.

177. *See United States v. Smith*, 869 F.2d 348, 353-54 (7th Cir. 1989) (considering the expert's rate of error in assessing the reliability of spectrographic voice identification).
This is the one factor even the Berry court could not apply to nonscientific testimony.\(^\text{179}\)

Although the publication and peer review aspect of Daubert is commonly applied to nonscientific testimony,\(^\text{180}\) it is also science specific.\(^\text{181}\) Peer review indicates reliability in science because it is common practice for scientists to publish in scientific journals and subject their research and findings to review by their peers.\(^\text{182}\) Nonscientific experts may not always publish their theories, however, because many particularized areas of expertise usually do not generate sufficient interest.\(^\text{183}\)

It is the job of a scientist to gather data, make calculations, and report on any findings. Nonscientific experts, on the other hand, usually are professionals in their field called to testify about their particular experience and may not be as accustomed to the practices of publishing and peer review as scientists\(^\text{184}\) as they are not as common for nonscientific experts.\(^\text{185}\) Finally, peer review is not always a guarantor of sound testimony. Any group espousing unconventional views can establish a journal for peer review and the lack of quality control in such journals makes suspect any assurance of reliability.\(^\text{186}\)

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\(^{178}\) See Laser, supra note 14, at 1413. The Berry court found the officer's testimony to be unreliable on the other Daubert factors, peer review and general acceptance. Although the officer claimed to have published some articles and a textbook, there was no peer review. See Berry, 25 F.3d at 1349-50.

\(^{179}\) See id.; see also Laser, supra note 14, at 1413.

\(^{180}\) See Oh, supra note 9, at 561.

\(^{181}\) See Agrimonti, supra, note 165, at 144.

\(^{182}\) See Daubert v. Merrell Dow Pharm., 509 U.S. 579, 593 (1993). The Daubert court found peer review relevant to the inquiry of the reliability of scientific testimony stating, "submission to the scrutiny of the scientific community is a component of 'good science' in part because it increases the likelihood that substantive flaws in methodology will be detected." Id.

\(^{183}\) See Daubert, 509 U.S. at 593 (stating that peer review is relevant but not dispositive in assessing the scientific validity of a particular technique or methodology on which an opinion is premised); David F. Horrobin, The Philosophical Basis of Peer Review and the Suppression of Innovation, 263 JAMA 1438 (1990) (stating that well-grounded but innovative theories may not be published); see also J. Ziman, AN EXPLORATION OF THE GROUNDS FOR BELIEF IN SCIENCE 130-33 (1978); Relman & Angell, How Good is Peer Review?, 321 NEW. ENG. J. MED 827 (1989).

\(^{184}\) See Laser, supra note 14, at 1413 ("Only in the formal, traditional sciences is there an established practice of publication and peer review.").

\(^{185}\) See id.

\(^{186}\) See Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on "clinical ecology" because the entire field of expertise is unreliable).
3. Judges as Gatekeepers

Daubert's gatekeeping function for trial judges transcends any qualitative differences between scientific and nonscientific testimony. In a recent case, Thornton v. Caterpillar, the judge found that the Daubert factors did not apply to the proffered testimony of a mechanical engineer because the test was never meant to be applied to testimony that is nonscientific in nature. The judge emphasized the differences between admissibility and reliability, and stated that admissibility is for the judge to decide while reliability is for the jury. This notion is implausible. While juries evaluate the relative credibility of witnesses, judges should be responsible for keeping all unreliable "junk" testimony out of their courtrooms, not simply "junk science."

The proliferation of "guns for hire" in trials also makes it essential that judges carefully screen nonscientific testimony. Although it is illegal to compensate a lay witness with anything of value, paying an expert witness for testimony is permissible and

187. One way judges have ensured reliability to a limited extent is by scrutinizing the qualifications of each expert to appear in his or her court. See Strong, supra note 140, at 363 ("[T]he question of the reliability of the general propositions utilized by the expert is conveniently subsumed under the question of the qualification of the expert witness.").
189. See id. at 577.
190. See id.
191. See United States v. Webb, 115 F.3d 711 (9th Cir. 1997) (J. Jenkins, concurring). Judge Jenkins reasoned that although the Daubert factors could not be applied to the specialized knowledge of law enforcement:
   We cannot be suggesting that the district court examine less rigorously the specialized knowledge underlying proffered nonscientific testimony, or that the district court may abdicate its role as gatekeeper where the subject matter does not depend on the scientific method. The trial court's role as gatekeeper concerning nonscientific "specialized knowledge" proves equally crucial to the integrity of the trial process . . . .
Id. at 717.
192. "Guns for hire" is a term which portrays experts as paid employees working as advocates to persuade the jury of the client's position. See Berry v. City of Detroit, 25 F.3d 1342, 1349 (6th Cir. 1994) (noting that in the age of "experts for hire," it is not inconceivable for a party to purchase experts with impressive credentials to testify for the party's benefit); Laser, supra note 14, at 1409 ("In the age of 'experts for hire,' it is not inconceivable for a party to 'purchase' persons with impressive credentials to say what the party wants them to say."); see also Perrin, supra note 2, at 1453.
193. See Watkins v. Telsmith, Inc., 121 F.3d 984, 1991 (5th Cir.) (stating that regardless of what kind of testimony is proffered, the allocation of Daubert's reliability principles is "germane to evaluating whether the expert is a hired gun or a person whose opinion in the courtroom will withstand the same scrutiny that it would among his professional peers").
indeed expected. This has created a market for experts in which lawyers purchase the expert who can best convince a jury of their client's position, regardless of whether the expert's conclusions are well founded. It has even been noted that a "fool with a small flair for acting and mathematics might be a more successful witness than, say, Einstein."197

As paid advocates, experts can be vehicles for pervasive corruption in courtrooms because they have a financial incentive to advance the case of the party who hires them. That experts will begin testifying free of charge is unlikely, so it is incumbent upon the judiciary to ensure that both scientific and nonscientific expert testimony is reliable and not prepared in anticipation of the litigation.200

4. Amending Rule 702

The extension of Daubert's gatekeeping requirement to non-scientific testimony would be best accomplished by adopting an amendment to Rule 702. In 1991, the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States proposed an amendment to the rule.201 The proposed amendment expressly added a "reasonable" reliability requirement which was

196. See Perrin, supra note 2, at 1415-16 ("Lawyers shop for experts, ultimately choosing the one that talks right, looks right, has the right credentials, and will work with the lawyer in the development of her opinions.").
197. Id. (citing GERRY SPENCE, WITH JUSTICE FOR NONE 270 (1989)).
198. See Trower v. Jones, 520 N.E.2d 297, 300 (Ill. 1988) (noting that a favorable verdict will enable the expert to establish a "track record")..
199. See Perrin, supra note 2, at 1414 (arguing that experts have an interest in advancing the case so they are retained in the future).
200. See Schofield, supra note 137, at 515 (stating that the Compton court should have inquired into whether the expert's testimony was prepared solely for the litigation).
201. The proposed amendment reads:

Testimony providing scientific, technical, or other specialized information, in the form of opinion or otherwise, may be permitted only if (1) the information is reasonably reliable and will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, and (2) the witness is qualified as an expert by knowledge, skill, experience, training, or education to provide such testimony.
implicitly stated in *Daubert.* Although such a requirement properly focuses attention on the problem of reliability, the proposal provides neither a definition of what "information is reasonably reliable," nor guidance in applying such a reliability standard. While the application of the *Frye* test is unduly limiting, this proposed amendment is too broad to be very useful.

C. Proposal

Rule 702 should be amended to effectively implement a reliability requirement and compel the judiciary to embrace its gatekeeping role in the admission of both scientific and nonscientific testimony. The amendment should address the problem of reliability in nonscientific testimony by providing a clear standard and framework for judges to follow, rather than requiring them to make a case by case inquiry, determining whether the particular testimony proffered is sufficiently scientific in nature, and thus subject to *Daubert*'s enhanced reliability scrutiny. Taking these factors into consideration, I propose the following amendment to Rule 702:

If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness, qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of opinion or otherwise if the testimony is shown to be reasonably reliable.

Testimony will be considered reasonably reliable if it is based upon sufficient facts, data, opinions, explanatory theory or reasoning i) which is generally accepted in the relevant specialized community or ii) if the testimony is shown to be not generally accepted, the party offering the testimony proves by a preponderance of the evidence that the testimony is otherwise reliable including a demonstration that sound principles have been applied reliably to the facts of the case, the witness is testifying in accordance with the same intellectual rigor applied in his or her
professional practice, and the field of expertise is known to reach reliable results.\textsuperscript{204}

\textsuperscript{204} This proposal incorporates elements of two of the many proposed amendments to Rule 702, reviewed by the Advisory Committee on the Federal Rules of Evidence in 1997, and one proposal recently approved to be recommended to the Standing Committee in April, 1998.

The first reviewed proposal provides:

Testimony providing scientific, technical or other specialized information, in the form of an opinion, or otherwise, may be permitted only if (1) the information is based upon adequate underlying facts, data or opinions, (2) the information is based upon an explanatory theory either (a) established to have gained widespread acceptance in the particular field to which the explanatory theory belongs, or (b) shown to possess particularized earmarks of trustworthiness, (3) the witness is qualified as an expert by knowledge, skill, experience, training or education to provide such information, and (4) the information will substantially assist the trier of fact to understand the evidence or to determine a fact in issue.

Michael H. Graham, Handbook of Federal Evidence (4th ed. 1996). One arguable problem with the proposal discussed in the Advisory Committee Reporter's comment is the vagueness of the language "particularized earmarks of trustworthiness" and "substantially assist." Advisory Committee on the Federal Rules of Evidence Reporter's Comment, October, 1997 (on file with author). The amendment proposed in this Note, including a provision entailing what judges should consider in evaluating trustworthiness or reliability, will remedy this problem. The second reviewed proposal reads,

A witness may testify, in the form of an opinion or otherwise, concerning scientific, technical, or other specialized information that will assist the trier of fact to understand the evidence or to determine a fact in issue, but only if (1) the information is reasonably reliable, and (2) the witness is qualified as an expert by knowledge, skill, experience, training, or education to provide that testimony.

Information normally will be considered reasonably reliable if it is based on premises, or derived from techniques, having significant support and acceptance within the relevant specialized community. A party seeking to object to a witness testifying thereto must show by a preponderance of the evidence that the information is not reasonably reliable.

Information based on premises or derived from techniques not having significant support and acceptance within the relevant specialized community will not be considered reasonably reliable. A party seeking to have an expert base testimony on this type of information must show by a preponderance of the evidence that this testimony is reasonably reliable.

Alan Tamarelli, Daubert v. Merrell Dow Pharmaceuticals: Pushing the Limits of Scientific Reliability, 47 Vand. L. Rev. 1175 (1994). A problem with this proposal is that it does not specifically state how a party might overcome a presumption of unreliability. See Advisory Committee on the Federal Rules of Evidence Reporter's Comment, October, 1997 (on file with author). The amendment proposed in this Note suggests that the additional inquiries as to whether the witness is adhering to the same standards of intellectual rigor required in the witness' field will provide a solution to this problem. The proposed amendment recently approved by the Advisory Committee to be recommended to the standing committee provides,

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness
This proposal goes further than simply suggesting a reliability requirement because it provides a specific standard by which to apply the reliability requirement. The guideline for what is normally considered “reasonably reliable” will eliminate confusion and inconsistent application in courts because judges will have a clear standard which they can uniformly apply. Moreover, the proposal also is flexible and broad enough to ensure the reliability of all expert testimony because the reliability requirement applies to both scientific and nonscientific testimony.

This proposal may seem similar to the Frye “general acceptance” test because it states that information is reasonably reliable if it has significant support within the relevant specialized community. The proposal does not, however, absolutely preclude theories that are not generally accepted within the relevant community of expertise. Although it is based on the assumption that general acceptance is the primary indicator of reliability, it provides a burden shifting proposition, which enables reliable testimony to be heard even if it has not gained general acceptance.

qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise provided that (1) the testimony is sufficiently based upon reliable facts or data (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Advisory Committee on the Federal Rules of Evidence proposal approved to be recommended to the Standing Committee, April 6, 1998 (on file with author). This proposal recognizes the significance of evaluating whether an expert has not only applied a sound methodology, but that the methodology is applied appropriately to the facts of the case. See In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 745 (3d Cir. 1994) (noting the importance of a methodology being properly applied to the specific facts of a case).

205. See supra note 200 (discussing the 1991 proposed amendment which simply suggests a reliability requirement for all expert testimony without providing a framework for how such a requirement would be implemented).

206. See Schofield, supra note 137, at 515 ("Without a uniform standard, an expert's testimony that is likely to fail under Daubert’s scientific factors could be repackaged under the guise of technical or nonscientific evidence and avoid Daubert's enhanced scrutiny.").

207. The proposal applies to both scientific and nonscientific specialized or technical knowledge.

208. See supra notes 22-29 and accompanying text

209. See supra note 28.

210. Initially, the party opposing the testimony bears the burden of proving it to be unreliable and if that is accomplished, the testimony is excluded. See Fed. R. Evid. 702. However, this amendment proposes that once the testimony is proven to be unreliable because it lacks general acceptance, the burden shifts back to the party offering the testimony to show that it is indeed reliable despite the lack of general acceptance.
If a party opposing an expert's testimony shows the testimony is not generally accepted, the party offering the testimony has an opportunity to show that the testimony is indeed reliable and overcome the presumption of unreliability. The proposal suggests that a way to overcome this presumption is by demonstrating that the testimony would withstand scrutiny by other experts in the field. The "general acceptance" in this proposal is different from that required by Frye because the proposal does not mandate that an expert use a generally accepted methodology. Rather, an expert may establish that the reasoning which led to the conclusions advanced would be generally accepted. Expert witnesses must establish a similarity between their professional practice or experience and the proffered testimony,\textsuperscript{211} which includes the inquiry into whether the witness has employed the same reasoning\textsuperscript{212} that other experts in the field use to base their conclusions.\textsuperscript{213} Moreover, the proposal suggests that part of ensuring whether a witness' methodology or reasoning is reliable is examining whether it has been appropriately

\begin{itemize}
  \item \textsuperscript{211} See Tassin v. Sears, Roebuck & Co., 946 F. Supp. 1241 (M.D. La. 1996) (holding that in the context of engineering testimony, when the expert's opinions are based on technical expertise, rigid compliance with the Daubert factors is not necessary as long as the expert provides a reasonable link between the information and procedures he uses and his conclusions); Imwinkelried, supra note 16, at 2292-92 (stating that the reliability of an expert increases with the more experiences an expert has and the similarity of those experiences to the testimony in question).
  
  \item \textsuperscript{212} See Schofield, supra, note 137, at 508 (stating that although nonscientific experts may not use a complicated methodology, all experts should base their conclusions on some methodology, reasoning or principle; for example, past experience constitutes part of a methodology through which an expert might adequately base a conclusion).
  
  \item \textsuperscript{213} The additional inquiry as to whether the expert is adhering to the same standards of intellectual rigor required in the expert's field will help establish that the expert is not a "hired gun" who has prepared the testimony solely for the litigation. See Sheehan v. Daily Racing Form, Inc., 104 F.3d 940, 942 (7th Cir. 1997) (noting the importance of an expert being "as careful as he would be in his regular professional work outside his paid litigation consulting"); Braun v. Lorillard Incorporated, 84 F. 3d 230 (7th Cir. 1996) (stating that the proper inquiry in evaluating the reliability of expert testimony should be what sort of data other professionals in the same field would require to support their conclusions); Schofield, supra note 137, at 511. Schofield argues:
    
    Perhaps one of the best indicators as to whether an expert's reasoning or methodology is reliable is whether the expert has followed the criterion established in his profession. An expert should not be able to have his testimony admitted in court on standards that are less than what is expected in the expert's field.

  \item Id. The application of such an inquiry would be to require lawyers, for example, to substantiate their legal conclusions in court with case law and statutes as they do routinely in their professional practice. See also Daubert v. Merrell Dow Pharm. 43 F.3d 1311, 1317 (9th Cir. 1995); Laser, supra note 14, at 1418.
\end{itemize}
applied to the facts of the case.\footnote{214} The requirement that an expert's field of expertise is known to reach reliable results will preclude the possibility that an expert might be able to satisfy that he or she has adhered to the intellectual rigor of an unreliable practice.\footnote{215} The proposal has the additional advantage of promoting judicial efficiency by having the relevant community of expertise, rather than the courts, determine the validity of the expert's testimony.\footnote{216}

The fields of scientific and nonscientific knowledge are so diverse\footnote{217} that it would be extremely burdensome to compel judges to become sufficiently learned in a particular area in order to assess the reliability of an expert testifying in that area.\footnote{218} This still may be required in rare cases where there is either not a large enough community of expertise to evaluate an expert's reasoning or lack of consensus within a community regarding acceptable standards.\footnote{219} However, in the majority of cases which do not present these issues, the proposal will allow judges to focus on their gatekeeping responsibilities rather than becoming "amateur experts."\footnote{220}

The Tenth Circuit case, \textit{Compton v. Subaru of America, Inc.},\footnote{221} best illustrates the practical application and utility of this proposal. The \textit{Compton} court held that where expert testimony is based on general engineering principles gathered from years of experience, rather than any particular methodology, performing a \textit{Daubert} reliability inquiry is not necessary.\footnote{222} Although the expert's reasoning

\footnote{214} See \textit{In re Paoli R.R. Yard PCB Litig.}, 35 F.3d 717, 745 (3d Cir. 1994) (stating that "any step that renders the analysis unreliable renders the expert's testimony inadmissible," and that this is true "whether the step completely changes a reliable methodology or merely misapplies that methodology").

\footnote{215} See \textit{Sterling v. Velsicol Chem. Corp.}, 855 F.2d 1188 (6th Cir. 1988) (rejecting the testimony of a "clinical ecologist" because the field is unreliable).

\footnote{216} See \textit{Polentz, supra} note 4, at 1189 (citing \textit{Reed v. State}, 391 A.2d 364, 371-72 (Md. 1978) (justifying the adoption of the \textit{Frye} test as a means of allowing the scientific community to make the determination on the validity of the testimony)).

\footnote{217} See \textit{supra} notes 35-45 and accompanying text (providing examples of different kinds of expert testimony).

\footnote{218} See \textit{Oh, supra} note 9, at 563 ("Judges would be required to acquire sufficient proficiency in a wide range of expertise.").

\footnote{219} See \textit{id.} (noting the problem of there being no consensus in a specific area regarding its "essential principles of knowledge").

\footnote{220} \textit{Daubert v. Merrell Dow Pharm.}, 509 U.S. 579, 600-01 (1993) (Rehnquist, C.J., concurring in part and dissenting in part) ("I do not doubt that Rule 702 confides to the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony. But I do not think it imposes on them either the obligation or the authority to become amateur scientists in order to perform that role.").

\footnote{221} 82 F.3d 1513 (10th Cir. 1996); see \textit{supra}, note 85-88 and accompanying text.

\footnote{222} See \textit{id} at 1520. This decision suggested that an expert would be able to get around a reliability inquiry by saying that no methodology was implemented to reach the expert's conclusions and that the job of evaluating the credibility of the expert
was unreliable, the court nonetheless admitted the testimony because the expert had sufficient qualifications and testified to relevant subject matter.

Under the proposed amendment, the party offering such an expert would have to establish that his or her conclusions are based on "adequate underlying facts, data, or opinion" and are "reasonably reliable," instead of focusing on the qualifications of the expert. If Subaru was able to demonstrate that the expert presented unreliable testimony, the expert would have had the opportunity to rebut this presumption by showing that he used standard engineering principles, thereby adhering to the intellectual rigor in his professional field. The application of this amendment would fill the reliability gap left by a sole inquiry into the expert's qualifications and relevance.

Conclusion

In areas of nonscientific expertise, where testimony rarely is based on a specific methodology, and thus is not adaptable to the four Daubert factors, the trial judge must still ensure that the testimony is reliable. While the fear of "junk science" pervading courtrooms compels judges to scrutinize scientific testimony, it is equally important that nonscientific testimony be grounded in well-reasoned and nonspeculative theory. Accordingly, Rule 702 should be amended to require trial judges to embrace their gatekeeping role with regard to all types of expert testimony. The proposed amendment resolves the inconsistent application of Daubert by providing a clear standard for judges to follow and affords the best solution for ensuring the reliability of nonscientific testimony.

may be left to the jury. In addition, it is unlikely that a jury would be any better able to assess the reliability of engineering principles than scientific principles.

223. In Compton, the experts opinion, that the plaintiff's car was defectively designed because it allowed excessive roof crush, was "questionable and lacked reliability," and the judge remarked that the expert's testimony was "more applicable to a Sherman tank than to any vehicle which the ordinary consumer would drive." Compton, 82 F.3d at 1516; see Schofield, supra note 137, at 490.

224. See Compton, 82 F.3d at 1518.

225. See supra, Part III.C.

226. See id.

227. See supra note 117 and accompanying text (discussing why the traditional application of Rule 702 to nonscientific testimony is problematic).
PROTECTING PROPERTY RIGHTS WITH STRICT SCRUTINY: AN ARGUMENT FOR THE "SPECIFICALLY AND UNIQUELY ATTRIBUTABLE" STANDARD

Daniel William Russo*

The Fifth Amendment is not about property or about commerce. It is about individuals; it is about fairness; and it is about freedom.¹

Introduction

Consider a builder who purchases a piece of property in a small city in order to build an apartment complex on the land. After submitting his plan to the local government, the builder is told that the permits to build are conditioned on whether or not he agrees to give a percentage of his land back to the city or pay an "impact fee."² The government explains that a study has found that the new complex will exacerbate the problems of overcrowded schools³ and traffic congestion⁴ and that the conditions are being imposed to offset these implications.

The builder does not believe he should have to give any of his land back or pay any fees, other than those normally imposed. He alleges that the city is conditioning permits to which he is entitled,

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2. See Noreen A. Murphy, Note, The Viability of Impact Fees After Nollan and Dolan, 31 NEW ENG. L. REV. 203, 204 (1996) ("An impact fee, a species of the development exaction, is a monetary charge imposed on developers as a condition of project approval.").

3. See Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961) (deciding whether an exaction of land in order to alleviate the problem of overcrowded schools was constitutional).

4. See Northern Illinois Home Builders Ass’n v. County of DuPage, 649 N.E.2d 384 (Ill. 1995) (deciding whether the application of transportation impact fees was constitutional).
on whether he pays a price the city determines is fair. This price, however, is not based on any evidence or material fact, and the city gives no guarantee that the price paid will be used to fix the potential problem(s) they are citing. The builder is then faced with a dilemma: pay a fee he did not calculate into his costs and threaten profit; reduce the size of his land by a percentage dictated by the city; or sell his land and attempt to build elsewhere. The builder, however, is not satisfied with any of the options presented by the city, so he decides to sue the municipality, alleging that the condition imposed is an unconstitutional regulatory taking under the Fifth Amendment.

This scenario, while simplified, highlights some of the complicated questions that arise in regulatory takings cases. It presents the question of how a private citizen’s property rights should be protected against government action. Some scholars argue that the takings issue is controversial because the United States Supreme Court did not provide any guidance for many years. Because of this silence, state courts developed their own standards to determine when a regulation constituted a taking. The state standards are similar in that each requires some type of relationship between the exaction imposed and the harm posed by the proposed develop-

5. See id.
6. See Associated Home Builders of the Greater East Bay v. City of Walnut Creek, 484 P.2d 606 (1971) (holding that a required dedication is constitutional so long as it results in any public benefit).
7. See Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965). In Jordan, the developer was presented with the options described in the accompanying text. See id. at 443.
10. See Dolan v. City of Tigard, 512 U.S. 374 (1994). The Court states, “Since state courts have been dealing with this question a good deal longer than we have, we turn to representative decisions made by them.” Id. at 389. The Court further explains that, despite some variations, state courts employ one of three general standards in determining regulatory takings cases. See id. at 389-91. First is the “judicial deference” standard, which is the least restrictive and thus favors municipalities. See id. Second is the “rational nexus” test, considered the intermediate standard, favoring neither municipalities nor developers. See id. at 390-91. Third is the “specifically and uniquely attributable” test. See id. at 389-90. This standard uses the court’s strictest scrutiny in determining the validity of the exaction, and is therefore the standard most favorable to the party on which the condition is being imposed. See id.
The fundamental difference among the various standards is the degree of nexus the respective state courts require municipalities to demonstrate in order to validate the imposition of the exaction.\textsuperscript{12}

In 1994, the Supreme Court decided \textit{Dolan v. City of Tigard}\textsuperscript{13} and adopted an intermediate standard of review for takings cases. This Note argues that this intermediate test does not sufficiently protect the property rights of individuals. Instead, this Note proposes that courts reviewing required exactions use a higher standard of scrutiny, particularly the "specifically and uniquely attributable" test adopted by the Illinois Supreme Court.\textsuperscript{14}

Part I provides a background of the Fifth Amendment's Takings Clause and outlines three significant United States Supreme Court takings cases: \textit{Pennsylvania Coal Co. v. Mahon};\textsuperscript{15} \textit{Nollan v. California Coastal Commission};\textsuperscript{16} and \textit{Dolan v. City of Tigard}.\textsuperscript{17} Part II discusses the three levels of scrutiny that states apply when deciding regulatory takings cases: (1) the "judicial deference" standard; (2) the "rational nexus" standard; and (3) the "specifically and uniquely attributable" test. Part III analyzes the scope and application of \textit{Nollan} and \textit{Dolan}, and argues that the "judicial deference" and "rational nexus" standards are inefficient in deciding regulatory takings cases. This Note concludes that the "specifically and uniquely attributable" test is most effective in deciding such

\textsuperscript{11} See Christopher J. St. Jeanos, \textit{Dolan v. Tigard and the Rough Proportionality Test: Roughly Speaking, Why Isn't a Nexus Enough?}, 63 \textit{Fordham L. Rev.} 1883, 1888 (1995) (stating that "[v]irtually every state court, when faced with a challenge related to development exactions, has required some sort of relationship between the exaction and a harm identified with the proposed development.").

\textsuperscript{12} See Nicholas V. Morosoff, Note, "'Take' My Beach Please!": \textit{Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions}, 69 \textit{B.U. L. Rev.} 823, 864 (1989). "While every state court has embraced this principle, they have sometimes differed on how close of a nexus the municipality must demonstrate in order to validate the exaction." \textit{Id.}

\textsuperscript{13} 512 U.S. 374 (1994).

\textsuperscript{14} See Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961). In explaining the "specifically and uniquely attributable" standard, the Court states:

If the requirement is within the statutory grant of power to the municipality and if the burden cast upon the subdivider is specifically and uniquely attributable to his activity, then the requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power.

\textit{Id.}, accord \textit{McKain v. Toledo City Plan Comm'n}, 270 N.E.2d 370 (Ohio 1971).

\textsuperscript{15} 260 U.S. 393 (1922).

\textsuperscript{16} 483 U.S. 825 (1987).

\textsuperscript{17} 512 U.S. 374 (1994).
cases because it properly balances the protection of fundamental private property rights with government regulations.

I. The Historic Evolution and Development of the Takings Clause

The political philosopher, John Locke, insisted that the only reason men created government was to protect the property rights of individuals. The protection of property rights, however, has changed since the days of Locke. The development of the Takings Clause is a good example of the evolution of real property law.

A. The Legislative Intent

The Fifth Amendment to the United States Constitution prohibits the government from taking private land from landowners without compensation. In writing the Fifth Amendment, James Madison was concerned with protecting the individual against the government and the majority it represents. By including the protection of property rights, Madison provided citizens with a sphere in which they were independent and secure in exercising other basic civil rights without government interference. The Takings Clause ("Clause") was a solution to a problem Madison felt strongly about: protecting property rights against failures in the political process.

20. See supra note 8.
22. See id. at 1856 (citing William Michael Treanor, Note, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L.J. 694, 699 (1985)); see also Marzulla, supra note 1. "Our system of private property is also essential to all of the other civil rights guaranteed by the Constitution. Property rights provide citizens with the independence and security they need to exercise their rights to free speech, freedom of religion and other basic civil rights." Id. at 258.

That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which
Although Madison’s reasons for authoring the Clause are clear, his intent concerning its scope is an issue of debate. This debate has been fueled considerably by the United States Supreme Court’s attempts to determine the Clause’s scope when deciding takings cases. The controversy surrounding the Clause lies in the interpretation of its language and its application in takings cases. Despite its use in regulatory takings actions since the late 1800s, many questions remain unanswered.

B. Judicial Scrutiny In Supreme Court Takings Cases

In 1922, the Supreme Court decided *Pennsylvania Coal Co. v. Mahon*, a case which arose because the Mahons owned the surface rights to a plot of land above a coal deposit to which the Pennsylvania Coal Company (“Company”) owned the subsurface rights. When the Company sought to begin mining, the Mahons sued claiming the mining of the coal violated the Kohler Act. The Company defended against the Mahon’s suit by claiming that the Kohler Act deprived it of its property rights without just compensation and therefore constituted a regulatory taking.

The Court agreed with the Company and held that the Kohler Act, as applied to these facts, constituted a regulatory taking in which just compensation was due. This decision invalidated a land use regulation because, as Justice Holmes stated, it went “too

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24. See generally id. (discussing the debate over the intended scope of the Takings Clause and posing the question whether it was Madison’s intention to limit the Clause’s application to physical takings only, or to protect property rights from government regulations which limit property use.).

25. See id. at 782.

26. See Morosoff, supra note 12, at 832.

27. See Treanor, supra note 23, at 795-97.

28. See Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) (“[T]his Court, quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.”). Id. at 124.

29. 260 U.S. 393 (1922).

30. See id. at 412. This right was expressly granted in the deed conveying the surface rights. See id.

31. See id. at 412-13. The Kohler Act forbade the removal of coal when such mining would cause subsidence of structures such as homes. 1921 Pa. Laws 1198.

32. See id. at 395.

33. See id. at 415.
However, the question of when a regulation went "too far," and therefore constituted a regulatory taking, remained unclear for decades because the Supreme Court failed to enact a bright line test.\(^{35}\)

Sixty five years after *Pennsylvania Coal*, however, the Supreme Court decided *Nollan v. California Coastal Commission*,\(^ {36}\) and finally addressed the lingering questions surrounding the regulatory takings issue. As required by California law, the Nollans applied for a building permit with the California Coastal Commission ("Commission") to erect a three-story home on their beachfront lot.\(^ {37}\) The Commission granted the permit under the condition that the Nollans grant an easement across a portion of their land for public access between two public beaches.\(^ {38}\) The Nollans challenged this condition on the grounds that it constituted a regulatory taking.\(^ {39}\)

\(^{34}\) See id. Justice Holmes states: 
"[W]e see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without just compensation. . . . The general rule at least is, that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking."

*Id.*

\(^{35}\) See Morosoff, *supra* note 12, at 837 (describing the "ad hoc" process the reviewing court must engage in when deciding takings claims); see also *id.* at 842-43 nn.135-37 (explaining that, in several cases after *Pennsylvania Coal*, the Court either rejected the takings claim because it did not deny the landowner all the use of the property or it simply ignored the takings claim and decided the case on other grounds).


\(^{37}\) See *id.* at 827. The Nollans owned a beachfront lot with a small bungalow on it. When the bungalow fell into disrepair and was no longer worth fixing, the Nollans decided to destroy it and build a three story beachfront home. The opinion states, "In order to do so, under Cal. Pub. Res. Code Ann. §§ 30106, 30212, and 30600 (West 1986), they were required to obtain a coastal development permit from the California Coastal Commission." *Id.* at 825.

\(^{38}\) See *id.* at 825.

\(^{39}\) See *id.* at 828-30. Upon challenging the imposition of the easement condition, the Nollans were granted an evidentiary hearing in order to determine the validity of the condition. At the conclusion of the hearing, the Commission reaffirmed the easement condition on the basis that the new home would create a "psychological" barrier between the beach and the public, placing a burden on the public's right to use the beach. *See id.* at 828-29. The Commission reasoned that the easement was justified because it somewhat offset this burden. *See id.* The Nollans then filed a writ of administrative mandamus with the California Superior Court and were successful in getting the easement condition struck down. *See id.* at 829. The California Court of Appeals then reversed, holding that the permit condition was valid because it was
Writing for the Court, Justice Scalia stated that in order for a government to legitimately regulate private property, there must be an "essential nexus" between the imposed condition and the harm sought to be prevented.\textsuperscript{40} Applying this new standard to the facts of the case, the Court held that no such nexus existed,\textsuperscript{41} and that the Commission would have to pay for an easement across the Nollan's property under the Fifth Amendment.\textsuperscript{42}

Despite clarifying some aspects of the takings issue, \textit{Nollan} also left some important questions unanswered. First, to what type of government regulation was the "essential nexus" standard supposed to be applied,\textsuperscript{43} and was the standard limited to physical dedications of property or could it also be applied to conditions like impact fees? Second, and perhaps most importantly, the Court did not decide the required degree of connection between the condition imposed and the projected impact of the development once the "essential nexus" between the state purpose and the condition was established.\textsuperscript{44}

Seven years later, the Supreme Court granted certiorari in \textit{Dolan v. City of Tigard},\textsuperscript{45} to "resolve a question left open by [its] decision in \textit{Nollan v. California Coastal Comm'n} . . . of what is the required

\underline{sufficiently related to the impact of the Nollan's new home. See id. at 830. The Court of Appeals stated that even if the home was not the sole reason for the need created and the relationship between the two was only indirect, the condition was still constitutionally valid. See id. The Nollans appealed to the Supreme Court, and were granted certiorari. See id.}

Justice Scalia began the Court's analysis by reciting the general rule that a land use regulation is not a taking if it "substantially advances a legitimate state interest" and does not "den[y] an owner economically viable use of his land." See id. at 834 (quoting \textit{Agins v. Tiburon}, 447 U.S. 255, 260 (1980)). Scalia also accepted the Commission's argument that protecting the public's ability to see the beach is a legitimate state interest. Scalia states, "We assume, without deciding, that this is so . . .", referring to the Commission's argument that protecting the view of the beach is a legitimate state interest. See id. at 835.

\textsuperscript{40. See id. at 837.}

\textsuperscript{41. See \textit{Nollan}, 483 U.S. at 837. The easement imposed on the Nollans, forcing the Nollans to allow the public to use their land to get from one public beach to another, in no way remedied the problem the Commission was citing, the obstruction of the public's view of the beach.}

\textsuperscript{42. See id. at 841-42. Unless the Commission compensated the Nollans, the easement imposed was "an out and out plan of extortion." \textit{Id.}}

\textsuperscript{43. See Mark W. Cordes, \textit{Discretionary Limits in Local-Land Use Control, Legal Limits On Development Exactions: Responding to Nollan And Dolan}, 15 N. Ill. U. L. Rev. 513, 528 (1995). "Because \textit{Nollan} involved the unusual scenario where there is no connection between an exaction and development impact, the full import of the 'essential nexus' standard was left undeveloped." \textit{Id.} at 527.}

\textsuperscript{44. See Murphy, supra note 2, at 236.}

\textsuperscript{45. 512 U.S. 374 (1994).}
degree of connection between the exactions imposed by the city and the projected impacts of the proposed development."\(^{46}\) Intending to expand her store, Ms. Dolan submitted a plan to the city in which she proposed to knock down the existing store and build a larger one with additional parking spaces.\(^{47}\) Based on Tigard’s new Community Development Code ("CDC"),\(^{48}\) the city approved Ms. Dolan’s permit application but attached two conditions to the proposal. First, she was to dedicate to the City of Tigard the portion of her property lying in the 100-year floodplain of Fanno Creek.\(^{49}\) Second, Ms. Dolan was required to dedicate an additional fifteen feet of land next to the floodplain.\(^{50}\) In total, the dedications required by Tigard constituted approximately 7,000 square feet or ten percent of Ms. Dolan’s land.\(^{51}\)

Ms. Dolan contested the required dedications, asserting that they constituted a taking of private property without just compen-

\(^{46}\) Id. at 377 (granting certiorari on Petitioner’s challenging of the Oregon Supreme Court which held that the City of Tigard could condition the granting of her building permit on the condition that Ms. Dolan dedicate a portion of her property).

\(^{47}\) See id. Petitioner, Florence Dolan, owned a plumbing and electrical supply store in Tigard, Oregon. The 9,700 square feet of store was situated on the east side of a 1.67-acre parcel of land which also included a gravel parking lot. Fanno Creek ran adjacent to the lot flowing through the land on the southwest corner. The first phase of Ms. Dolan’s proposal called for 17,600 square feet of store and a paved 39 space parking lot, the second phase called for an additional building and more parking spaces. See id. at 379.

\(^{48}\) See id. at 378-80. Prior to Dolan’s permit application, the state of Oregon required all the cities and counties of Oregon to pass a land use plan consistent with the state’s planning goals. See id. Tigard’s Community Development Code required all landowners in the area zoned “Central Business District” to comply with a 15% open space and landscaping requirement. See id.

\(^{49}\) See id. at 380-81. Tigard sought this land in order to improve the drainage system along the creek. See id. A portion of Tigard’s Community Development Code addressed flooding problems with Fanno Creek. The plan established that an increase in impervious surfaces (i.e., paved parking lots) would increase the flooding problems. It also suggested a number of ways to decrease the flooding including channel excavation next to Dolan’s property and keeping the floodplain free of structures. See id. at 379-80. The plan concluded that the costs of remedying the flooding problem would be shared with property owners. Owners along the creek would pay more because of the direct benefit they would receive from the improvements. See id.

\(^{50}\) See id. at 380-81. This portion of land was to be used as a pedestrian/bicycle pathway because a transportation study identified automobile congestion in the Central Business District as a problem. See id. at 380-83. This pathway was intended to give people an alternative to using their automobiles on short trips within the district. See id. at 381-83. The Community Development Code required developers supply the land for the pathway by dedicating land when beginning new developments. See id. at 379-80.

\(^{51}\) See Dolan, 512 U.S. 380-81.
The Court held that when the required "essential nexus" is found between the imposed condition and the state's legitimate purpose, the state must then prove the existence of a "rough proportionality" between the projected effects of the development and the dedication required. Applying the two-prong

52. See id. at 381-83. Ms. Dolan took her claim to the Oregon Land Use Board of Appeals (LUBA) asserting that Tigard's dedication conditions were not related to the proposed development and therefore constituted a taking. See id. After evaluating Ms. Dolan's claim, LUBA found a "reasonable relationship" between both conditions imposed and the proposed development. Concerning the requirement to dedicate land for the improved drainage system, LUBA found a "reasonable relationship" because the new building and parking lot would increase impervious surfaces, therefore increasing the runoff into Fanno Creek. See id. Concerning the dedication for a pathway, LUBA also found a "reasonable relationship" based on the conclusion that the larger store would require more employees and attract more customers, therefore increasing automobile congestion on the roads and in parking lots. See id.

The Oregon Court of Appeals and the Oregon Supreme Court, both affirmed LUBA's ruling. See Dolan v. City of Tigard, 832 P.2d 853 (Or. Ct. App. 1992) (rejecting Dolan's argument that the United States Supreme Court had adopted a stricter standard then the "reasonable relationship" test, by adopting the "essential nexus" test in Nollan), aff'd, 854 P.2d 437 (Or. 1993), rev'd, 512 U.S. 374 (1994). After exhausting the state appellate remedies, Ms. Dolan appealed to the United States Supreme Court.


54. See Dolan, 512 U.S. at 391. The opinion, written by Chief Justice Rehnquist, states, "No precisely mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." Id. at 391-92.

Upon adding the "rough proportionality" standard as the second prong in determining regulatory takings cases, the Court analyzed three different state standards in order to determine the level of scrutiny required in the test. See id. at 388-91 (discussing three separate state standards and the level of scrutiny required in each one). The Court states, "Since state courts have been dealing with this question a good deal longer then we have, we turn to representative decisions made by them." Id. at 389.

The standard requiring the lowest level of scrutiny is the "judicial deference" standard. See, e.g., Associated Home Builders of the Greater East Bay v. City of Walnut Creek, 484 P.2d 606 (Cal. 1971) (holding that required exactions are justified on the basis of general public need); Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964); Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673 (N.Y. 1966). See infra Part II.A. The Dolan Court felt this standard was too lax and did not adequately protect the property owner's rights. See Dolan, 512 U.S. at 391.

The standard requiring the highest level of scrutiny was the "specifically and uniquely attributable" test. See, e.g., McKain v. Toledo City Plan Comm'n, 270 N.E.2d 370 (Ohio Ct. App. 1971) (holding that the required exaction is permissible only if it is specifically and uniquely attributable to the developer's activity); Ansuini, Inc. v. City of Cranston, 264 A.2d 910 (R.I. 1970). See infra Part II.B. The Court felt this standard was too exact a standard for municipalities to meet. See Dolan, 512 U.S. at 391.

The majority determined that the intermediate standard, the "rational relationship" standard, was the required level of scrutiny under the Fifth Amendment. See id. The opinion states, "We think the 'reasonable relationship' test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previ-
test to the facts in Dolan, the Court held that an "essential nexus" did exist between the conditions imposed and a legitimate state interest. The Court, however, found that the city failed to meet the "rough proportionality" standard, and thus the regulation amounted to a taking.

II. The State Standards of Review in Regulatory Takings Cases

The Supreme Court, in Dolan, analyzed three different state standards before selecting the intermediate level of scrutiny used in deciding the case. The standards are similar in that all require some degree of relationship between the exaction imposed and the projected harm of the development. They differ, however, in the level of scrutiny a court is required to use when analyzing a municipality's exaction or dedication. In light of the Court's precedent in Dolan, it is important to understand the origins of the various state standards.

ously discussed." Id. However, in order to prevent confusion with the term "rational basis" used to describe the level of scrutiny under the Equal Protection Clause, the Court renamed the standard "rough proportionality." See id.

55. See id. at 383-84.

56. See id. at 391-97. As to the dedication of land along Fanno Creek, the majority found that this dedication was based on "rather tentative findings" that Dolan's development would increase storm water flow thereby increasing the city's need to manage the land for drainage purposes. See id. at 384. The majority also relied on the fact that Ms. Dolan's loss of her right to exclude was disproportionate to the City's possible benefit of controlling floods. See id. at 391. Chief Justice Rehnquist states, "As we have noted, this right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" Id. (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)). The dedication imposed for the land to be used as a pedestrian/bicycle pathway also failed the "rough proportionality" standard. See id. at 392-97. According to the Court, this dedication was not justified by the city's finding that the pathway "could" offset some of the projected increase in traffic congestion. Id. at 397. ("[t]he findings of fact that the bicycle pathway system 'could' offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system will, or is likely to, offset some of the traffic demand.") (quoting Dolan v. City of Tigard, 854 P.2d 437, 447 (Or. 1993), cert. granted, 510 U.S. 989 (1993), rev'd 512 U.S. 374 (1994)).

57. See id. at 384-91 (analyzing the state standards of review); see also supra note 54.


59. See St. Jeanos, supra note 11, at 1888.
A. The “Judicial Deference” Standard

The “judicial deference” standard requires the lowest level of judicial scrutiny. It requires only a general showing that the condition imposed may offset the potential harm of the development. This standard requires the reviewing court to automatically accept the legislative determination that a nexus exists. Therefore, the exaction plan is automatically approved unless the developer can show that the municipality’s reasons for it are meritless. This is an extraordinarily heavy burden for the developer to meet.

In Billings Properties, Inc. v. Yellowstone County, the Montana Supreme Court applied the “judicial deference” standard in a case where a developer’s plan to subdivide a parcel of land was rejected because it did not provide for the dedication of land to Yellowstone for parks and playgrounds. In reviewing the developer’s claim, the Billings Court held that a municipality’s determination that a proposed development may create a need for public land is sufficient to render the exactions imposed constitutional. This holding suggests that the determination of a nexus between the condition and the projected harm is left solely to the municipality.

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60. See Morosoff, supra note 12, at 865.
62. See Billings, 394 P.2d at 185; see also infra note 64.
63. See Morosoff, supra note 12, at 865. “Under this judicial-deference standard, exactions [sic] schemes are automatically approved whenever a local government merely states that it found a connection between the exaction and some development-created need. The burden is in effect placed upon the developer to show that the scheme lacks the requisite nexus.” Id.
64. See St. Jeanos, supra note 11, at 1889.
65. See Billings, 394 P.2d at 182; see also Jenad, 218 N.E.2d at 674 (deciding whether it was constitutional to allow the Village Planning Board to require a developer to allot land or pay an impact fee as a condition precedent to the approval of the proposed development). The Jenad Court held that the dedication of land or the payment of an impact fee is constitutional if the evidence reasonably establishes that the development creates the needs for such parks and playgrounds. 218 N.E.2d at 676 (citing Billings, 394 P.2d 182 (Mont. 1964)).
66. See id. at 184. The petitioner presented to the Planning Board of Yellowstone County a plan to subdivide a parcel of land and requested the plan’s approval. The Planning Board denied petitioner’s proposal because it did not include a dedication as required by state law. See id. The developer sued claiming that the required dedication of land was a taking because it did not provide the developer with just compensation. See id.
67. See id. at 185. The opinion states, “An act of the legislature is presumed to be valid . . . [and] every intendment is in favor of upholding its constitutionality.” (citing Gas Products Co. v. Rankin, 207 P. 993, 999 (Mont. 1922)).
imposing the condition. Because the developer did not prove that his subdivision would not create a need for a park, the Court held that the exactions did not constitute a regulatory taking.

B. The "Rational Nexus" Standard

Courts using the "rational nexus" standard do not simply assume the validity of the municipality's determination that an exaction is necessary. Instead, the reviewing court will require the municipality to demonstrate that the exaction bears some "rational nexus" to the negative impact of the proposed development.

In Jordan v. Village of Menomonee Falls, the Wisconsin Supreme Court applied the "rational nexus" standard in a case where the Village passed an ordinance requiring a subdivider to dedicate a portion of his land or pay an impact fee in lieu of the dedication. In reviewing the ordinance, the Jordan Court held that for an exaction requirement to be constitutional, the municipality must provide evidence which reasonably establishes that approving the subdivision would require the municipality to provide more land for schools, parks, and playgrounds. Based on the evidence presented, the Court upheld the Village ordinance.

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68. See id. at 188 ("The question of whether or not the subdivision created the need for a park or the parks is one that has already been answered by our Legislature.").
69. Id. at 188.

In the instant case no evidence has been introduced to rebut such presumption and mindful of the duty of this court to uphold enactments of the Legislature if there is any rational basis on which they can be upheld, it is found that the statute is not an unreasonable exercise of the police power.

70. See St. Jeanos, supra note 11, at 1891 ("Courts will not defer to unfounded assertions offered by a municipality to demonstrate why the exactions is necessary to offset the harm.").
71. See, e.g., Hollywood, Inc. v. Broward County, 431 So. 2d 606, 611 (Fla. Dist. Ct. App. 1983) (holding that "the local government must demonstrate a reasonable connection, or rational nexus" between the municipalities need and the potential impact).
72. 137 N.W.2d 442 (Wis. 1965).
73. See id. at 443. The municipality reasoned that such dedications were required in order to provide for schools, parks and recreational needs. See id. at 443-44. The subdividers, with full knowledge of the ordinance, proceeded with the project after paying a $5,000 impact fee. See id. at 444. They then brought suit to have the money returned claiming the fee was an unconstitutional taking without just compensation. See id. at 445.
74. See id. at 448. "The test of reasonableness is always applicable to any attempt to exercise the police power." Id.
75. See id. at 448-49. The Court found that the Village's evidence showing a significant growth in population and in local school enrollment, as well as expert testimony
The "rational nexus" test thus requires a stricter level of scrutiny than the "judicial deference" standard. Courts use this standard because it does not unduly inhibit the ability of government to regulate land use or give undue deference to legislative determinations. This test attempts to balance the needs of the community with the property rights of the developer. After its use in Jordan, many state courts adopted it when deciding regulatory takings cases.

C. The "Specifically and Uniquely Attributable" Standard

In contrast to the "judicial deference" and "rational nexus" standards, the "specifically and uniquely attributable" test applies strict scrutiny when evaluating land use regulations. This test requires that the imposed exaction be in direct proportion to a specifically created need and thereby limits required exactions to those specifically and uniquely attributable to the impact of the development.

regarding a healthy environment for human habitation, was enough to establish the rational nexus between the development and the exaction. See id. The expert testified that a minimum of 3,000 square feet should be dedicated for parks and schools for each family in the area, in order to create a "good environment for human habitation". See id.

76. See Morosoff, supra note 12, at 868. "Straddling the fence between the judicial-deference and the 'specifically and uniquely attributable' tests is a position known as the rational-nexus test." Id.

77. See Delaney, supra note 58, at 154. "[T]he more moderate rational nexus test . . . 'allows the local authorities to implement future oriented comprehensive planning without according undue deference to legislative judgments.'" Id. (quoting Wald Corp. v. Metropolitan Dade County, 338 So. 2d 863 (Fla. Dist. Ct. App. 1976)).

78. See id.

79. See, e.g., Wald Corp., 338 So. 2d at 868 (stating that the rational nexus approach provides a more feasible basis for analyzing dedication requirements and thereby explicitly adopting the rational nexus approach used in Jordan); Simpson v. City of North Platte, 292 N.W.2d 297, 301 (Neb. 1980) (holding that the exaction requirement placed on the developer must have a reasonable relationship or nexus to the use of the property, if no such nexus exists the requirement is invalid); Call v. City of West Jordan, 614 P.2d 1257, 1258 (Utah 1980) (citing Jordan while applying the rational nexus test).

80. See St. Jeanos, supra note 11, at 1890.

81. See id. "Several state courts require a precise correlation between the requested exaction and the harms that would result from development. In jurisdictions following this standard, the exaction must be found necessary to alleviate a harm that will be caused specifically by the proposed development and is not attributable to development in general." Id.
The Illinois Supreme Court has championed this standard, and other state courts have adopted it.

82. The phrase "specifically and uniquely attributable" was first used in 1960 by the Illinois Supreme Court in Rosen v. Village of Downers Grove, 167 N.E.2d 230 (Ill. 1960). The Court, in Rosen, held that a required dedication of land or the payment of a fee, as a condition to development approval, must be specifically and uniquely attributable to the developer's activities. See id. at 233. Furthermore, the planning board's authority to regulate does not give them the power to require conditions in order to solve all of the municipality's problems. See id. at 233-34. One year later, the Illinois Supreme Court again applied this standard to another development exaction imposed under the same state-enabling legislation relied upon in Rosen.

In Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961), the plaintiff was a subdivider who submitted a plan to the Mount Prospect Planning Commission for approval. See id. at 800-01 (the proposal included the subdivision of a parcel of land and the building of 250 residential units). The plaintiff's proposal met all of the Planning Commission's requirements under the ordinance except for a required dedication of a percentage of the land being developed. See id. Under the statute, the plaintiff would have been required to dedicate 6.7 acres of land to the village. The 6.7 acres of land required was going to be used as the location for a new elementary school and playground. See id. Upon the plaintiff's refusal to dedicate the land, the Commission refused to approve the subdivision proposal. See id. The plaintiff brought suit claiming that the section of the ordinance requiring the land dedication amounted to a taking without just compensation.

In deciding this case, the Illinois Supreme Court noted that a municipality under development must consider present and future needs for schools and recreational facilities. See id. at 802. The Court states:

Neither the plaintiffs nor the defendants in this case take the negative side of the question as to the desirability either of education or recreation. The question is not one of the desirability of education or recreation, nor of the desirability to improve the public condition, but, rather, the question presented here is one of determining who shall pay for such improvements.

Id.

The Court found, however, that the record did not establish that Mount Prospect's need for such facilities was specifically and uniquely attributable to the plaintiff's development. See id. at 802. The problem of overcrowded schools in Mount Prospect was due to the development of the entire Mount Prospect community. See id.

The agreed statement of facts shows that the present school facilities of Mount Prospect are near capacity. This is a result of the total development of the community. If this whole community had not developed to such an extent or if the existing school facilities were greater, the purported need supposedly would not be present.

Id.

The plaintiff's proposal of an additional 250 homes did not create the problem, it only added to a pre-existing municipal concern. The Court states, "Therefore, on the record in this case the school problem which allegedly exists here is one which the subdivider should not be obliged to pay the total cost of remediying, and to so construe the statute would amount to an exercise of the power of eminent domain without compensation." Id.

83. See McKain v. Toledo City Plan Comm'n, 270 N.E.2d 370 (Ohio 1971). The Court of Appeals of Ohio applied the standard when evaluating a land dedication requirement for an off-site road improvement. The Planning Commission sought a strip of land in order to repair a road that was 700 feet from the development sight and "totally unrelated to the proposed subdivision." See id. at 374. The plaintiff
Most recently, the Illinois Supreme Court reaffirmed the use of the "specifically and uniquely attributable" test in its first regulatory takings case since the United States Supreme Court’s decision in *Dolan*.\(^{84}\) In *Northern Illinois Home Builders Ass’n Inc. v. The County of Du Page*,\(^{85}\) the Illinois Supreme Court applied this standard when analyzing two state-enabling statutes permitting counties to impose transportation impact fees on new developments.\(^{86}\)

In deciding the case, the *Northern Illinois* Court used the first prong of the *Dolan* test and established that an essential nexus existed between preventing further traffic congestion and improving roads.\(^{87}\) When it applied the second prong of the analysis, however, the Court used a higher level of scrutiny in determining whether the exaction imposed was related enough to the potential impact of the new development. Instead of using *Dolan*’s "rough proportionality" standard, the Illinois Supreme Court used the "specifically and uniquely attributable" test\(^{88}\) and held that DuPage owned a single parcel of land, 3.71 acres in size. *See id.* at 372. The city demanded a 30-foot strip along one side of the parcel in order to widen an existing roadway. *See id.* at 373.

In deciding the takings issue in the case, the Court agreed that a municipality may require a developer to dedicate land if the proposed development creates such a need. *See id.* at 374. These needs however, must be specifically and uniquely attributable to the developer’s activities. *See id.* If this is not the case, the regulation is in “contravention of constitutional prohibitions” and is therefore forbidden. *See id.* The Court found that the need to repair a road 700 feet from the proposed development site, and completely unrelated to the subdivision, did not satisfy the "specifically and uniquely attributable" standard. *See id.; see also Ansuini, Inc. v. City of Cranston, 264 A.2d 910 (R.I. 1970) (holding that a city ordinance requiring a fixed percentage of the developer’s land will inevitably lead to inequities, and may not always meet the “specifically and uniquely attributable” test).*

\(^{84}\) *Dolan v. City of Tigard*, 512 U.S. 374 (1994).  
\(^{85}\) 649 N.E.2d 384 (Ill. 1995).  
\(^{86}\) *See id.* at 387. Although the state legislature had replaced the first enabling statute with the second, DuPage had enacted local ordinances under both and therefore both statutes required review. *See id.* Under the first enabling act, DuPage County passed an ordinance which called for the collection of impact fees in order “[T]o ensure that the new development pays a fair share of the costs of transportation improvements needed to serve new development.” *See id.* at 388.

A year and a half later, the state legislature repealed the first enabling act and passed the Road Improvement Impact Fee Law. (605 ILCS 5/5-901 et seq. (West 1992)) *See id.* This second enabling act included the language, “[a]n impact fee payable by a developer shall not exceed a proportionate share of costs incurred by a unit of local government which are specifically and uniquely attributable to the new development paying the fee.” *Id.* DuPage County subsequently amended its impact fee ordinances to reflect a number of changes. The new ordinances reflected changes in the previous ordinance’s impact fee schedules as well as in changes in fuel and property taxes. *See id.*  
\(^{87}\) *See id.* at 389.  
\(^{88}\) *See id.* The opinion states:
Page would impose impact fees only for road improvements made necessary by the new development. Moreover, the new development paying the fee must receive a “direct and material benefit” from the improvements the fee had financed.

III. Where Do We Go from Here: A Resolution to the Question of Judicial Scrutiny in Takings Law

While the Supreme Court has refined its approach to the takings issue, state and lower courts continue to grapple with the question of how and when to apply the Nollan/Dolan standard. It is time courts adopt a unified interpretation.

A. Interpreting the Scope and Application of Nollan and Dolan

The United States Supreme Court’s decision in Nollan, establishing the “essential nexus” requirement, has had several effects on the regulatory takings issue. First, the Supreme Court made it clear that municipalities would no longer be permitted to trade development rights for exactions that were unrelated to the projected impact of the development, and thus courts would be forced to look closely at the proffered reasons for the condition imposed.

The appellate court correctly found, and the parties agree, that Pioneer Trust sets forth the standard applicable in this case. Thus, “in order for the impact fee to pass constitutional muster the need for road improvement impact fees must be ‘specifically and uniquely attributable’ to the new development paying the fee.”

Id. (quoting Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961)). In completing its analysis of this issue, the Court found that only the second of the two enabling acts met the strict requirements of the “specifically and uniquely attributable” standard. See id. at 389. The majority reasoned that because this enabling act contained the phrase “specifically and uniquely attributable” it expressly mandated the required degree of connection between the exaction and the development. See id. The Court also relied on the fact that the second enabling act provided a clear definition of what “specifically and uniquely attributable” means. See id. The act states in its definitional section:

Specifically and uniquely attributable means that a new development creates the need, or an identifiable portion of the need, for additional capacity to be provided by a road improvement. Each new development paying impact fees used to fund a road improvement must receive a direct and material benefit from the road improvement constructed with impact fees paid.

Id. at 389-90 (quoting the definitional section of 605 ILCS 5/5-903 (West 1992)).

89. See id. at 390.
90. See id.
91. See supra notes 43-44 and accompanying text.
93. See supra note 40 and accompanying text.
94. See Nollan, 483 U.S. at 837.
Nollan also was an indication that the Court was preparing to reinvestigate the role of the Takings Clause in protecting private property rights and limiting land use regulations.95

In Dolan,96 the Supreme Court added the "rough proportionality" prong, and thus determined the required degree of connection between the exactions imposed and the projected impacts of the proposed development.97 The Court did not, however, clarify the scope of Dolan's application.98 It remains unclear whether the "rough proportionality" standard should be applied only to regulations that require a physical dedication of land, or if its scope is broader.

The Dolan standard clearly applies to exactions that require physical dedications of property because the Court's decision specifically relies on the fact that Tigard's restriction required a dedication of Dolan's property.99 In Dolan, the Court also noted its traditional concern for government actions that focus on individual citizens as opposed to society as a whole.100 Moreover, most conditions requiring physical dedications involve particular parcels of land and individual landowners, and thus are almost always subject to the Dolan test.

It is unclear, however, whether Dolan applies to the imposition of impact fees. The day after the Dolan decision was announced, the Supreme Court remanded a California Supreme Court case for reconsideration in light of its decision in Dolan.101 The California case, Ehrlich v. City of Culver,102 did not involve a physical dedication of land, but rather a landowner who was required to pay a $280,000 impact fee in order to get his project approved.103 The Supreme Court's instruction to review the case under Dolan strongly suggests that it intended the Dolan standard to apply to impact fees as well as physical dedications when such conditions were imposed on an individual basis.104

97. See supra note 54 and accompanying text.
98. See Cordes, supra note 43, at 538.
99. See Dolan, 512 U.S. at 385-86; see supra note 56 and accompanying text.
100. See Dolan 512 U.S. at 385-86.
101. See Murphy, supra note 2, at 246.
103. See id. at 471.
104. See Murphy, supra note 2, at 248. ("By vacating this decision one day after deciding Dolan, with instructions to the lower court to reconsider their holding specifically in light of Dolan, the Supreme Court impliedly suggested that impact fees
The *Nollan/Dolan* standard should be applied to impact fees because the Supreme Court, in both opinions, continually used the phrase "permit condition" as opposed to "land exaction" or "physical dedication." In both cases, however, the condition imposed by the municipality required a physical dedication of land. If the Court's intent was to limit the standards to only physical exactions, it consistently would have referred to these types of conditions. Instead, the Court referred to the municipality's requirements as "permit conditions," and therefore revealed its intent to apply the *Dolan* standard to impact fees as well.

Moreover, *Nollan* and *Dolan* should apply to impact fees because the Supreme Court, in both opinions, demonstrated its commitment to strengthen the protection of the Fifth Amendment's Taking Clause and reassert the importance of protecting individual property rights under the Clause. A narrow reading of these cases would unnecessarily weaken the Court's clear intent.

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105. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836 (1987). "The Commission argues that a *permit condition* that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking." *Id.* (emphasis added). "We therefore find that the Commission's imposition of the *permit condition* cannot be treated as an exercise of its land-use power for any of these purposes." *Id.* at 839 (emphasis added). See *Dolan*, 512 U.S. at 386. "In evaluating petitioner's claim, we must first determine whether the 'essential nexus' exists between the 'legitimate state interest' and the *permit condition* exacted by the city." *Id.* (emphasis added). "The second part of our analysis requires us to determine whether the degree of the exactions demanded by the city's *permit conditions* bears the required relationship to the projected impact of petitioner's proposed development." *Id.* at 388 (emphasis added).

106. See *supra* notes 38, 49, 50 and accompanying text.

107. See *supra* note 105 and accompanying text.

108. See *Nollan*, 483 U.S. at 841 ("We view the Fifth Amendment's Property Clause to be more than a pleading requirement."); *Dolan*, 512 U.S. at 392 ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."); see also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (holding land use regulation which deprives owner of all economic value of land constitutes a taking); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987) (holding that government must pay compensation for temporary regulatory taking).

109. See Murphy, *supra* note 2, at 252 (footnote omitted).
Whether *Dolan* applies to land use regulations based on broad legislative decisions is also a matter of debate. Language in the opinion suggests that the *Dolan* standard does not apply to such broad legislative acts. For example, zoning ordinances which restrict land use in a specific section of a city are not subject to the *Dolan* standard because the burden of the state interest being advanced is placed on the community as a whole. *Dolan*'s two-prong test should apply only when the cost of a benefit to society is being disproportionately placed on an individual landowner, not to broad legislative acts.

**B. The Protection of Property Rights**

Conditioning an individual's permit approval on the dedication of land or the payment of a fee is a different exercise of power than the government's power to pass regulations that effect society as a whole. In *Dolan* the Supreme Court attempted to ensure that the exercise of this power does not result in an unfair burden placed on an individual. In deciding *Dolan*, however, the Supreme Court adopted only an intermediate level of scrutiny, and thus failed to resolve the confusion and potential for government abuse surrounding the regulatory takings issue. Therefore, the Supreme Court should adopt one bright line, strict scrutiny test, in order to protect the private property rights of individuals singled out by the government for regulatory takings.

1. **The Ineffectiveness of the “Judicial Deference” Standard**

The inherent shortcomings of the “judicial deference” standard are clear because the municipality imposing the exaction is the branch of government that determines the nexus between the exaction and the projected harm. Therefore, under this standard, the exactions imposed are constitutional if the municipality says they are. Allowing the municipality to make these determinations

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110. See *Dolan*, 512 U.S. at 384. In the opinion, the Court acknowledges the importance and necessity of allowing state and local governments to engage in land use planning and points out the traditional power of governments to do so. See id.; see also Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”).

111. See *Cordes*, supra note 43, at 538.

112. See *infra* note 125.

113. See *Dolan*, 512 U.S. at 390.

114. See *Jenad*, 218 N.E.2d at 677. The dissent states, “The principle of decision in this case would constitutionally allow municipal officers to prohibit real estate development in cities, towns and villages unless the newcomers pay whatever sums of
without a high level of judicial scrutiny creates the potential for abuse of a municipality’s police power. In jurisdictions using the “judicial deference” standard, conditions imposed by municipalities are almost always constitutional.\(^\text{115}\)

2. The “Rational Nexus” Standard: Not Strict Enough

Despite its popularity in state courts, the “rational nexus” standard is simply not strict enough when used to analyze required exactions, because a “reasonableness” standard does not require a direct correlation between the alleged public need and the proposed development.\(^\text{116}\) Instead, it allows a municipality to present evidence to show that any one of a number of municipal concerns exist and that the required exaction will help alleviate one of those concerns.\(^\text{117}\)

For instance, concern for a growing population or overcrowded schools is likely a concern for a municipality at all times. Why should the developer pay to alleviate a pre-existing problem that the local government has been concerned with all along? Courts should force municipalities to prove that a new development specifically exacerbates a pre-existing problem, and hold the developer liable only for the cost of the aggravation and not the entire problem.

If the developer dedicates land or pays a fee, then the people who live in the immediate area or who will live in that development should benefit from the exaction. The “rational nexus” standard does not guarantee that the specific harm cited will be alleviated by the exaction because the standard does not require a direct correlation between the harm cited and the exaction imposed. Thus, it is time for the judiciary to challenge the abuse of development exactions in local government by increasing the level of scrutiny applied in deciding land use cases.\(^\text{118}\)

C. The “Specifically and Uniquely Attributable” Standard: A Call for Strict Scrutiny

The use of the “specifically and uniquely attributable” standard by the Illinois Supreme Court has been controversial since the

\[^{115}\] See supra note 62 and accompanying text.
\[^{116}\] See Morosoff, supra note 12, at 869.
\[^{117}\] See supra note 74 and accompanying text.
\[^{118}\] See Murphy, supra note 2, at 254.
United States Supreme Court decided *Dolan*. The reaffirmance of this test is important not only to the builders in Illinois, but also to private property owners nationwide. It exemplifies a judicial movement to restore private property rights and level the playing field on which developers and local governments interact.

1. **Curbing Government Abuse of Power**

In drafting the Fifth Amendment, one of Madison’s intentions in protecting private property was to ensure citizens a more extensive domain of liberty. Thus, property is not only a right, but also performs the function of maintaining independence so that other individual rights may be protected from the majority. When property rights are threatened, the danger of losing other civil rights exists because the sphere of protection that private property provides is weakened. In a constitutional democracy, such as in the United States, the right to property defines the areas in which the majority must yield to the minority. Therefore, such rights need to be protected with nothing less than the judiciary’s strictest level of scrutiny.

Advocates of heightened scrutiny argue that only rigorous judicial review will protect against the overreaching and abuse of government power. Allowing municipalities to package the issuance of permits with the conditions of exactions is an example of such an abuse. When this bundling of permits and exactions is allowed to

119. See generally J. Linn Allen, *Too high a price? Builders across U.S. contest impact fees*, CHI. TRIB., June 14, 1992, at 1. Local government officials argue that this standard is simply to tough for them to meet and to easy for the developer’s to overcome when an exaction is imposed. See id. According to these officials, tax caps make it extremely hard to finance the building of schools, parks, and roads in order to accommodate community growth and impact fees and required land dedications are the only way these municipalities can do so. They had hoped the Illinois Supreme Court would abandon this standard for the two prong test used in Dolan. See id. Builders and developers however, are obviously pleased with the reaffirming of this standard. According to them, impact fees and land dedications make building unaffordable and significantly raise the prices of affordable homes. It is this test, the developers claim, that levels an unbalanced playing field. See id.

120. See Barros, *supra* note 21, at 1858; see also *supra* note 22 and accompanying text.

121. See Barros, *supra* note 21.

122. See id. at 1857-58.

123. See id.

124. See St. Jeanos, *supra* note 11, at 1903 (citing the Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner at 11-12, *Dolan* (No. 93-518)).
occur, developers are often forced to bear the burdens that the Takings Clause was designed to eliminate.\(^ {125}\)

As Northern Illinois Home Builders Ass’n Inc. v. County of DuPage\(^ {126}\) exemplifies, the “specifically and uniquely attributable” standard decreases the likelihood of such an injustice because it requires that the new development specifically create the need for which the exaction is imposed,\(^ {127}\) and assures that the development receive a material benefit from the improvement that the fee finances.\(^ {128}\) Local governments and municipalities, however, retain the power to consider and regulate community growth under this test. As long as the cost placed on the developer is specifically and uniquely attributable to his/her activities, there is no violation of the developer’s property rights.

According to Professor Richard Epstein, “[e]rrors of overinclusion occur when the regulation sweeps wider than necessary to control the identified evil . . . .”\(^ {129}\) In effect, these overinclusive errors lead to individual land owners being forced to bear the costs of society because the municipality is requiring more from the individual than is needed to offset the individual’s activities. The Nollan/Dolan standard does not prevent such an injustice because it does not guarantee that the development dedicating the land or paying the fee is, in fact, the development that will receive the material benefit from the required dedication. The “specifically and uniquely attributable” standard, however, will strike down any regulation that requires more of an exaction than is needed to offset the externalities of the proposed development.\(^ {130}\)

In guarding against the overreaching abuse of a local government’s police power,\(^ {131}\) the “specifically and uniquely attributable” standard also examines the municipality’s incentive for using this

\(^ {125}\) The United States Supreme Court has stated, “(o)ne of the principal purposes of the Takings Clause is ‘to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’” Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

\(^ {126}\) 649 N.E.2d 384 (Ill. 1995).

\(^ {127}\) See id. at 389; see also supra note 88 and accompanying text.

\(^ {128}\) See id. at 389-90; see also supra note 88 and accompanying text.


\(^ {130}\) See Northern Illinois Home Builders Ass’n, 649 N.E.2d at 390-91; see also supra note 88 and accompanying text.

power. If a municipality's power to issue development permits conditioned on exactions goes unchecked, the municipality has an enormous incentive to solve all types of problems unrelated to the development.\textsuperscript{132} By requiring that the development be the specific cause of the impact for which the exaction is imposed, the local government no longer has such an incentive because local officials would know that their actions would be analyzed under rigorous judicial scrutiny. Therefore, under this standard, there is little room for the government to abuse its power by unfairly taking land and imposing impact fees.

2. Balancing the Unstable Political Process

Heightened scrutiny also is necessary because the political process is directly connected to the problems surrounding the takings issue.\textsuperscript{133} Often, local politics create factions that discriminate against outside developers or individuals who do not have voting rights or political clout within the community.\textsuperscript{134} Upon entering the community with a development proposal, these individuals must face local land use regulations without the aid of the political process.\textsuperscript{135}

In addition, most land use regulations are not self-executing.\textsuperscript{136} Instead, a broad regulation is applied and enforced by local planning boards that are influenced by the municipality's officials and insiders.\textsuperscript{137} According to Professor Epstein, "[a]n enormous slippage thus occurs between the articulation of a general principle and its concrete application."\textsuperscript{138} Therefore, what tends to happen is that the actual application of the regulation becomes skewed by the influence of local officials and protesters seeking to avoid the development completely or to avoid the payment of just compensation.

The "specifically and uniquely attributable" standard's strict scrutiny is necessary to balance the unstable political process that administers land use regulations.\textsuperscript{139} By applying this test to re-

\begin{itemize}
\item \textsuperscript{132} See St. Jeanos, \textit{supra} note 11, at 1904 n.151 (citing the Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner at 20, \textit{Dolan} (No. 93-518)).
\item \textsuperscript{133} See Epstein, \textit{supra} note 129, at 265.
\item \textsuperscript{134} See id. at 264.
\item \textsuperscript{135} See id. ("[W]hy should they be required to negotiate the hurdles of the local zoning procedures in order to overcome obstacles to land development that never should have been erected in the first instance?").
\item \textsuperscript{136} See id.
\item \textsuperscript{137} See id.
\item \textsuperscript{138} See Epstein, \textit{supra} note 129, at 265.
\item \textsuperscript{139} See id.
\end{itemize}
quired physical exactions and impact fees, the reviewing court will be able to: 1) directly measure the impact of the regulation; 2) sort through the political red-tape and examine the true motive of the municipality imposing the exaction; and 3) if necessary, determine the correct amount of compensation owed to the individual property owner.\textsuperscript{140}

3. The "Specifically and Uniquely Attributable" Standard Is Not "Too Exacting"

Government officials and other opponents of heightened scrutiny believe that the "specifically and uniquely attributable" standard is too exacting.\textsuperscript{141} They argue that this test requires a showing of data and information about proposed projects that is practically impossible to obtain, and that it rarely results in the finding of a sufficient nexus between the need created and the exaction imposed.\textsuperscript{142}

This argument is flawed, however, because a municipality that has the resources to meet the intermediate standard of review also has the resources to show that the exaction is specifically and uniquely attributable to the new development. Once this burden is met, the development is guaranteed a direct and material benefit from either the land given or the fee paid. The municipality can make its necessary improvements, at the cost of the developer, without unconstitutionally limiting the latter's right to private property. Moreover, this increased burden on the municipality is justified because an individual's property rights are at stake.

4. The "Specifically and Uniquely Attributable" Standard Does Not Prohibit Government Land Use Regulations

Law and economics advocates also argue against the use of strict scrutiny in land use regulation cases.\textsuperscript{143} They contend that the trade of a permit for an exaction is an efficient transfer which keeps the market competitive and thus benefits society as a whole.

\textsuperscript{140} See id. at 266.

\textsuperscript{141} See Gerald P. Callaghan, \textit{Illinois High Court Reaffirms Strict Test For Development Fees}, 18 Chi. Lawyer 73 (May 1995). Many of the opponents use the same reasoning as the United States Supreme Court did in \textit{Dolan}, however the Court in that case relied on the "nature of the interests at stake." See Dolan v. City of Tigard, 512 U.S. 374, 3889-90 (1994).

\textsuperscript{142} See Murphy, supra note 2, at 226 (citation omitted).

\textsuperscript{143} See St. Jeanos, supra note 11, at 1904 (noting that economists argue that the swap of an exaction for a permit to develop is an efficient transfer).
These opponents also argue that the "Lochner Era" established that courts have no authority to review governmental economic decisions, such as the financing of public roads and schools.

While the economic argument presents legitimate concerns when discussing the role of courts in a municipality's business decisions, it is not persuasive when the constitutional right to property is at stake. The "specifically and uniquely attributable" test does not eliminate a municipality's right to regulate land use, a necessary function in modern day society. Instead, this standard allows courts to protect landowners from municipal overreaching and abuse of power without becoming improperly involved in the municipality's decisions. Moreover, it removes the municipality's incentive to abuse its power to regulate land use. When the municipality attempts to do so, the "specifically and uniquely attributable" standard provides the courts with a bright line test to use in order to protect an individual's property rights.

Conclusion

In the controversy surrounding land use exactions, the Fifth Amendment should be interpreted to permit an individual to freely develop property without bearing unfair costs imposed by a municipality. With the use of minimum or intermediate levels of review, the protection afforded by the Takings Clause is improperly reduced. By requiring that land use exactions be specifically and uniquely attributable to the projected impact of the new development, individual private property rights will be restored.

145. See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 829-31 (3d ed. 1996). The "Lochner-era" refers to the time period between 1905 and 1934 when the United States Supreme Court used heightened judicial scrutiny, relying on the Due Process Clause of the Fourteenth Amendment, to strike down approximately 200 economic regulations. Id.
146. See St. Jeanos, supra note 11, at 1905.
147. See Dolan v. City of Tigard, 512 U.S. 374, 384 1994) (noting that the power of state and local governments to engage in land use regulation still exists).
HARNESSING PAYNE: CONTROLLING THE ADMISSION OF VICTIM IMPACT STATEMENTS TO SAFEGUARD CAPITAL SENTENCING HEARINGS FROM PASSION AND PREJUDICE

Beth E. Sullivan*

Introduction

It was just three days before Christmas when James Bernard Campbell came into the Reverend Bosler's home and brutally murdered the Reverend and critically injured his daughter Sue Zann. Sue Zann Bosler stood terrified and helpless as this total stranger stabbed her father twenty-four times, and then stabbed her six times, leaving them both for dead. Sue Zann's father died, but, miraculously, she survived and now must live everyday with the painful memories and physical scars of this gruesome crime.

A jury convicted Campbell of murder in the first degree. At the sentencing hearing, the judge informed the jury that the sentence could be either death or life imprisonment. Sue Zann took the stand to give a victim impact statement, as permitted by Florida law, which would inform the jury about her own life and the life her father lived. She gave "deep," "dramatic," and "emotionally moving" testimony. In short, Sue Zann was the prosecution's "blockbuster witness," who, through her wrenching testimony,

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1. See 48 Hours: My Father's Killer (CBS television broadcast, Oct. 2, 1997) (noting that the crime occurred on December 22, 1968) [hereinafter 48 Hours].
2. See id.
3. See id.
4. See id.
5. See id.
6. See id.
7. Id. With tears streaming down her face, she described the savage murder and the pain she endured. See id. Between tears, she relayed to the jury how the stabbing resulted in taking the side and part of her brain out of her skull. See id.
helped secure the death penalty.\(^8\) Two courts, however, subsequently reversed the sentence on technicalities.\(^9\)

Meanwhile, over the past ten years, Sue Zann Bosler has become the person most determined to keep Campbell alive.\(^10\) At the third sentencing hearing in ten years, Sue Zann again took the stand, but under significantly different circumstances.\(^11\) In a valiant effort to uphold the beliefs of her father, who opposed the death penalty, Sue Zann was determined to see peace prevail.\(^12\) While her prior testimony was "deep and eloquent," this time it was "as unsympathetic and undramatic as possible."\(^13\) In response to the prosecution’s question about her livelihood, Sue Zann explained that she has two jobs: one as a hairstylist and one as an advocate

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8. Id.
9. See id.; see also Campbell v. State, 571 So.2d 415 (Fla. 1990) (vacating death penalty and remanding for resentencing on grounds that the court should have considered in mitigation the fact that Campbell suffered from impaired capacity and had a deprived and abusive childhood); Campbell v. State, 679 So.2d 720 (Fla. 1996) (reversing death sentence and remanding for third resentencing, holding that Campbell was denied a fair penalty hearing because the prosecutor improperly discredited the defense psychologist and made improper comments to the jury).
10. See 48 Hours, supra note 1. "Despite what has happened, she sees James Campbell not as a monster, but as a human being." Id. In fact, Sue Zann has become a leading voice in the movement against the death penalty, traveling nationwide with a group called "Murder Victims’ Families for Reconciliation," in an effort to enlist support and encouragement for the movement, as well as Campbell. Id. "It has become her cause, almost her obsession," to save not only Campbell, but every single person on death row. Id.
11. See id.
12. See id. Sue Zann Bosler recalled how her father once had told her that if he were to be murdered he still would not want the defendant to be put to death; for, more than anything, he desired peace on earth. See id.
13. Id. No longer did she clutch a tissue and wipe her tears; rather, she remained calm and collective. See id. She referred to the defendant as "James" or "the gentleman," as she coldly and abruptly responded to the prosecution’s questions about the crime. Id. "It was deliberate - she had an agenda," noted the prosecutor, who described Sue Zann’s victim impact statement to be a different testimony entirely, with a different Sue Zann." Id.
against the death penalty.\textsuperscript{14} In only three hours the jury returned a sentence of life imprisonment.\textsuperscript{15}

A comparison of Sue Zann's remarkably different testimonies reveals the role emotions can play in capital sentencing, and how significantly they can prejudice the defendant's constitutional rights. When Sue Zann expressed pain and torment, Campbell received the death penalty; however, upon manipulating her testimony so as to maintain a calm and distant appearance, Campbell received only life imprisonment. Unlike Sue Zann, however, most victims support the death penalty.\textsuperscript{16} In fact, in today's society, victims are often the driving force behind the prosecution's push for a death sentence,\textsuperscript{17} and it is their tears and painful recollections that

\textsuperscript{14} See id. While Florida law does permit the use of victim impact statements in capital sentencing hearings, the State has made clear the prohibition against any opinions regarding the death penalty of life imprisonment. See id.; see also FLA. STAT. ANN. § 921.141 (West Supp. 1997). Despite this restriction by the state, Sue Zann still managed to find a loophole through which she could express her beliefs. But, when she was called back to the stand by the defense, the judge was skeptical about letting her proceed. See 48 Hours, supra note 1. He sent the jury out and ordered Sue Zann to tell him what she planned to say. See id. In response, she asserted that she wanted to forgive James. See id. Moreover, she commented, "I respect his life and value it here on this earth, and I believe in life." Id. The judge ruled that such opinions have no place in the courtroom and are not allowed under Florida law. See id. As such, the defense found no room to call Sue Zann as a witness.

\textsuperscript{15} See id. Sue Zann's determination to save Campbell's life ended in victory, not only for herself and Campbell, but also for the movement. In retrospect, she believes this final sentencing gave her the closure she so desired and her own life a new beginning. See id. But, while that is indeed heart-warming, that was not what our courtrooms were designed for. The purpose of a criminal prosecution is not to heal the wounds of the victim, but to punish the offender. Oftentimes the two may coincide, but that cannot be the sole mission of justice.

\textsuperscript{16} See Tom Morganthau, Condemned to Life, Newsweek, Aug. 7, 1995, at 19 (reporting that only 17% of those questioned in a random poll oppose the death penalty in all cases). "Now more than ever, Americans support the death penalty by striking majorities." Id. In a poll taken by Princeton Survey research associates, 79% of the adults surveyed favored the death penalty for Timothy McVeigh. See id.; see also David Wallechinsky, 'He Killed My Child, But I Don't Want Him To Die,' Parade Magazine, Jan. 18, 1998, at 4 (noting that recent surveys conclude that a majority of Americans favor the death penalty).

\textsuperscript{17} See generally Editorial, Death and Delusion, 19 Nat'tl L.J. 44, June 30, 1997, at A14 (noting that "[p]opular sentiment has long favored the death penalty"); Scott Robinson, Editorial, Stacking the Deck Heart-Wrenching 'Victim Impact' Statements Make it Virtually Impossible for Jurors to Set Emotion Aside, Rocky Mt. News, June 8, 1997, at 1B (noting that in "modern-day death penalty trials" the "emphasis has shifted to the personal human consequences of crime, paving the way for death sentences based on moral outrage and retribution"); Brent Staples, Editorial, When Grieving 'Victims' Can Sway the Courts, N.Y. Times, Sept. 22, 1997, at A26 (stating that "the solemn activity of mourning has become a raucous and public blood sport").
deeply touch the jury in a way that substantially prejudices the defendant.  

Victim impact evidence, as introduced by oral testimony and statements that identify victims of the crime and the extent of their suffering, presents a myriad of problems to the American court system, especially with regard to the criminal defendant's right to a fair trial. This Note traces the historical development of victim impact statements ("VIS") through United States Supreme Court jurisprudence and state legislation, and analyzes their use in the sentencing phase of capital trials. Part I explores the case and statutory history of VIS during capital sentencing hearings. Part II examines the current use of VIS and the reality of their consequences, by comparing the recent sentencings of Jesse Tsimmendequas and Timothy McVeigh. Part III argues that the Supreme Court's decision in Payne v. Tennessee has troublesome implications in light of the capital defendant's constitutional rights, the history of the death penalty, and traditional sentencing procedures. This Note concludes by proposing guidelines that should be expressed in an amendment to the United States Constitution to compel all courts to uniformly regulate the use of VIS during capital sentencing hearings and to protect the constitutional rights of defendants.

18. Rule 403 of the Federal Rules of Evidence recognizes how substantially emotions can prejudice in holding that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVI D. 403. The prejudice which Rule 403 refers to is "unfair prejudice." Ballou v. Henri Studios, 656 F.2d 1147 (5th Cir. 1981) (noting that unfair prejudice is "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one"). See e.g., Terry v. State, 491 S.W.2d 161 (Tex. Crim. App. 1973) (holding that the autopsy pictures revealing severed parts of an infant's body "clearly served to inflame the minds of the jury"); see also infra notes 80-87 and accompanying text (detailing the pain and anguish jurors, reporters, and spectators endured as family members of the victims of the Oklahoma bombing took the stand at Timothy McVeigh's sentencing hearing).

19. See United States v. McVeigh, 944 F. Supp. 1478, 1491 (D. Colo. 1996) (stating that victim impact statements are the "most problematical of all the aggravating factors and may present the greatest difficulty in determining the nature and scope of the 'information' to be considered").

20. 501 U.S. 808 (1991) (holding that "the eighth amendment did not erect a per se bar prohibiting a capital sentencing jury from considering victim impact evidence").
I. A Historical Perspective

A. Case Law

The constitutionality of victim impact evidence was first addressed by the Supreme Court in *Booth v. Maryland.* The Court held, in a five-to-four decision, that the Eighth Amendment prohibits a capital sentencing jury from considering VIS. The VIS, prepared by the State of Maryland, provided the jury with a description of the personal characteristics of the victims and the emotional impact of the crime on the survivors. They also contained family members' detailed characterizations and opinions of both the crime and the defendant. The Court found that the admission of VIS "creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner."

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21. 482 U.S. 496 (1987). Booth was convicted of robbing and murdering an elderly couple and a jury of his peers sentenced him to death, after considering a VIS. See id. at 501-02.

22. See id. The Court reasoned that such information is entirely irrelevant to the decision of imposing the death penalty. See id. at 503.

23. See id. at 499-500.

24. See id. The statement was formulated on the basis of interviews with the families of both of the victims and described in great detail the emotional impact of the crime, including personal problems that the survivors have since endured. See id. at 499. It also emphasized the victims' background and personalities, highlighting their best qualities and stressing how much they would be missed. See id. In one section, the daughter "concluded that she could not forgive the murderer, and that such a person could 'n'ever be rehabilitated.'" Id. at 500 (quoting App. 62). The son noted that as a result of the crime he suffers from insomnia and depression, and is "fearful for the first time in his life." Id. (quoting App. 61). Moreover, he asserted that his parents were "butchered like animals." Id. "The VIS also noted that the granddaughter had received counseling for several months after the incident, but eventually stopped because she concluded that 'no one could help her.'" Id. (quoting App. 63). The State Division of Parole and Prohibition official, who had conducted the interviews, concluded the VIS by writing: "It is doubtful they will ever be able to fully recover from this tragedy and not be haunted by the memory of the brutal manner in which their loved ones were murdered and taken from them." Id. (quoting App. 63-64).

Defendant moved to suppress this emotionally laden VIS on the grounds that it was "both irrelevant and unduly inflammatory, and that therefore its use in a capital case violated the Eighth Amendment of the Federal Constitution." Id. at 500-501; see also U.S. CONST. amend. VIII (providing that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

25. *Booth,* 482 U.S. at 503. The Court in *Booth* was deeply concerned with prejudicial impact VIS can have on defendants, especially in light of their irrelevancy to the blameworthiness of the defendant. See id. at 504. The Court reasoned that the defendant most often does not know the victim and therefore can have no such knowledge about his or her character and/or family. See id. (stating that studies have revealed "defendants rarely select their victims based on whether the murder will
The Supreme Court subsequently held, in *South Carolina v. Gathers*, that VIS given by a prosecutor also violate the Eighth Amendment. Relying on *Booth*, the Court held that the state...
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ments at issue concerned "personal characteristics of the victim" which were irrelevant to the defendant's blameworthiness. As such, the Court deemed it unconstitutional to impose a sentence of death based upon factors of which the defendant could not have been aware.

Only two years later, however, the Court, in Payne v. Tennessee, overruled Booth and Gathers, in so far as they prohibited VIS. The Payne Court's six-to-three decision opened the door to victim impact evidence relating to the personal characteristics of the victim, the emotional impact of the crime on the victim's family, as

several bags containing such religious articles as rosary beads, two Bibles, olive oil, plastic statues, and religious tracts. See id.

The prosecutor's closing remarks before the sentencing jury included reading at length from a religious tract that the victim had been carrying at the time of the murder and commenting on personal qualities inferred from the possession of such. See id. at 808. The tract from which the prosecutor read was entitled "The Game Guy's Prayer." It relied upon metaphors of football and boxing to extol the virtues of the "good sport." See id. at 807. The prosecutor inferred from the fact that the victim possessed this tract, as well as a voter registration card, that he was a religious man who cared about his community. See id. at 809. The prosecutor remarked:

We know from the proof that Reverend Minister Haynes was a religious person. He had his religious items out there .... Among the many cards that Reverend Haynes had among his belongings was this card. It's in evidence. Think about it when you go back there. He had ... religious items, his beads. He had a plastic angel.

Id. at 808 (citing App. 41-43). In addition, the prosecutor read one of the victim's prayers at length, and concluded: "Reverend Haynes believed in this community. He took part. And he believed that in Charleston County, in the United States of America, that in this country you could go to a public park and sit on a public bench and not be attacked by the likes of Demetrius Gathers." Id.

28. Id. at 811 (noting that the statement by the prosecutor is "indistinguishable in any relevant respect from that in Booth"). "As in Booth, '[a]llowing the jury to rely on [this information] ... could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill." Id. (citing Booth, 482 U.S. at 505).

29. The Court relied on their prior holding in Booth, in which the Court held that "such statements introduced factors that might be 'wholly unrelated to the blameworthiness of a particular defendant.' " Id. (citing Booth, 482 U.S. at 504). In conclusion, the Gathers Court rendered the content of the victim's belongings, such as the religious tract from which the prosecutor read and his voter registration card, to have been completely irrelevant to the circumstances of the crime. Id. at 812 (stating that "[u]nder these circumstances, the content of the various papers the victim happened to be carrying when he was attacked was purely fortuitous and cannot provide any information relevant to the defendant's moral culpability"). The logic of this reasoning seems obvious when considering the flip side of the facts of the Gathers case. For instance, the victim's bag could very well have contained porno magazines and a dime bag of marijuana instead of religious artifacts.

well as comments from the prosecutor. The Court reasoned that the Booth decision "unfairly weighted the scales in a capital trial" because the defendant has a right to introduce all mitigating evidence that may inform the jury about his character, while the State is barred from counteracting such evidence. Moreover, the Court

31. See id. (holding that "[t]he Eight Amendment erects no per se bar prohibiting a capital sentencing jury from considering 'victim impact' evidence relating to the victim's personal characteristics and the emotional impact of the murder on the victim's family, or precluding a prosecutor from arguing such evidence at a capital sentencing hearing"). Payne was convicted of first-degree murder of a mother and her two-year-old daughter, and first-degree assault with intent to murder a three-year-old boy. See id. at 811. The jury sentenced Payne to death and Payne appealed, contending that the admission of testimony by the victim's grandmother, as well as the State's closing argument, violated his Eighth Amendment rights under Booth. See id. at 816.

The grandmother's testimony described how her grandson Nicholas had been affected by the murders of both his mother and sister. See id. at 814. She asserted:

He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie.

Id. at 814-15 (citing App. 3).

During closing arguments, in an effort to persuade the jury to apply the death penalty, the prosecutor commented:

There is obviously nothing you can do for Charisse and Lacie Jo. But there is something you can do for Nicholas. Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened to his baby sister and his mother. He's going to want to know what type of justice was done. He is going to want to know what happened. With your verdict, you will provide the answer.

Id. at 815 (citing App. 12).

The Supreme Court of the United States affirmed both the sentence and the conviction, rejecting the merit of Payne's assertions. See id. at 827 ("A state may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed."). The Court grounded its reasoning on the assertion that "the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment. Id. at 819 (reasoning that "two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm"). The Court illustrated that two defendants may each participate in a robbery, and each may act with "reckless disregard for human life," but only one defendant may be subject to the death penalty simply because his robbery resulted in the death of a victim, while the other's did not. Id. (citing Tison v. Arizona, 481 U.S. 137, 148 (1987)).

32. See id. at 822. The Court reasoned:

while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering 'a quick glimpse of the life' which a defendant 'chose to extinguish,' or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide.

Id. (quoting Mills v. Maryland, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)); see also Booth, 482 U.S. at 517 (White, J., dissenting) (arguing that the State has a
argued that VIS are not offered to provoke prejudicial and arbitrary determinations, but rather to show each victim's "uniqueness as a human being." According to the Payne Court, the specific harm caused by the defendant is essential to the jury's meaningful assessment of the defendant's "moral culpability and blameworthiness."

**B. Victims' Rights Movement and the Legislative Response**

Over the past three decades, a massive outpouring of support for victims' rights has proliferated. Motivated by the same concerns legitimate interest in countering the defendant's mitigating evidence "by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family".

The Court deemed it an insult to all civilized members of society to welcome a parade of witnesses who will testify on the defendant's behalf (i.e., with respect to character, good deeds, troublesome background, upbringing, etc.), without granting the victim an equal right of response. The Court found that to virtually place no limits on the introduction of mitigating evidence by the defendant, but to bar the State "from either offering 'a quick glimpse of the life' which a defendant 'chose to extinguish', . . . or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide," is to unfairly weight the scales in a capital trial. *Id.* at 822 (quoting Mills v. Maryland, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)). Thus, in a sincere effort to address such inequity and "keep the balance true," the Court granted the victim a role in the prosecution. *Id.* at 826 (citing Snyder v. Massachusetts, 291 U.S. 97, 122 (1934)). And, by rendering the heinousness of the crime to be an inherent part of the defendant's blameworthiness, the Court removed victims from the second-rate position they have for so long assumed, thereby tipping the scales of justice back in the other direction.

33. *Id.* at 823 (dismissing the *Booth* Court's concern that VIS will encourage comparative judgments such as, "that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy").

34. *Id.* at 825. However, in rendering VIS valid under the Eighth Amendment, the Court did not mean to say that they were not troublesome. Justice O'Connor's concurrence noted: "We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, 'the Eighth Amendment erects no per se bar.'" *Id.* at 831. "If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment." *Id.*

35. See Carrie L. Mulholland, Note, *Sentencing Criminals: The Constitutionality of Victim Impact Statements*, 60 Mo. L. Rev. 731, 734 (1995) ("The rise of the victims' rights movement started in the 1960's, in conjunction with the women's rights movement's claim that the criminal system mistreated rape victims").

Recent years have seen an outpouring of popular concern for what has become known as 'victims' rights' — a phrase that describes what its proponents feel is the failure of the courts of justice to take into account in their sentencing decisions not only the factors mitigating the defendant's moral
as the *Payne* Court, advocates of the victims' rights movement seek to balance the rights of victims with those already granted to the defendant by entitling them to a voice and a means of fair redress. They argue that the system ignores victims, thereby victimizing them twice. In an attempt to level the playing field, the

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36. See Mulholland, supra note 35, at 734 (1995) ("Supporters of the movement contended that the criminal justice system was entirely unsympathetic to victims by denying them a formal role in the judicial system, exploiting them to prosecute the criminal, and failing to provide rehabilitation or assistance after sentencing of the criminal."). Essentially, supporters mandate that the law provide victims with a more meaningful role in the criminal justice system. See id.; see also Diane Kiesel, *Crime and Punishment: Victim Rights Movement Presses Courts, Legislatures*, 70 A.B.A. J. 25, 28 (Jan. 1984).

37. See Oberlander, supra note 35. Some victims feel as though the system excludes them from participating in the prosecution of the defendant, thereby victimizing them yet again. See id.; see also Thomas J. Phalen & Jane L. McClellan, *Speaking For The Dead At Death Sentencing: Victim Statements in Capital Cases — A Right of Survivorship?*, 31 ARIZ. ATT'Y 12, 12 (Nov. 1994) (noting that one goal of the movement is "to prevent victims from being victimized twice — once by the criminal and once by the criminal justice system"). Essentially, the argument is that victims are too
movement places primary emphasis on passing legislation, with an ultimate goal of achieving a constitutional amendment.\textsuperscript{38} Two concerns seem to govern the movement: (1) the desire for the victim to obtain closure and regain a sense of control over life, and (2) the concern for retributive justice.\textsuperscript{39}

often forgotten by the system, and deemed irrelevant to the administration of justice. By means of the VIS, however, the jury is forced to view the victim as flesh and blood and take into account the true extent of the defendant's actions. Without such evidence, both the crime and the victim are otherwise marginalized.

\textsuperscript{38} See Kelly McMurry, Victims' Rights Movement Rises to Power, ASS'N OF TRIAL LAW. OF AM., July 1, 1997 (stating that the "ultimate goal" of victims' rights advocates is "to win passage and enactment of a proposed victims' rights amendment to the U.S. Constitution" and further noting that this effort has already achieved "the endorsement of President Clinton and won significant bipartisan support in Congress"). Supporters of the amendment are motivated primarily by the hope that its passage would "bring into balance a criminal justice system in which the scales are tipped in favor of the accused." \textit{Id.} (noting that "[a]n amendment would also ensure that crime victims' rights are enumerated in much the same way the Bill of Rights outlines protections for criminal defendants"). In its current form, as Senate Joint Resolution 6, the proposed 28th Amendment provides victims of violence the following rights:

- to be notified of and to attend all public proceedings relating to the crime;
- to be heard and to submit impact statements at sentencing and parole hearings;
- to be notified of an offender's release, parole, or escape; to a final disposition of the criminal proceedings without unreasonable delay; to an order of restitution from the convicted offender; to have the safety of the victim considered in determining any offender's release from custody; and to be notified of these rights.

\textit{Id.} (noting that "[w]hile advocates are quick to applaud . . . federal and state measures, they contend that the legislation varies in scope and, when taken together, does not go far enough to ensure that 'justice, fairness, and equity are extended to all innocent victims of crimes, just as we properly do for those accused of crimes'.") In essence, the above proposal combines the assurances of a number of federal and state legislative acts into a constitutional amendment in an effort to ensure universal application. See also Evan Gahr, Advocates Raise Wide Support for Victims-Rights Amendment, INSIGHT MAG., March 10, 1997, at 42 (noting that the leaders of the grassroots crime-victims movement are pushing for amendment because "[a]bsent federal action . . . the justice system will continue to treat victims as second-class citizens"). The overall consensus of the advocates is that there is a pressing need to enumerate such rights; for without an amendment there is no way to guarantee that the rights of crime victims will not be ignored. See \textit{id.} The rights provided by the proposal are indeed pertinent in ensuring a victims a greater degree of rights within the justice system; however, the proposal ignores the effects on the defendant. My own proposal, in contrast, addresses the rights of both victims and defendants, in an effort to attain a true balance. See supra notes 145-155 & accompanying text. Rather than included only general provisions that essentially reiterate current statutory rights, my amendment proposal focuses primarily on controlling the prejudice which VIS have the grave potential to create. See \textit{id.}

\textsuperscript{39} Oberlander, \textit{supra} note 35, at 1624 (citing Maureen McLeod, Victim Participation at Sentencing, 22 CRIM. L. BULL. 501, 504 (1986)). "A victim is often devastated by the criminal act against her because of her resulting feeling of vulnerability and her sense that she has lost control over her life. Consequently, some critics have viewed the victims' rights movement merely as a self therapy for victims." \textit{Id.} at 1624-25; see
In response to innumerable proposals by victims' rights advocates and out of a growing concern for the rights of victims, Congress took a ground-breaking step in 1982 and enacted the Victim and Witness Protection Act,\(^{40}\) which sought to accord witnesses and victims a greater degree of rights and protections in the criminal justice system.\(^{41}\) In 1990, Congress passed the federal Victims Rights and Restitution Act,\(^{42}\) more commonly known as the Victims' Bill of Rights,\(^{43}\) granting victims the right to be notified of, and present at, court proceedings and to be kept apprised of the status of such factors as the defendant's conviction, sentencing, imprisonment, and release.\(^{44}\) The Victims' Bill of Rights mandated that victims could not be excluded from the courtroom, unless their

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41. See id.; see also Oberlander, supra note 35, 1626 n.28 (stating that the Act "codified Congressional findings that recognized the importance of victims in the criminal justice system"). The Victim and Witness Protection Act recognized the importance of victims in the criminal justice system, declaring its purposes to be:

(1) to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process; (2) to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant; and (3) to provide a model for legislation for State and local governments.

See Oberlander, supra note 35 at 1626 n.28 (citing 96 Stat. at 1249). In addition, the Act "amended the Federal Rules of Criminal Procedure to require the inclusion of victim impact as part of the presentence report submitted to the sentencing authority." Mulholland, supra note 35, at 735.

42. 42 U.S.C. § 10606(b) (1995). A crime victim has the following rights:

(1) the right to be treated with fairness and with respect for the victim's dignity and privacy; (2) the right to be reasonably protected from the accused offender; (3) the right to be notified of court proceedings; (4) the right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial; (5) the right to confer with attorney for the Government in the case; (6) the right to restitution; (7) the right to information about the conviction, sentencing, imprisonment, and release of the offender.

Id.

43. See McMurry, supra note 38.

44. See id. (citing Paul G. Cassel & Robert E. Hoyt, The Tale of Victims' Rights, LEGAL TIMES, Dec. 23, 1996, at 32); see also 42 U.S.C. § 10606(b).
presence at trial would materially alter their testimony at the sentencing.45

This conditional language of the Victims' Bill of Rights was tested, however, during the Timothy McVeigh trial,46 when Judge Matsch ruled that if the victims of the crime were to testify at the sentencing, then they could not be present at the trial.47 Consequently, most victims of the Oklahoma bombing faced a Catch-22. If they opted to testify at sentencing, then they would never see justice play out. If they watched the trial, however, then they could never personally tell the jury of their suffering.48 Frustrated and angered by having to make such a painful choice, the victims turned to Congress in hopes of redress, arguing that the defendant had no legitimate basis for barring them from trial.49

In response to their cries, President Clinton endorsed the "Victim Rights Clarification Act"50 ("VRCA") on March 19, 1997, overruling Matsch's order on the eve of the trial and mandating that a crime victim be permitted to make VIS, as well as observe


46. McVeigh was found guilty and sentenced to death for using an explosive-laden truck to blow up the Alfred P. Murrah Federal Building in Oklahoma City, consequently killing 168 people and injuring hundreds more. See John Gibeaut, The Last Word: Jury Is Still Out On Effects Of Victim Impact Testimony, A.B.A. J., Sept. 1997, at 42. Six months after McVeigh was sentenced to die, Terry Nichols was convicted of conspiring with McVeigh and eight counts of involuntary manslaughter, but acquitted of first degree murder and use of a truck bomb. See Jo Thomas, Death Penalty Ruled Out As Nichols Jury Deadlocks in Oklahoma Bombing Case, N.Y. TIMES, Jan. 8, 1998, at A1. Nichols, however, escaped the death penalty, on January 7, 1998, when the deeply divided jury failed to reach a unanimous decision. See id. (stating that after deliberating for 13 hours, over the course of two days, the Federal jury "could not decide just how active a role he played in the bombing"). Judge Matsch dismissed the jury and will now impose sentencing himself. See id. But, under Federal law, only a jury may impose a sentence of death; thus, Nichols will now get a life term, or possibly a lesser sentence. See id. (noting that Nichols still could face the death penalty should a grand jury in Oklahoma indite him and McVeigh in state murder charges).

47. See United States v. McVeigh, 958 F. Supp. 512, 514 (D. Colo. 1997) (excluding potential penalty witnesses from the courtroom under Rule 615 of the Federal Rules of civil Procedure); see also McMurry, supra note 38 (stating that Judge Matsch's concern was "[t]hat what they heard and saw in the courtroom could prejudice their testimony").

48. See McMurry, supra note 38.

49. See id.; see also 143 CONG. REC. S2507-01, S2507 (March 19, 1997) (noting that the Victim Rights and Restitution Act serves to clarify the Victims' Bill of Rights "so it is indisputable that district courts cannot deny victims and surviving family members the opportunity to watch the trial merely because they will provide information during the sentencing phase of the proceedings"); Judge Gives Bomb Survivors OK to Attend McVeigh Trial, S. F. EXAMINER, March 26, 1997, at A11.

the trial itself. The Act's goal is to treat victims with a greater degree of respect by demanding that they be granted not only a voice by which to express their pain, but also a wider latitude of participation.

II. The Reality of Victim Impact Statements in the Courtrooms of Capital Sentencing Hearings Today

The VRCA and the Payne decision provide the groundwork for the law today with respect to VIS, despite their failure to specify any limitations or guidelines regarding the scope of admissible statements. Thus, while forty-nine states presently allow the sentencing jury to consider VIS in non-capital cases, the extent of their use varies distinctly from court to court, and state to state.

Many jurisdictions mirror the Payne Court's decision, broadly allowing statements from the families of victims about the impact of

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51. See id. The statute, which is currently in effect, enacted a new provision that allows victims of crime in capital cases to observe the trial "of a defendant accused of that offense because such victim may, during the sentencing hearing, testify as to the effect of the offense on the victim and the victim's family . . . ." See McVeigh, 958 F. Supp. at 514 (citing 18 U.S.C. § 3510(b)). The title is short for Public Law 105-6, which the President signed. See id.; see also 143 Cong. Rec. at S2508 ("This bill will ensure that victims of crimes have an opportunity to alleviate some of their suffering through witnessing the operation of the criminal justice system."); Editorial, Oklahoma Trial Ruling Fallout, Chi. Sun-Times, March 27, 1997, at 29.

52. See 143 Cong. Rec. at S2507 (noting that "this is an important piece of bipartisan legislation that will clarify the intent of Congress with respect to a victim's right to attend and observe a trial and participate at sentencing"). One speaker, Mr. Leahy, a senator from Vermont, further noted the importance of victims both having access to the courtroom and being heard, recalling:

many times when the person being sentenced had suddenly gotten religion, had suddenly become a model person, usually dressed in a better suit and tie than I wore as a prosecutor and was able to cry copious tears seeking forgiveness and saying how it was all a mistake, sometimes reality came to the courtroom only when the victim would speak.

Id. at S2507-S2508. Mr. Leahy continued: "I remember one such victim had very little to say, with heavy scars on her face that would probably never heal. That said more than she might." Id. at S2508 (noting the statute's probable influence on state courts as well).

53. See Gibeaut, supra note 46, at 43. "There is simply no clear guidance [from Payne] as to where the line between appropriate . . . victim impact testimony ends and an appeal to passion - the human reactions, emotive reactions of revenge, rage [and] empathy, all of those things - beings,' Matsch told the lawyers before the sentencing phase began." Id.

54. See Mulholland, supra note 35, at 742.

55. See id. at 743; see also Oberlander, supra note 35, at 1627 (noting that "[w]hile almost all states allow for some form of victim impact at some stage in the judicial process, the extent of that involvement varies from jurisdiction to jurisdiction").
the death on the family. 56 Other states, however, have imposed more stringent limitations on their use. 57 For example, some states,


57. See Mulholland, supra note 35, at 743. For example, some states impose various requirements such as:

(1) the statements must be general and cannot delve into the victim's character and worth; (2) the statements must be read by the prosecutor, and not on the form of testimony from family members; (3) the statements cannot be unduly prejudicial to the defendant; (4) the statements must adhere to victim impact statement forms; and (5) the statements can only be used when a judge, instead of a jury, is sentencing the defendant.

Id. Cf. TEX. CRIM. PROC. CODE ANN. § 56.03 (West Supp. 1995) (requiring VIS to comply with victim impact forms); State v. Wise, 879 S.W.2d 494, 516 (Mo. 1994) (requiring that statements be general and not delve into the victim's character); State v. Sumpter, 438 N.W.2d 6, 9 (Iowa 1989) (requiring victim impact evidence to comply with victim impact forms).
such as Idaho and Georgia, limit VIS to non-capital cases, 58 while Pennsylvania, Kansas, and New Hampshire allow VIS only when a judge, and not a jury, is sentencing the defendant. 59 Currently, twelve of the thirty-eight states that impose the death penalty have permitted consideration of victim impact statements during capital sentencing hearings. 60

A. New Jersey’s Approach

New Jersey is one of the states that has permitted VIS in capital cases after Payne, but has been particularly stern with respect to their use. On June 19, 1995, Governor Whitman signed a “victim impact statute”61 into law, which essentially provides that the prosecution may admit evidence of the victim’s character and the impact of the death on the victim’s survivors, but not until the defendant has placed his own character at issue. 62 Moreover, the


62. See id. “Unlike the open-ended federal law and many state statutes, New Jersey’s only allows victim impact evidence if the defendant first presents evidence on his or her own character.” Gibeaut, supra note 46, at 43. The law provides that:

When a defendant at a sentencing proceeding presents evidence of the defendant’s character or record pursuant to subparagraph (h) of paragraph (5) of this subsection, the State may present evidence of the murder victim’s character and background and of the impact of the murder on the victim’s survivors. If the jury finds that the State has proven at least one aggravating factor beyond a reasonable doubt and the jury finds the existence of a mitigating factor pursuant to subparagraph (h) of paragraph (5) of this subsection, the jury may consider the victim and survivor evidence presented by the State pursuant to this paragraph in determining the proper weight to give mitigating evidence presented pursuant to subparagraph (h) of paragraph (5) of this subsection.

State v. Muhammad, 678 A.2d 164, 169 (N.J 1996) (quoting N.J.S.A. 2C:11-3c(6)). The statute was enacted by the New Jersey Legislature in response to the Supreme Court’s decision in Payne, as well as the constitutional authority granted by the New
Supreme Court of New Jersey has noted that despite the statute’s constitutional authority under *Payne*, it “‘provides an additional and, where appropriate, more expansive source of protections against the arbitrary . . . imposition of the death penalty.’”

New Jersey allows the use of VIS only in limited circumstances, and in a way that the jury will not likely become “overwhelmed and confused.” The Supreme Court of New Jersey refuses to admit statements by the family members that either make characterizations or elicit personal opinions about the defendant, the crime, or the appropriate sentence. Any statement that is “grossly inflammatory, unduly prejudicial, or extremely likely to divert the jury from its focus on the aggravating and mitigating factors” likewise is excluded. Accordingly, the New Jersey courts have limited victim impact evidence to “statements designed to show the

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64. *Id.* at 175. The *Muhammad* Court held that a brief statement by the victim’s family, as to how the murder impacted their lives, would not tend to inflame the jury anymore than would a brief statement by the defendant. See *id.* at 175 (citing State v. Zola, 548 A.2d 1022 (1988), cert. denied, 489 U.S. 1022 (1989) (holding that a brief statement by the defendant “would not inject fatal emotionalism into the jury's deliberations’’)). However, the *Muhammad* Court noted limitations on the use of such evidence, holding that if offered to rebut the defendant’s presentation of mitigating evidence, the VIS must be both “relevant and reliable.” *Id.* at 176. Moreover, the admission of such evidence demands a balancing test as whether its probative value is substantially outweighed by a risk of prejudice to the defendant or confusion to the jury. *Id.* The Court noted that “in each case there is a traditional guard against the inflammatory risk, in the trial judge’s authority and responsibility to control the proceedings consistently with due process, on which grounds the defendant may object.” *Id.* (quoting *Payne*, 501 U.S. at 836 (Souter, J., concurring)). In addition, the evaluation of specific victim impact evidence’s admission should ultimately be left to the discretion of the trial court, unless such evidence is on its face clearly inadmissible. See *id.* at 176.
65. See *id.*
66. *Id.* (citing State v. Williams, 550 A.2d 1172 (N.J. 1988)). “Allowing such testimony could render a defendant’s trial fundamentally unfair and could lead to the arbitrary imposition of the death penalty.” *Id.* at 176-77.

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impact of the crime on the victim's family and to statements that demonstrate that the victim was not a faceless stranger," concluding that "[t]here is no place in a capital trial for unduly inflammatory commentary." 67

The New Jersey Legislature also has taken steps to reduce the chance that the jury will misuse victim impact evidence. 68 For instance, the jury may consider victim impact evidence only if the jury finds that the State has proven, beyond a reasonable doubt, at least one aggravating factor, and the jury finds the existence of a mitigating factor. 69 Moreover, even if such requirements are met, the VIS can be used only to determine how much weight the jury will attach to the catch-all mitigating factor. 70 In contrast to other state legislatures, the New Jersey Legislature adamantly opposes the use of victim impact evidence as a general aggravating factor, in a sincere effort to shield the sentencing phase from prejudice. 71 As such, the Legislature has adopted a number of safeguards to ensure that such evidence "will not be admitted in a manner that would allow the arbitrary and unconstitutional imposition of the death penalty." 72

67. Id. at 177. The Muhammad Court concluded that "in conjunction with the Victim's Rights Amendment, it is obvious that the electorate of New Jersey wants the State to align itself with the weight of authority that has recognized the relevance of victim impact evidence." Id. at 178.

68. See id. at 179 (noting that "the admission of victim impact evidence is limited to a clearly delineated course").

69. See id.

70. See id. "Essentially, section 5(h) is a catch-all factor of defendant's mitigating evidence not encompassed in the other defining factors." Id. at 170. The victim impact statute mandates that such evidence can be introduced for one purpose and one purpose only - to give the jury proper assistance in determining the appropriate weight to give the catch-all mitigating factor. Id. at 179. "Victim impact testimony may not be used as a general aggravating factor or as a means of weighing the worth of the victim." Id. "[O]ur law does not regard a crime committed against a particularly virtuous person as more heinous than one committed against a victim whose moral qualities are perhaps less noteworthy or apparent." Id. (quoting Williams, 550 A.2d at 1202).

71. See id. at 179. Some state legislatures have enacted statutes that essentially allow victim impact evidence to be admitted for any purpose whatsoever, as opposed to New Jersey's more stringent limitations. See id. (citing Ark. Code Ann. § 5-4-602(4) (Michie 1993)); see also Ill. Rev. Stat. Ch. 38, para. 1406 (1989). Moreover, it is apparent that the New Jersey Legislature relied upon previous state opinions which recognized the necessity of allowing capital sentencing juries to "reach a verdict and impose a penalty without inordinate exposure to unduly prejudicial, inflammatory commentary." Muhammad, 678 A.2d at 179 (citing Williams, 550 A.2d at 1204).

72. Id. The New Jersey victim impact statute does not automatically grant the victim's family the right to testify during the sentencing hearing. See id. "[R]ather, the prosecutor is to determine what evidence, if any, should be submitted" to the
B. Recent Capital Sentencing Hearings

All of the precautions constructed by the New Jersey Supreme Court were taken into account in the sentencing of Jesse Timmendequas, the repeat sex offender who was convicted of the rape and murder of seven-year-old Megan Kanka in 1994. In response

Id. at 180. For instance, prior to commencement of the sentencing hearing the defendant must be warned that if he or she chooses to assert the catch-all factor, then the State has the freedom to introduce victim impact evidence. See id. Moreover, the State must provide the defendant with a list of names of all witnesses that it plans to call so that defense counsel will have a full and fair opportunity to interview such witnesses prior to their testimony. See id.

Recognizing the significant possibility that such evidence will prejudice the defendant, the State has also expressed that, absent any exceptional circumstances, one survivor's account will suffice to provide the jury with "a glimpse of each victim's uniqueness as a human being and to help the jurors make an informed assessment of the defendant's moral culpability and blameworthiness." Id. (noting that "[t]he greater the number of survivors who are permitted to present victim impact evidence, the greater the potential for victim impact evidence to unduly prejudice the jury against the defendant"). Emotions are to be kept under complete control, and the court will not hear any testimony concerning "the victim's family member's characterizations and opinions about the defendant, the crime, or the appropriate sentence." Id. The State has further held that the testimony of minors should be permitted "except under circumstances where there are no suitable adult survivors." Id.

In addition, the New Jersey judge ordinarily conducts a Rule 104 hearing before the sentencing hearing begins as to the statement's admissibility. See id. The testimony must be reduced to writing and can provide a general factual profile of the victim's character, as well as describe the impact of the death on the family. See id. The statement must be free of any "inflammatory comments or references" and must be factual, not emotional. Id. Moreover, the probative value of the proffered testimony cannot be substantially outweighed by the risk of prejudice to the defendant. See id. ("Determining the relevance of the proffered testimony is particularly important because of the potential for prejudice and improper influence that is inherent in the presentation of victim impact evidence."). However, the court notes that in making the determination of relevance, there is ordinarily a strong presumption that the victim impact evidence will be admissible if it demonstrates that the victim was a unique human being. See id. Finally, the prosecutor is put on notice that any comments about victim impact evidence during closing arguments must be limited to that already stated by the witness, in his or her pre-approved testimony. See id.

73. See supra notes 61-72 and accompanying text.

74. See Dale Russakoff & Blaine Harden, Megan's Murderer is Sentenced To Death; Jury Finds Repeat Sex Offender's Childhood Suffering Did Not Lessen Responsibility, WASH. POST, June 21, 1997, at A3, available in 1997 WL 11162193. Jesse Timmendequas, the repeat sex offender, was convicted of the rape and murder of 7-year-
to defense counsel's pleas for compassion, Megan's father, Richard Kanka, took the stand for the prosecution. He read from a pre-approved, three-page victim impact statement, portraying his daughter as a tomboy who enjoyed playing with toy trucks in the mud, and also as a girl, who adored having tea parties with her dolls. Mr. Kanka also mentioned that Megan's brother, who was eighteen months older, always considered himself her protector, and has been found screaming in his closet in the middle of the night in the three years since his sister's rape.

As required by law, Mr. Kanka maintained his composure throughout, and kept his "emotion at bay." While his statement gave the jury a glimpse into the character of Megan Kanka and the pain which her death has caused to those who loved her, it neither capitalized upon such emotions, nor made inflammatory or prejudicial comments. By adhering to the procedural safeguards mandated by the New Jersey Supreme Court, Mr. Kanka's statement balanced the sentencing hearing in the most controlled manner possible.

In the recent trial of Timothy McVeigh, however, the VIS were not as strictly regulated, and the emphasis shifted dramatically from a small peek into the life of the victim to wrenching tales of the horrifically personal and emotional consequences of McVeigh's crime. The VIS permitted by the trial judge during the sentencing hearing were drenched with pain, torment, despair, and anguish.

old Megan Kanka and was sentenced to death by a jury in Trenton, New Jersey, on July 21, 1997. See id. During the penalty phase, Timmendequas' lawyers pled for mercy, insisting that his intent was never to kill Megan. See id. They characterized him as borderline mentally retarded, perhaps due to his mother's alcoholism, a pedophile, and a victim of sexual abuse by his own father. See id.

75. See Gibeaut, supra note 46, at 43.
76. See id.
77. See Russakoff & Harden, supra note 74. He noted that her favorite color was pink and her favorite flavor of ice cream was mint chocolate chip. See id. "Megan was our little community newsletter," he said, "with live broadcasts nearly every day at dinner time." Id. Mr. Kanka also stated: "The only peace we have as parents are the moments during sleep when we don't have to deal with the harsh realities of our everyday lives." Gibeaut supra, note 46, at 43.
79. Id.
80. See supra note 46.
81. See Peter Gorner, Empathy vs. Impartiality In The Courtroom; Victims Leave Lasting Impact On The System, CHI. TRIB., June 15, 1997, at 1, available in WL 3558785 (noting that "[w]ithin minutes, six of the jurors had begun to weep").
They consumed two full days of testimony, as a parade of witnesses described in extensive detail the crime's gruesome aftermath.\textsuperscript{82}

One police officer gave an account of "life ebbing from the hand of a dying woman trapped by concrete rubble, whose gurgling blood was mistaken for running water."\textsuperscript{83} Another heart-wrenching story described to the jury three-year-old Brendan Denny clenching a green block in his hand, with a brick embedded in his forehead.\textsuperscript{84} And, Kathleen Treanor told the jury how she kissed her four-year-old daughter Ashley goodbye, never to see her alive again.\textsuperscript{85} The parade of grief-stricken witnesses actually evoked

\textsuperscript{82} See Gibeaut, supra note 46, at 42. "[J]urors, spectators and even the judge wept as family members, rescue workers and others took the stand for two days." Id. at 43. U.S. District Judge Matsch's goal was to keep the sentencing hearing from turning into some kind of public "lynching;" however, his efforts were apparently not enough. See Richard A. Serrano, Judge Restricts McVeigh Penalty Case Testimony, L.A. TIMES, June 4, 1997, at A1, available in 1997 WL 2216846 (noting that the penalty phase "cannot become a matter of such emotional testimony which would inflame or incite the passions of the jury . . . as to whether the defendant should be put to death"). Matsch told prosecutors that he would allow relatives and survivors to take the stand, but their testimony could not address a desire for revenge nor mention the funerals of loved ones who has died as a result of the bombing. See id. Matsch further barred from evidence any pictures of the victims or their family members at weddings, Christmas celebrations, or other joyous occasions. See id. Matsch also denied the government's request to admit certain videotapes of victims, including a home-made film of a typical day at a credit union prior to the bombing. See id.; see also Michael Fleeman, Judge in Oklahoma Bombing Vows to Avoid 'Lynching,' PARES BACK HEARING, ASSOCIATED PRESS, June 3, 1997, available in 1997 WL 4869060 (noting that Judge Matsch also barred a poem by a victim's father). Despite such efforts, however, grief, sorrow, and devastation took a toll on jurors and spectators alike. See generally Gibeaut, supra note 46.

\textsuperscript{83} See Robinson, supra note 17. The use of VIS by witnesses such as police officers and coroners is obviously problematic given that bystanders are by definition not victims. Thus, to introduce such testimony serves only to capitalize upon the jurors' emotions, thereby running the impermissible risk that the death penalty will be imposed arbitrarily and capriciously. See also infra text accompanying notes 126-128.

\textsuperscript{84} See Robinson, supra note 17 (questioning how any juror could respond dispassionately to such an event).

\textsuperscript{85} Eric Pooley et al., Death or Life? McVeigh Could Be The Best Argument For Executions, But His Case Highlights The Problems That Arise When Death Sentences Are Churned Out In Huge Numbers, TIME MAG., June 16, 1997, at 31, available in 1997 WL 10902240. Treanor explained how after unspeakable days of waiting, she "recovered her daughter's body from the rubble, buried the little girl, and trudged on." Id. She said she received a call from the medical examiner's office several months later. See id.

Id. He said, 'We have recovered a portion of Ashley's Hand,' Treanor testified in a trembling voice that Rose as she fought to get through each sentence, 'and we wanted to know if you wanted that buried in the mass grave or if you would like to have it.' And I said, 'Of course, I want it. It's a part of her.'

\textit{Id.} That was about the extent of Treanor's testimony; for that was about all she could physically and emotionally handle. See id. "Treanor dissolved, her body racked by
such a “mass outpouring of empathy from those in attendance that at least one newspaper offered to provide counseling for its reporters covering the case.” In fact, the government ultimately cut its presentation short because of its dramatic effect.

Both McVeigh and Timmendequas were forced to pay for their heinous crimes with their own lives. Their sentencing hearings differed drastically, however, with respect to the use of VIS. A comparison of the two hearings reveals the inconsistency that plagues capital sentencing proceedings in America. What is perhaps most troubling, however, is the grave potential for abuse in situations where the evidence against the defendant is not so overwhelming. In a case where the crime is not as atrocious, and the guilt not as obvious, the emotional impact of the VIS certainly could be the defining line between life and death.

...

VIS primarily are supported on grounds of fairness to the victim. It repeatedly has been argued that because a defendant may introduce mitigating evidence to inform the jury about his or her character, the State must likewise be granted the right of fair response. VIS, by their nature, grant victims a new voice in the criminal justice system which can remind the capital sentencer that they also are individuals whose deaths touched the lives of many. Accordingly, victims claim that VIS rectify the imbalance pervading criminal courtroom proceedings by allowing them to participate in the prosecution of the defendant. Advocates further contend that VIS allow the victim a means of coping, closure, and recovery, as well as encourage cooperation between the prosecutor and the victim.

VIS, however, have not escaped constitutional challenge and debate, especially with respect to their potential violation of the constitutional rights of the capital defendant. VIS primarily are criticized because they replace the rational process of imposing a death sentence with arbitrary and capricious jury discretion. Many opponents argue not only that the emotional nature of VIS

89. See supra notes 36-39 and accompanying text.
90. See supra note 32 and accompanying text. But see Payne v. Tennessee, 501 U.S. 808, 859 (1991) (Stevens, J., dissenting) ("This argument is a classic non sequitur: The victim is not on trial; her character, whether good or bad, cannot therefore constitute either an aggravating or a mitigating circumstance.").
91. See Phalen & McClellan, supra note 37, at 12 (stating that the movement also "seeks to provide victims with a greater role in the criminal justice process"); see also Oberlander, supra note 35, at 1625.
92. See supra note 39.
93. See McLeod, supra note 39, at 504-07 (noting that VIS help victims regain control over their lives, enhance system efficiency by encouraging cooperation of witnesses, and also fulfill the victim's desire for retributive justice).
94. See supra note 25; see also infra note 95.
95. See William Hauptman, Note, Lethal Reflection: New York's New Death Penalty and Victim Impact Statements, 13 N.Y.L. SCH. J. HUM. RTS. 439, 475-76 (1997) (noting that "[t]he most commonly voiced objection to victim impact statements is the inherent possibility that they violate a defendant's right to equal protection"). "When our society is choosing which heinous murderers to kill and which to spare, its gaze ought to be carefully fixed on the harm they have caused and their moral culpability for that harm, not on irrelevant factors such as the social position, articulateness, and race of their victims and their victims families." Id.; see also Mulholland, supra note 35, at 746 ("Arguably, victim impact statements inject an arbitrary factor in deciding whether to impose the death penalty").
“impermissibly inflame and prejudice the jury,” but that the reliability of VIS is suspect because they “are difficult to verify and impossible for the defendant to rebut.” Others hold that VIS are unfair because they value some lives more than others and unconstitutionally punish defendants for things which they could never have foreseen. It also has been argued that their appeal to juror’s emotions undermines the Supreme Court’s command that the decision to impose the death penalty should be reasoned and morally sound, not discretionary and wanton. Finally, it is fair to contend that courtrooms are not designed for the coping of the victim, and that the trial and conviction of the defendant is, in and of itself, an adequate vindication of the victim’s rights.

A. The Payne Decision Reconsidered

Despite criticism and dissent, the victims’ rights movement has gained momentum and nationwide support. A majority of jurisdictions now permit VIS, and Congress has codified Payne’s basic legal tenets. Moreover, popular sentiment favors the death

96. Mulholland, supra note 35, at 747.
97. Id. ("A defendant's sentence should solely be based on the severity of the crime and the defendant's record, not on the emotional impact of the victim's family.").
99. See Gregg v. Georgia, 428 U.S. 153, 189 (1976) (following the holding of Furman v. Georgia, 408 U.S. 238 (1971) that “where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action”). The Court further noted that the punishment “must not involve the unnecessary and wanton infliction of pain,” and “must not be grossly out of proportion to the severity of the crime.” Id. at 173; see also Gibeaut, supra note 46, at 42; infra notes 110-115 and accompanying text.
100. See supra note 35.
101. See Mulholland, supra note 35, at 742 (noting that “[m]ost jurisdictions, including . . . the District of Columbia and the federal court system, are closely aligned with the United States Supreme Court decision in Payne and permit victim impact statements from the victim’s family regarding the impact of the victim's death on the family”).
102. See Fed. R. Crim. P. 32(c)(2)(D); see also supra notes 40-52 and accompanying text; Mulholland, supra note 35, at 735 n.29 (citing Unif. R. Evid. 404(a)(2) (amended 1986) (emphasis added)). The Uniform Rules of Evidence, which are more restrictive than the Federal Rules of Criminal Procedure, also provide:

(E) evidence of a pertinent trait of character of the victim offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peculiarity of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor (is admissible for the purpose of providing that the victim acted in conformity with his character on a particular occasion).
penalty, and victims’ rights advocates have proposed a victims’ rights amendment to the Constitution. If VIS are going to be an intrinsic part of the criminal justice system, however, then it must be determined how they will be used, so as to minimize any risk of prejudice to the capital defendant.

While the Payne Court did hold that VIS were not an Eighth Amendment violation, the Court did “not hold . . . that victim impact evidence must be admitted, or even that it should be admitted.” In fact, the Court noted that VIS could be inflammatory in certain instances and thereby unduly prejudice the defendant. What the Court failed to consider, however, is where to draw the line between the admissible and the inflammatory and in what manner the courts may draw it. Although the Court apparently was confident that this was a detail best left to the discretion of the trial judge on a case-by-case basis, the blatant inconsistencies and troublesome discrepancies between the McVeigh and Tim-

UNIF. R. EVID. 404(a)(2) (amended 1986). Moreover, “(a)s crime has increased it is not illogical to believe that the trends for a more active role of the victims will increase.” Anderson, supra note 35, at 402 (noting that “[p]olitical pressure on judges, prosecutors, and other elected officials to recognize the need for victims to participate in the punishing of the offender will continue to have a profound effect on all aspects of the criminal justice system”).

103. See supra notes 16-17.
104. See supra note 38.
106. Justice O'Connor notes:

The possibility that this evidence may in some cases be unduly inflammatory does not justify a prophylactic, constitutionally based rule that this evidence may never be admitted. . . . If, in a particular case, a witness’ testimony or a prosecutor’s remark so infects the sentencing proceeding so as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment.

Id. Moreover, O'Connor states that “[t]hat line was not crossed in this case,” yet fails to define what exactly that line is. Id.

107. See Payne, 501 U.S. at 827 (holding that “[a] State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim’s family is relevant to the jury’s decision as to whether or not the death penalty is imposed”). But, in ruling that such evidence should be treated no “differently than other relevant evidence is treated” the Court seems to leave the door of admittance open to the discretion of the particular trial judge. Justice O'Connor's concurring opinion lends further support to this notion. See id. at 831 (noting that “[t]rial courts routinely exclude evidence that is unduly inflammatory”). In other words, if the judge chooses to admit the VIS, the Eighth Amendment will not render it unconstitutional; however, if the evidence is found to be so unduly inflammatory that its admittance would prejudice the jury against the defendant, then the judge has the option of excluding it. See id. And, in the event that the trial is rendered “fundamentally unfair,” as a result of admitting prejudicial victim impact evidence, then the Due Process Clause of the Fourteenth Amendment can provide a means of relief. See id. at 825.
mendequas sentencing hearings reveal the inherent danger of such ambiguity. Accordingly, if the use of VIS is to continue, it must be strictly regulated.

1. Comparing Payne to Prior Supreme Court Death Penalty Jurisprudence

The Supreme Court consistently has held that "the penalty of death may not be ordered automatically, arbitrarily, irregularly, randomly, capriciously, wantonly, freakishly, disproportionately or under any procedure that permits discrimination by race, religion, wealth, social position or economic class." For the application of the death penalty to be constitutionally valid, the procedure must carefully protect against passion or prejudice. Thus, in an effort to shield the capital sentencing proceeding from the foregoing prejudices, "the Supreme Court has mandated that the sentencer be given specific guidelines which will direct and limit the sentencer's discretion." The sentencer must weigh the aggravating and mitigating circumstances in making a reasoned determination. Moreover, the death penalty process must ensure individu-

108. See supra notes 74-88 and accompanying text.
109. The Court seems to deny the fact that VIS significantly alter traditional sentencing procedures, in stating that "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." Payne, 501 U.S. at 825. In this respect, the Court is rather disingenuous.
110. See United States v. McVeigh, 944 F. Supp. 1478, 1487 (D. Colo. 1996) (noting that "[f]our separate opinions were filed in support of the judgment in Gregg v. Georgia . . . that a sentence to death for murder under a new sentencing scheme adopted by the Georgia legislature was not an unconstitutional punishment"). While the Supreme Court has accepted the death penalty as constitutional, individual justices continue to struggle with an exact articulation of the their views "about the imperatives of a valid procedure in the many subsequent decisions approving and disapproving variations in state laws governing the extreme punishment of death." Id. "They have been more clear in stating what is prohibited than what is required." Id.; see also Gregg v. Georgia, 428 U.S. 153, 189 (1976) (holding that the death sentence must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"); accord South Carolina v. Gathers, 490 U.S. 805, 810 (1989). Cf. Enmund v. Florida, 458 U.S. 782 (1982); U.S. CONST. amend. VIII & XIV.
111. See McVeigh, 944 F. Supp. at 1487.
113. See 18 U.S.C. § 3593(c) (1995). At the sentencing hearing, any information relevant to the sentence may be admitted, including any mitigating or aggravating factor considered under § 3592. See id. The defendant may present any information relevant to a mitigating factor, and the government may present information relevant to a mitigating factor, for which notice has been provided for under 18 U.S.C.A. § 3593(a). See id. While there is some degree of variation with respect to how states qualify such "aggravating" circumstances, the aggravating factors must be "objectively
alized consideration of each defendant and allow the jury to consider both the circumstances of the crime, as well as the defendant’s character.\textsuperscript{114} Accordingly, when making the very serious de-

proviable and rationally related to the criminal conduct in the offenses proven at trial.” \textit{McVeigh}, 944 F. Supp. at 1487. “The aggravating factors function to focus the jury’s attention on the particular facts and circumstances pertinent to each defendant found guilty of an offense punishable by death in the context of mitigating factors unique to him as an individual human being.” \textit{Id.} at 1488. In essence, they serve to aid the jury in distinguishing “those who deserve capital punishment from those who do not . . . .” \textit{Id.} (citing \textit{Arave v. Creech}, 507 U.S. 463, 474 (1993)); \textit{see also} U.S.C. § 3593(a)(2) (1995) (setting forth the aggravating factors that the government, if the defendant is convicted, proposes to prove as justifying a death sentence).

The factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and the victim’s family, and may include oral testimony, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim’s family, and any other relevant information.

18 U.S.C. § 3593. Aggravating circumstances often include such factors as the murder of a public official or a law-enforcement officer, murder for hire, or an especially cruel or heinous felony murder. \textit{See} Rich Henson, \textit{3 Men, 3 Convictions; What Happened?}, \textit{Seattle Times}, June 15, 1997, at A3, \textit{available in} 1997 WL 3238466 (noting that legal experts say that aggravating circumstances usually must be proven beyond a reasonable doubt, as opposed to mitigating circumstances, which need only be proven by a preponderance of the evidence). If no aggravating factor is found to exist, then “the court shall impose a sentence other than death authorized by law.” 18 U.S.C. § 3593(d) (noting that “[a] finding with respect to any aggravating factor must be unanimous”).

With respect to “mitigating” circumstances, the Supreme Court has mandated that the defendant has the constitutional right to present all relevant mitigating factors that could support a sentence less than death. \textit{See} 18 U.S.C.A. § 1392(a) (West 1997) (listing all mitigating factors which the finder of fact shall consider in determining whether a sentence of death is justified). Such factors include: “impaired capacity;” “duress;” “minor participation;” “equally culpable defendants;” “no prior criminal record;” “disturbance;” “victim’s consent;” and, “other factors in defendant’s background, record, or character or any other circumstance of the offense that might mitigate imposition of the death sentence.” \textit{Id.} at §§ (a)(1)-(8); \textit{see also}, 18 U.S.C.A. § 3593(c) (mandating that the burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the existence of such a factor is established by a preponderance of the information”); \textit{McVeigh}, 944 U.S. at 1487 (stating that “[t]here can be no limitation on the ability of individualized jurors to consider mitigating factors”); \textit{Eddings v. Oklahoma}, 455 U.S. 104, 114 (1982).

114. \textit{See} Myrum, \textit{supra}, note 112, at 376-77; \textit{see also} \textit{Zant v. Stephens}, 462 U.S. 862, 879 (1983) (stating that a jury must make an “individualized determination” as to whether the defendant should be sentenced to death, based on “the character of the individual and the circumstances of the crime”); \textit{Enmund}, 458 U.S. at 801; \textit{Woodson v. North Carolina}, 428 U.S. 280, 281 (1976) (noting that “[t]he respect for human dignity underlying the Eighth Amendment . . . requires consideration of aspects of the character of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of imposing the ultimate punishment of death”).
termination whether to execute the defendant, the jury must "focus on the defendant as a 'uniquely individual human bein[g].""

Before the Payne Court's ruling, the decision to impose the death penalty was applied universally and dispassionately. Any evidence that did not inform the jury about the character of the crime or the character of the defendant was automatically disregarded. Under the confines of such a controlled standard, each defendant was equal in the eyes of the sentencer. The Payne decision, however, marked a deviation from traditional procedures, in an eager attempt to grant the victim a higher degree of equality.

This effort to balance the rights of the victim with those of the defendant, however, comes with a hefty price. Although the "uniqueness" of the victim, his or her character and reputation, the victim's family, and the emotional impact of the crime are presented to the jury, there is a grave risk that some victims' lives will be valued more than others. Moreover, the victim impact evidence creates a "'tactical' 'dilemma' for the defendant because it allows the possibility that the jury will be so distracted by prejudicial and irrelevant considerations that it will base its life-or-death decision on whim or caprice."

2. The Payne Decision's Troublesome Implications

VIS, by their nature, focus on the victim's uniqueness—a notion that represents a complete departure from the traditional focus on the defendant. Although this departure may be warranted, both by society and the ideals of justice, it is gravely important not to violate the constitutional confines of rational and moral sentencing

115. Booth v. Maryland, 482 U.S. 496, 504 (1987) (quoting Woodson, 428 U.S. at 304 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.)). "[I]t is the function of the sentencing jury to 'express the conscience of the community on the ultimate question of life or death.'" Id. (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 (1968)).

116. See Staples, supra note 17, at A26 ("In the interest of equal justice, the same, dispassionate standard was to be applied to every crime and to every defendant, whether rich or poor, criminal or upstanding, loved or despised.").

117. See id.

118. See id.

119. See Payne v. Tennessee, 501 U.S. 808, 866 (1991) (Stevens, J., dissenting) (asserting that "[t]he fact that each of us is unique is a proposition so obvious it requires no evidentiary support"). In fact, "[s]uch proof risks decisions based on the same invidious motives as a prosecutor's decision to seek the death penalty if a victim is white but to accept a plea bargain if the victim is black." Id.


121. See generally supra notes 35-39 and accompanying text.
procedures in doing so. The justice system simply cannot allow arbitrary and prejudicial factors to constitute the means of VIS, regardless of the importance of the ends of protecting victims’ rights. It is untenable to permit a decision as grave as the death penalty to “turn on the perception that the victim was a sterling member of the community rather than someone of questionable character.”

The Supreme Court merely danced around this issue in Payne, stating that victim impact evidence “is not offered to encourage comparative judgments of this kind,” but rather to reveal “each victim’s ‘uniqueness as an individual human being,’ whatever the jury might think the loss to the community resulting from his death might be.” This argument ignores the vulnerability of human emotions. Thus, the Court failed to address the troublesome implication of allowing emotionally laden factors, such as the circumstances of the victim’s death, the community’s recollections of the victim’s benevolence, or the degree of emotional distress suffered by the family, to be included in the VIS.

Recall the emotional roller coaster of the McVeigh sentencing. The sobering tales and gruesome memories of the victims were painful enough for any juror to hear, but when coupled with the graphic and horrific details recalled by rescue workers, police, and coroners, the grief became simply too much for any human to handle. Certainly no juror could have been expected to set emotions aside and make a decision based on reason alone. The alleged purpose of VIS is to grant victims a voice, by which those victims may cope and obtain closure. At no point throughout the entire course of the victims’ rights movement, however, has anyone advocated the need to grant bystanders a voice. Thus, the testimony admitted by Judge Matsch from witnesses, such as the police and coroners, was completely unwarranted and provided an

122. Booth, 482 U.S. at 506 & n.8 (stating that “[w]e are troubled by the implication that defendants whose victims were assets to the community are more deserving of punishment than those whose victims are perceived to be less worthy”).
123. Payne, 501 U.S. at 823.
124. Perhaps the Court overlooks the fact that we, as human beings, are by nature all unique individuals, no matter what our position in society may be. Certainly any member of the jury can well recognize such a notion without the aid of detailed description by the victim’s family. “What is not obvious, however, is the way in which character or reputation in one case may differ from that of possible victims,” and where evidence that dwells on a victim’s social status is admitted to prove such differences, some victims are consequently rendered more deserving of protection and life than others. Payne, 501 U.S. at 866 (Souter, J., dissenting).
125. See supra notes 80-87 and accompanying text.
126. See supra notes 85-86 and accompanying text; see generally id.
127. See supra note 39 and accompanying text.
even greater imbalance to the capital sentencing hearing. To open the door to testimony by professionals who have chosen to routinely interact with crisis situations serves only to unduly prejudice a jury that has already heard the testimony of the victims themselves. Accordingly, Judge Matsch’s lack of control over the sentencing hearing completely undermined McVeigh’s constitutional protections and rendered the jury’s decision to impose the death penalty both arbitrary and capricious.

In McVeigh’s case, the heinousness of his crime made the outcome fairly predictable, but in countless other cases VIS could be the defining line between life and death. Without a more controlled and uniform employment of VIS, their use becomes troublesome and highly prejudicial. This result was not expected by the Payne Court, and does not constitute a reasoned and moral application of the death penalty under the Eighth Amendment.

3. Proposals to Limit Payne

To permit anything less than controlled and uniform procedures for admitting VIS is potentially to open a “Pandora’s box” of possibilities for a prosecutor seeking the death penalty.” Consider the ramifications of a sentencing hearing that permits evidence, such as the victim’s resume, diary, funeral eulogy, poetry, art work, pictures, and trophies, as well as tales by the victim’s family of their loved one’s goals, dreams, and aspirations. Moreover, imagine the admission of testimony from people that the victim assisted emotionally and economically as a result of volunteer work, or patients of the victim’s medical practice who would testify to the victim’s ability to save lives, or even fellow parishioners of the victim’s church who would recall the victim’s regular attendance and heartfelt generosity. Absent more narrowly defined guidelines or crite-

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128. See supra notes 83-85 and accompanying text.
129. See supra note 18.
130. See U.S. CONST. amend. VIII (dictating that “cruel and unusual punishments” should not be inflicted); see also supra notes 110-112 and accompanying text; Payne 501 U.S. at 824 (noting that “[w]here the State imposes the death penalty for a particular crime, we have held that the Eighth Amendment imposes special limitations upon that process”).
131. Anderson, supra note 35, at 405. Imagine just how far the line could be pushed. See id. (noting that the prosecutor might attempt to submit “work performance evaluations, recorded testimonials, funeral eulogies, or even a high school report card, in an effort to demonstrate the loss to the family and community”). It doesn’t take much of an imagination to fathom what the future might hold if the reigns of admittance are not tightened severely. McVeigh’s sentencing might only have been the beginning, rather than the extreme.
ria from the Supreme Court, Congress, or state legislatures, there exists too grave a potential that the Payne holding will be improperly interpreted.132

Although proponents of VIS put forth a number of “compelling arguments,”133 the fundamental concern underlying the movement for victim participation is human emotions.134 Most victims may be

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132. See Lee v. State, 942 S.W.2d 231, 236 (Ark. 1997) (allowing VIS by the victim’s sister describing the painful experience of selecting the victim’s wig for the funeral); Hicks v. State, 940 S.W.2d 855, 857 (Ark. 1997) (Brown, J., concurring) (permitting into evidence a 14 minute silent videotape, accompanied by a family member’s tearful narration, that contained approximately 160 photographs spanning the entire life of the victim). While more than 60 of the photos depicted stages of the victim’s life from when he was a toddler up to his marriage and birth of two children, another 70 or so were dedicated to the lives of his two sons, tracing their growth from infancy to adulthood, and the remaining pictures ranged from “family events, such as Thanksgiving dinner, to the victim’s involvement with various aspects of the carnival business.” Id. But see Ledbetter v. State, 933 P.2d 880, 890 (Okl.Cr. 1997) (finding error in admitting portions of a VIS that “described the murder as a ‘selfish act;’ related one child’s opinion that his mother was ‘butchered like an animal,’ and recalled one child’s memory that Appellant had threatened to kill the victim and ‘somehow I knew in my heart he meant it’”). Despite such a ruling, however, the Ledbetter court held that the survivor’s opinion that the death penalty was an appropriate sentence was not improper. See Ledbetter, 933 P.2d at 891. Cf. Conover v. State, 933 P.2d 904, 920 (Okl. Cr. 1997) (holding that the admitted VIS tipped the scales too far in favor of the prosecution). The court rendered statements such as the victim was “butchered like an animal,” that the defendant was a “parasite” and “murderous animal” failed to “shed any light on the victim’s life or the impact of the loss of the victim to his family.” Conover, 933 P.2d at 920-21 (stating that “such statements are inflammatory descriptions designed to invoke an emotional response by the jury”). Moreover, the court found that the VIS which described the victim as a baby, his childhood, and his parent’s dreams and hopes for his future “in no way provide insight into the contemporaneous and prospective circumstances surrounding his death; nor do they show how the circumstances surrounding his death have . . . impacted a member of the victim’s immediate family.” Id. at 921. As such, the commentary was deemed to have been more prejudicial than probative and thus outside of the permissible scope of victim impact evidence. See id. at 920. The case was remanded for resentencing because of the trial court’s failure to provide the defendant with his right of confrontation; thus, the actual effect of having improperly admitted such prejudicial victim impact evidence was addressed only in dicta. See id. See also State v. Tucker, 478 S.E.2d 260, 267 (1996), cert. denied, 117 S.Ct. 1561(1997) (admitting photographs during sentencing hearing so as to depict “shots to Victim’s head and that they were fired at close range,” as well as color photos “to show the difference between the blood Victim coughed up and the blood from her wound”). In addition, the sentencing judge admitted photos of “Victim at different places on vacation, Christmas decorations in Victim’s yard, Victim holding her godchild, and Victim fishing.” Tucker, 478 S.E.2d at 27 (holding that such victim impact evidence was admissible to show the victim’s uniqueness and that nothing shown by the photographs would render the trial fundamentally unfair).

133. See supra notes 36-39 and accompanying text; see also supra text accompanying notes 89-93.

134. Anderson, supra note 35, at 399 (noting that “[e]motional considerations and recognition of the victim’s personal suffering play a major role. . . .”).
motivated to tell their story out of a sincere desire to attain closure. However, what if the victim instead is motivated by spite? It is often difficult to tell exactly where the victims' motivations lie, and the judicial process should not be jeopardized by allowing America's courtrooms to become a dwelling place for bloodthirsty revenge. The death penalty cannot bring back the dead, nor is its purpose to serve in the interest of vengeance. Wounds that cut as deep as these never will be healed by the death of another.

135. One commentator noted that "[t]here is also a calculated judgment that the sentencer who hears from the victim or the victim's family will find the victims suffering more reason to hold the defendant responsible and thus will sentence more stringently." Id. at 400 (citing Martha Minow, Surviving Victim Talk, 40 UCLA L. REV. 1411, 1416 (1993)). Others asserted that opening the door to VIS "marks the resurgence of vengeance by victims and families through the criminal justice system since direct participation in the courtroom provides an alternative to vigilante justice." Id.

136. The pain and suffering which victims' families endure as a result of their loss is no doubt extreme, but America's courtrooms are not a place for emotional outbursts and inflammatory comments. As one observer noted:

"Until quite recently, bereavement brought a period of reflection. But over the last decade, the solemn activity of mourning has become a raucous and public blood sport. In the television age anguish only seems real when broadcast over the airwaves. . . . The bereaved now hold regular press conferences, as did Ronald Goldman's father almost every day of the O.J. Simpson trial. Elsewhere, family members leave the courtroom with high fives and fists in the air as though sentencing someone to death were no more serious than a football game. I understand the depth of the pain and the desperate quest for relief. But the judicial system and courtroom were meant for a different purpose entirely."

Staples, supra note 17.

137. See Hauptman, supra note 95, at 479 (noting that "vengeance is an inappropriate rationale for allowing the use of victim impact statements"). "Vengeance is pure anger manifested by uncontrolable, prejudicial outbursts. This leads to disproportionate sentencing which hinges on the eloquence (or mere presence) of family members." Id.

138. See Wallechinsky, supra note 16 (article exploring why a minority of victims' families actually oppose the death penalty for the very people who murdered their loved ones). Bud Welch's daughter, Julie Marie, was a victim of the Oklahoma bombing. See id. He recalls a conversation he had once shared with his daughter about the death penalty and their mutual opposition to it. See id. He admits wavering, however, after Julie's death because he was consumed by rage and hate. See id. (stating that "[t]he first half year after the bombing, had I known that McVeigh was guilty, I would have been for his execution"). As time passed, however, Welch's outlook altered. He recalled:

"[A]fter time, I was able to examine my conscience, and I realized that if he is put to death, it won't help me in the healing process. People talk about execution bringing 'closure.' To hell with 'closure.' My little girl is not coming back, and that's for the rest of my life.

Id. Celeste Dixon is another victim who opposes the death penalty. See id. (noting that she started to feel sorry for the man who killed her mother). She comments:

"There's a tendency in victims' support groups and within prosecuting attorneys' offices to make people feel that they are being disloyal to the person
That is simply not the nature of the healing process, and it is not the purpose or the intent of the criminal justice system.\textsuperscript{139} The law is not a form of therapy, but rather, a means of justice.

The Eighth Amendment dictates that reason, morals, and precision must reign supreme.\textsuperscript{140} Thus, a means must be developed for granting the victim a voice that does not capitalize on inflammatory and emotional factors or unduly sway the jury with wrenching tales of sorrow and pain. Under proper guidelines, VIS should contain no more than a general description of the victim. Any statements dealing with social status, religion, and political beliefs should be prohibited because they serve no more than to capitalize upon the jury's emotions and preconceived ideals. Moreover, commentary about the victim's funeral and gory, distasteful details or characterizations of the crime itself should be exempt on the grounds that such statements open the door to passion and prejudice.\textsuperscript{141} In addition, any opinions regarding the death penalty, appropriate sentencing, or the defendant must be barred on the grounds that they are irrelevant to the decision of whether or not to impose the death penalty, as well as prompt irrational and emotionally charged decision-making.

\section*{B. Minimizing the Prejudice of Payne by Imposing a Set of Stringent and Uniform Guidelines}

The \textit{Payne} Court's ambiguity regarding the proper procedures for admitting victim impact evidence during a capital sentencing trial is troublesome. While the interests of the victim are impor-

\footnotesize{who died if they don't want the murderer to die. They're led to expect that the murderer's death is going to help them heal. It doesn't. All it does is make them focus on anger and hatred. After the execution, the object of their hatred is gone, and they still haven't dealt with their grief.}

\textit{Id.}, at 4-5.

\footnotesize{139. "Sentencing in criminal cases is said to serve all or part of four purposes: (1) retribution; (2) deterrence; (3) incapacitation; and (4) rehabilitation." Hauptman, \textit{supra} note 95, at 478.}

\footnotesize{140. See \textit{supra} note 110-112 and accompanying text; \textit{see also} U.S. Const. amend. VIII (mandating against the infliction of "cruel and unusual punishments"); \textit{supra} note 99.}

\footnotesize{141. One need not be a "bleeding-heart liberal to be wary of injecting too much emotionalism into death penalty cases." Cathy Young, \textit{Let's Keep the Focus on the Perpetrator of Crime}, \textit{Det. News}, June 24, 1997, at A7, \textit{available in} 1997 WL 5590501. While the suffering of those affected by the heinous crime is indeed something we should consider, it is crucial to remember that "we differentiate degrees of homicide not according to the victim's pain or the survivor's grief, but according to the intent and the moral culpability of the perpetrator, and that's where the focus should remain." \textit{Id.}
tant, a death sentence free from passion or prejudice must remain the primary concern. When the decision whether to execute a person is based on arbitrary factors, inflammatory comments, or an appeal to juror emotions, the death penalty is no longer being applied objectively or reasonably. It thus follows that VIS demand the most stringent, controlled, and narrowly defined means of regulation possible given their potential to render a capital defendant's trial fundamentally unfair. Assuming, therefore, that a majority of courts will continue to use VIS, it is necessary to determine how courts can apply them in a manner which least prejudices the defendant's right to a trial free from passion and prejudice.

1. Proposed Procedural Safeguards

In order to prevent a decision as grave as sentencing a human to death from resting on arbitrary, subjective, and capricious factors, a test no less restrictive than strict scrutiny is demanded.\footnote{142. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding that “all racial classifications, imposed by federal, state, or local government actor, must be analyzed by strict scrutiny”). The same analysis would apply to capital sentencing hearings; for rights at risk here are equally fundamental. In fact, no right could be more fundamental than the right to life. As such, nothing short of strict scrutiny should apply. “The strict scrutiny standard analysis requires that the legislative purpose be so compelling as to justify the means utilized.” 20 N.Y. Jur. 2d Constitutional Law § 356 (1982). In other words, the ends must be narrowly tailored to the ends.}

From a constitutional perspective this is crucial because fundamental rights mandate the highest judicial scrutiny.\footnote{143. See supra note 142; see also 16A AM. JUR. 2d Constitutional Law § 750 (1979) (“Statutes affecting fundamental constitutional rights must be drawn with precision and must be tailored to serve their legitimate objectives . . . .”).} And, the right to a capital sentencing hearing free from passion and prejudice is fundamental because the Eighth Amendment has consistently been interpreted to guarantee such a right.\footnote{144. See supra notes 110-115 and accompanying text; see also ); Woodson v. North Carolina, 428 U.S. 280, 228 (1976); Gregg v. Georgia, 428 U.S. 153, 173 (1976); Robinson v. California, 370 U.S. 660, 666 (1962); United States v. McVeigh, 944 U.S. 1478, 1487 (D. Colo. 1996) (noting that “the procedure must protect against a decision motivated by passion and prejudice”).} Accordingly, the means employed to achieve this kind of justice must be directly related to the state's compelling interest in ensuring that right.

Improperly employed VIS can violate a defendant's fundamental rights. Thus, their use must adhere to a very stringent set of guidelines that should be expressed in a constitutional amendment,\footnote{145. See supra note 142; see also 16A AM. JUR. 2d Constitutional Law § 750 (1979) (“Statutes affecting fundamental constitutional rights must be drawn with precision and must be tailored to serve their legitimate objectives . . . .”)}
thereby ensuring that the law will be applied fairly and consistently. By incorporating victims’ rights into the “supreme law of the land,” all judges and courts will be compelled to comply with minimum requirements. Moreover, the procedure of admittance should be clear and unambiguous, leaving no room for abuse of discretion, thereby reducing the costs of frivolous appeals.

The procedural safeguards outlined by the New Jersey Supreme Court provide the best starting point for establishing a universal set of guidelines because they address the needs of the victim, while, at the same time, protect the defendant’s constitutional rights. In fact, the sentencing of Jesse Timmendequas was a perfect example of how such safeguards effectively can control passion and prejudice. Timmendequas’ gruesome crime certainly had the makings for a wrenching sentencing hearing. Forced to comply with the state’s requirements, however, Mr. Kanka controlled his emotions, and his testimony granted the jury only a small peek into the life that was destroyed. The VIS did not capitalize on the suffering of the victims, but still reminded the jury that they were dealing with human beings. Moreover, despite the court’s limitations, it was inevitably clear that the defendant’s actions caused an innocent family incredible suffering. Mr. Kanka’s testimony thus accomplished all that was ever desired by victims’ rights advocates, without jeopardizing the defendant’s right to a sentencing free of arbitrary and capricious factors.

Houses propose an amendment, or if the legislatures of two-thirds of the states call for a constitutional convention.” GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 75 (3d ed. 1996). Furthermore, in order for the amendment to be adopted, it must be ratified by three-fourths of the states. See id. It should be noted that this amendment may also be used as a template for state statutes. Nonetheless, I am proposing a constitutional amendment because that is the direction things are heading. See McMurry, supra note 38 (setting forth the contents of the current proposal). For the sake of administrative convenience, it seems most logical to adhere to this current trend, given that if passed, the law would apply universally to all states, as opposed to proposing that all fifty states adopt identical statutes.

147. Marbury v. Madison, 5 U.S. 137, 180 (1803) (holding that “the particular phraseology of the constitution of the United States confirms and strengthens the principle . . . that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument”).

148. See supra notes 61-72 and accompanying text.

149. See supra notes 74-79 and accompanying text.

150. See supra note 74.

151. See supra notes 76-79 and accompanying text.
2. Proposal for a Constitutional Amendment

The following proposal for an amendment to the United States Constitution establishes guidelines and procedural safeguards to effectively minimize the risk of prejudicing the jury against the capital defendant.152

The trial judge, because of her familiarity with the case, knowledge of and respect for the law, and inherent authority to control and provide a fair courtroom, is in the best position to undertake the balancing test outlined by the following guidelines:

Section 1. The victim impact statement first must be written out and submitted to the judge for approval. The testimony may relate to the impact of the victim’s death on his or her immediate family. It may also contain general commentary about the victim, such as education, age, employment, and family. Moreover, the VIS must adhere to the following standards:153

[1] It can be no more than 2 pages, double-spaced.
[2] It can make absolutely no reference to or opinions about the death penalty or appropriate sentence.
[3] It can express no feelings or opinions about the defendant.
[4] It must refrain from making any characterizations about the circumstances of the crime.
[5] It must not assert any comment about the victim’s moral views or religious affiliation.
[6] It must be void of overtly emotional or inflammatory comments.
[7] It must avoid all commentary that touches upon the victim’s social status or political beliefs.

152. The proposed amendment relies heavily upon many of the concerns of the New Jersey Supreme Court. See supra notes 61-72 and accompanying text.

153. This prong closely adheres to the language of Payne. The Payne Court held that “evidence about the victim and about the impact of the murder on the victim’s family is relevant to the jury’s decision as to whether or not the death penalty should be imposed.” Payne v. Tennessee, 501 U.S. 808, 827 (1991).

154. With respect to subsections [2] and [3], however, the Payne Court refrained from deciding the constitutionality of such commentary. See id. at 832-33 (O’Connor, concurring). But see Booth v. Maryland, 482 U.S. 496, 508 (1987) (holding that such information “can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant”). Moreover, the Booth Court noted that the admission of such “emotionally charged opinions . . . is inconsistent with the reasoned decisionmaking we require in capital cases.” Id. at 508-09; see supra note 25.
Section 2. The probative value of the victim impact evidence must not be substantially outweighed by its risk of undue prejudice to the capital defendant or confusion to the jury.\textsuperscript{155}

Section 3. If admissible under Sections 1 and 2, only one spokesperson may speak to the jury on behalf of all victims. That person must be over the age of eighteen, unless no other survivors are available to testify. In such an event, admissibility will then be left to the discretion of the trial judge. The testimony shall take the form of reading from the pre-approved statement, and the designated reader shall refrain from crying or showing any overt signs of emotion. The judge will warn the designated reader of this requirement beforehand. If there is a problem controlling emotions, the prosecutor will be appointed to read the statement.

Section 4. The VIS shall be read only if the defendant opens the door to character evidence by introducing mitigating evidence at the sentencing.

Section 5. The defendant shall be forewarned that if he or she chooses to introduce mitigating evidence, then the government will likewise have the opportunity to introduce evidence about the character of the victim by way of VIS.

Section 6. Defense counsel shall be given timely notice of the government's intentions to present victim impact evidence and the name of the victim who will testify. Defense counsel may interview the witness beforehand and cross-examine the witness at the sentencing hearing.\textsuperscript{156}

Section 7. Any comments by the prosecution during summation, with respect to the victim impact evidence, should be strictly limited to the previously heard testimony.

Section 8. In response to the reading of the VIS, the judge shall give the jury a limiting instruction. The jury shall be ordered to

\textsuperscript{155} This prong essentially mirrors the language of Rule 403 of the Federal Rules of Evidence, which holds: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." \textit{FED. R. EVID.} 403.

\textsuperscript{156} The prospect of cross-examining a witness is not appealing. Consider the ramifications of attacking the character of the grieving widow or the reputation of the suffering parent. The mere possibility of causing the witness more pain and anguish seems to render cross-examination a far too risky endeavor for the defense attorney, especially given the likely response of the jury. Nevertheless, as a matter of due process, the defendant is entitled to a rebuttal of the evidence offered against him or her. \textit{See Booth}, 482 U.S. at 507 (citing Gardner v. Florida, 430 U.S. 349, 362 (1977) (opinion of Stevens, J.) (due process requires that defendant be given a chance to rebut presentence report)).
make a reasoned and moral judgment, and not be swayed by emotions or sympathy. The judge shall remind the jury that while emotions are indeed powerful, a death sentence cannot be motivated by vengeance, and emotions cannot be a factor in determining a sentence. In addition, the judge shall note that VIS are designed to give the jury a small glimpse into the life of the victim and the suffering that his or her death imposed on the survivors. However, the full extent to which the victim’s survivors have suffered cannot be the grounds for determining the defendant’s moral culpability. The jury shall concentrate on the circumstances of the crime and the defendant’s record in making a sentencing determination.

3. Discussion of Amendment

The above guidelines do not require the jury to first find evidence of one aggravating factor beyond a reasonable doubt before considering the VIS, as the New Jersey Supreme Court does, because such mental gymnastics are well beyond the comprehension of a lay juror.\(^{157}\) Thus, if the defendant opens the door to such evidence, the jury may consider it. In addition, the above proposal strictly limits the victim impact testimony to one survivor, while the New Jersey Supreme Court leaves the door open to “special circumstances.”\(^{158}\) Given the high potential of undue prejudice that can result from days of heart-wrenching testimony, there can be no room for discretion on the part of the sentencing judge to allow

\(^{157}\) See supra notes 69-71 and accompanying text. By invoking such a limitation, New Jersey seeks to prevent VIS from becoming “a means of weighing the worth of the defendant against the worth of the victim.” State v. Muhammad, 678 A.2d 164, 179 (N.J. 1996). And, in essence, that is exactly what this Constitutional Amendment is trying to prevent. However, New Jersey’s means of achieving this goal is somewhat thwarted; for once the jurors hear the VIS, it will be virtually impossible for them to forget what was said should they not unanimously find the existence of an aggravating factor. See id. While the Muhammad Court maintains that “[t]he entire structure of the penalty phase of capital cases is premised on the belief that jurors will use evidence only for its proper purpose,” it is unlikely that emotionally laden testimony of this nature could ever be completely ignored, especially given the weakness of human emotions. See id. Perhaps the New Jersey Supreme Court overlooked the fact that juries are not typically comprised of trained legal professionals, but rather lay persons whose knowledge of and experience with the law is minimal. The risk that the jurors will misuse the VIS is significant; thus, any effort to impose such complex rules is in vain. Given the likelihood that the other narrowly defined guidelines will counter any risk of prejudice, the VIS may therefore be considered whenever the defendant opens the door to such evidence.

\(^{158}\) See Muhammad, 678 A.2d at 180. The Court fails to specify what such circumstances may be; however, the mere possibility of an exception to the rule creates the inherent danger of a slippery slope.
statements from more than one survivor. Finally, at the conclusion of the victim impact testimony, the judge also will be required to give a limiting instruction as to the extent of the testimony’s use in order to temper the effect of human emotions. The instructions are to remind jurors of the goals of sentencing and the higher ideals of the justice system, in order to prevent them from reaching a decision based on fleeting emotions.

These guidelines are not inconsistent with the *Payne* decision. They merely clarify its ambiguities and ensure that VIS are properly employed. The *Payne* Court noted that “(t)here is no reason to treat such evidence differently than other evidence is treated,”\(^\text{159}\) and thus, VIS, like all other evidence, must be susceptible to tests of relevance, reliability, and prejudice. Although the traditional focus on the defendant may have shifted, the *Payne* Court did not rule that VIS are exempt from the traditional admissibility standards for evidence.\(^\text{160}\)

**Conclusion**

In many cases, VIS have the potential to make a marked difference between life and death. Faced with the inconsistent state of the law after *Payne*, efforts must now be directed towards controlling the prejudicial impact of VIS, in order to avoid unduly prejudicing defendants in capital sentencing hearings. An amendment to the United States Constitution is the most adequate protection against the influence of passion and prejudice. The gravity of the sentence demands such uniformly stringent control, and the rights already defined by the Constitution compel nothing less. By applying the safeguards set forth by these guidelines, courts throughout the United States can avoid inconsistent, capricious, and arbitrary decisions. To permit otherwise would be to run the impermissible risk of tipping the scales of justice, thereby denying the possibility of equality in the courtroom.

\(^{159}\) *Payne*, 501 U.S. at 826.

\(^{160}\) See *id*.; see also supra notes 105-106 and accompanying text.
WALKING A TIGHTROPE: REDRAWING CONGRESSIONAL DISTRICT LINES AFTER SHAW V. RENO AND ITS PROGENY

Donovan L. Wickline*

Introduction

For over thirty years, the Voting Rights Act ("VRA") has quietly revolutionized minority voting rights and power in the United States. Congress enacted the VRA in 1965 as a response to the array of discriminatory devices that southern jurisdictions used to deny Blacks political participation after the passage of the Fifteenth Amendment. Today, some commentators consider the VRA to be the most effective civil rights statute ever. The most dramatic example of the immediate effectiveness of the VRA occurred in Mississippi, where the Black registration rate soared from 6.7% to 59.4% within three years of the statute's passage. Moreover, the number of Black elected officials increased in the seven originally targeted southern states from fewer than 100 in 1965 to 3265 in 1989.

The quiet era of the VRA, however, has ended. In recent years, the statute has gained center stage in the debate over the constitu-

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2. See generally QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 (Chandler Davidson & Bernard Grofman eds., 1994) (showing how the VRA "quietly" enfranchised Black voters in the South during its first twenty-five years) [hereinafter QUIET REVOLUTION].

3. The Fifteenth Amendment states in pertinent part: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.


6. See Chandler Davidson, The Voting Rights Act: A Brief History, in CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 7, 43 (Bernard Grofman & Chandler Davidson eds., 1992) [hereinafter CONTROVERSIES]. The seven originally targeted states were Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and 40 counties in North Carolina. Id. at 19.
tionality of a variety of race-conscious public policies. In voting rights cases, the dispute has focused on a remedy to certain violations of the VRA: the creation of majority-minority election districts where voting is otherwise polarized along racial lines.

In Shaw v. Reno ("Shaw I") and its progeny, the United States Supreme Court invalidated majority-minority congressional districts in North Carolina, Georgia, and Texas using strict scrutiny analysis under the Fourteenth Amendment's Equal Protection Clause ("EPC"). By requiring that majority-minority congressional districts be redrawn, however, the Supreme Court has in-

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7. Although the continued necessity for affirmative action programs has dominated this debate, the constitutional arguments and analyses, regarding the legality of affirmative action and the constitutionality of majority-minority voting districts, are substantially parallel. Compare Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (ruling that strict scrutiny must be applied to federal affirmative action programs) and City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (striking down a city minority set-aside program after applying strict scrutiny) with Miller v. Johnson, 515 U.S. 900 (1995) (striking down a majority-minority voting district after applying strict scrutiny) and Shaw v. Reno, 509 U.S. 630 (1993) (ruling that strict scrutiny must be applied to a majority-minority voting district that was so bizarre in shape that only unconstitutional racial gerrymandering could provide the explanation).


11. The Fourteenth Amendment states in pertinent part: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
vited litigation under Sections 2\textsuperscript{12} and 5\textsuperscript{13} of the VRA.\textsuperscript{14} As a result of the Court's decisions, state legislatures face a Catch-22. If they use race as a predominant factor in drawing congressional districts, they are subject to strict scrutiny under the EPC. If they fail to draw majority-minority districts, however, they are subject to litigation under Sections 2 and 5 of the VRA.

This Note explores the tension between the Supreme Court's recognition of a new cause of action under the EPC and the established requirements of the VRA. Part I explains how the EPC originally was interpreted to protect voting rights and how Congress, in an effort to provide further protection, enacted the VRA.

\begin{itemize}
\item \textsuperscript{12} 42 U.S.C. § 1973 (1998). Section 2 provides:
  \begin{enumerate}
  \item No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . . .
  \item A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.
  \end{enumerate}
\Id.

\item \textsuperscript{13} \Id. at § 1973c. Section 5 is intended to identify and eliminate any new state voting requirements or procedures, in those jurisdictions found to have histories of systemic racial discrimination, that have the purpose or effect of "denying or abridge the right to vote on account of race or color." \Id.; \textit{see also} Beer v. United States, 425 U.S. 130, 141 (1976) ("T[he purpose of Section 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."). The Justice Department's long-standing interpretation of section 5 incorporates the "results" standard of section 2. \textit{See} Heather K. Way, \textit{Note, A Shield or a Sword? Section 5 of the Voting Rights Act and the Argument for the Incorporation of Section 2}, 74 Tex. L. Rev. 1439, 1439 (1996). \textit{But see} Reno v. Bossier Parish Sch. Bd., 117 S. Ct. 1491, 1501 (1997) (holding that preclearance under section 5 may not be denied solely because a covered jurisdiction's new voting "standard, practice, or procedure" violates section 2).

\item \textsuperscript{14} \textit{See} Johnson v. Miller ("Johnson III"), 922 F. Supp. 1556 (S.D. Ga. 1995), \textit{aff'd sub nom.} Abrams v. Johnson, 117 S. Ct. 1925 (1997). As a result of the Supreme Court's decision in \textit{Miller}, the Southern District of Georgia ordered a remedial congressional districting plan that reduced the number of majority-Black districts from three to one. \textit{See} Johnson III, 922 F. Supp. at 1561. Thereafter, the minority groups in \textit{Abrams} challenged this court-ordered plan as retrogressive and a dilution of Black voting strength in violation of sections 2 and 5 of the VRA. \textit{See} Brief for Appellants at *i, Abrams (No. 95-1425), \textit{available in} 1996 WL 416713; \textit{see also infra} Part II.C.2.
Part II reviews the Supreme Court decisions in *Shaw I* and its progeny and examines the tension created by application of the VRA and EPC. Part III argues that the VRA and EPC can coexist in harmony if the Court holds that compliance with the statute is a compelling state interest, and that a majority-minority district drawn to remedy a Section 2 violation is narrowly tailored by virtue of what the plaintiffs must show to establish the violation in the first instance. The Note concludes that the Court should clarify the meaning and role of “compactness” in redistricting and provide some guideposts for the legislators, litigants, and courts involved in the reapportionment process.

I. Background

A. The EPC Protects Voting Rights

In the United States, voting is a fundamental political right. Over 100 years ago, the Fifteenth Amendment was ratified, constitutionally guaranteeing the right to vote for minorities. The need for the protections of the Fourteenth Amendment in the voting rights context became clear, however, because states attempted to deny Blacks their right of suffrage through discriminatory devices such as poll taxes, literacy tests, and racial

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15. “Compactness” in redistricting may refer to the shape of the district or the dispersion of the population within the district, but the Supreme Court has never provided clear guidance for determining what “compact” means or how the analysis regarding whether a district's shape is compact should interrelate with the inquiry that focuses on population. See infra Parts II.C.1 and III.B.2.

16. See Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 670 (1966) (“[W]ealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.”); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.”); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (referring to “the political franchise of voting” as a “fundamental political right, because preservative of all rights”); see also Laurence H. Tribe, *American Constitutional Law* § 16-10, at 1460-61 (2d ed. 1988) (stating that the right at stake in cases involving voting rights is one to equal participation in governmental and societal decision-making).

17. U.S. Const. amend. XV.

18. The Fifteenth Amendment states in pertinent part: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” Id. § 1.

gerrymandering of voting districts. Some states even created at-large election schemes. These plans diluted the potential voting strength of minorities because the larger White population would vote cohesively for its preferred candidates. Other states gerrymandered districts so that minorities were either excluded from important voting districts or scattered among various districts, ensuring that they could never constitute a majority of votes in any district. Therefore, both the Fourteenth and Fifteenth Amendments are necessary to constitutionally guarantee the right to vote and to protect the right of a citizen to have his or her vote count.

The EPC of the Fourteenth Amendment requires that a citizen not only be allowed to vote, but also possess voting power that is weighted equally to that of other citizens. In equal protection

20. See, e.g., South Carolina v. Katzenbach, 383 U.S. 301, 310-13 (1966) (discussing the history of discriminatory voting procedures designed specifically to prevent Black citizens from exercising their right to vote).

21. See, e.g., Rogers v. Lodge, 458 U.S. 613, 616 (1982) (striking down the use of an at-large electoral system and upholding the lower court's order that the state adopt single-member districts). At-large or multimember district electoral plans dilute minority voting strength when the majority group votes cohesively for the candidates of their choice, effectively barring the minority group from electing any of the candidates of their choice. Id. at 616-17. At-large election schemes disfranchised Blacks by indirection because White officials would abolish districts entirely and place Black voters in majority-White multimember districts. See Davidson, supra note 6, at 24.

In City of Mobile v. Bolden, 446 U.S. 55 (1980), the Supreme Court made it substantially more difficult for minority plaintiffs to challenge at-large or multimember districts when it held that they had to prove intent to discriminate on the basis of race if they were to successfully bring a claim of vote dilution under section 2 of the VRA. Id. at 66. In 1982, however, Congress amended section 2 effectively overruling the Court's holding in Bolden by prohibiting any voting practice, regardless of its purpose, that results in discrimination. See supra note 12.

22. The term gerrymander, named after Massachusetts Governor Elbridge Gerry, became popular in 1812 after then-governor Gerry approved a salamander-shaped district drawn by the state legislature to benefit his Democratic party. See Kristin Silverberg, Note, The Illegitimacy of the Incumbent Gerrymander, 74 Tex. L. Rev. 913, 922-23 (1996).

23. See, e.g., Wright v. Rockefeller, 376 U.S. 52, 53-56 (1964) (upholding a New York congressional apportionment statute excluding African American and Puerto Rican citizens from one district and placing them in other districts because the plaintiffs failed to prove discriminatory intent); Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960) (ruling that an Alabama law was unconstitutional if petitioners could show that the all-White Alabama legislature redrew Tuskegee's municipal boundaries to exclude all but four or five of the city's 500 Black voters, but none of its White ones).

24. See Davidson, supra note 6, at 24, which discusses how redistricting processes dominated by Whites resulted in gerrymandering to disfranchise Blacks by indirection so that they would not make up a majority of the voters in any district.

25. U.S. Const. amend. XIV.

26. See Reynolds v. Sims, 377 U.S. 533, 560-61 (1964) ("[T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people . . . .".

20. See, e.g., South Carolina v. Katzenbach, 383 U.S. 301, 310-13 (1966) (discussing the history of discriminatory voting procedures designed specifically to prevent Black citizens from exercising their right to vote).

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25. U.S. Const. amend. XIV.

26. See Reynolds v. Sims, 377 U.S. 533, 560-61 (1964) ("[T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people . . . .")
cases, the Supreme Court applies strict scrutiny to legislative actions when a plaintiff proves that the government possessed a racially discriminatory intent or purpose.\textsuperscript{27} When a plaintiff shows such intent, the Court requires the defendant to show that the legislature narrowly tailored its law to satisfy a compelling governmental interest.\textsuperscript{28}

To prove discriminatory intent, a plaintiff must show either that a law clearly, or on its face, discriminates on the basis of race,\textsuperscript{29} or that in its application a clear pattern emerges that is “unexplainable on grounds other than race.”\textsuperscript{30} If the plaintiff proves that discriminatory purpose is one motivating factor in the decision to enact the legislation, then strict scrutiny must be applied.\textsuperscript{31}

\begin{itemize}
\item \textsuperscript{27} Miller v. Johnson, 515 U.S. 900; 912 (1995) (“[S]tatutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object.”).
\item \textsuperscript{28} See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (“[Racial] classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”). Moreover, in City of Richmond v. Croson, the Court stated:
\begin{quote}
Indeed, the purpose of strict scrutiny is to “smoke out” illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also assures that the means chosen “fit” this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.
\end{quote}
\end{itemize}


\begin{itemize}
\item \textsuperscript{29} See, e.g., Croson, 488 U.S. at 477-78 (striking down a city program that set-aside contracts for minority businesses).
\item \textsuperscript{30} Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977). The \textit{Arlington Heights} Court stated that “[a]bsent a pattern as stark as that in \textit{Gomillion or Yick Wo}, impact alone is not determinative,” and the Court must look to direct and circumstantial evidence of discriminatory purpose. \textit{Id.} In \textit{Yick Wo v. Hopkins}, 118 U.S. 356 (1886), the Court held a facially race-neutral city ordinance to be unconstitutional under the EPC because the plaintiffs showed that it was administered exclusively against Chinese immigrants. \textit{Id.} at 374. In \textit{Gomillion v. Lightfoot}, 364 U.S. 339 (1960), the Court held that if the petitioners proved their allegations that an Alabama law created a racially gerrymandered district, the statute infringed on the right of Blacks to vote in violation of the Fifteenth Amendment. \textit{Id.} at 341-42.
\item \textsuperscript{31} See \textit{Arlington Heights}, 429 U.S. at 265-66. In \textit{Arlington Heights}, the plaintiff, a nonprofit real estate developer, alleged that the city violated minorities' equal protection rights by refusing to rezone a fifteen-acre parcel so as to permit the construction of low- and moderate-income housing. \textit{Id.} at 252. The Court held that the plaintiff failed to prove that racially discriminatory intent or purpose was a motivating factor in the zoning decision, thus ending the constitutional inquiry. \textit{Id.} at 270.
The Supreme Court has used the EPC to create principles governing the mapping of voting districts. Applying strict scrutiny analysis, the Court has struck down redistricting plans that used at-large electoral schemes because they classified citizens on the basis of race. Moreover, it held that a state legislature that was not apportioned on a population basis violated the EPC because it unconstitutionally diluted voter strength. Almost as soon as states were forbidden from using various discriminatory voting devices, however, they created new practices to prevent Black citizens from voting. Congress passed the Civil Rights Act of 1964 to remedy the problem, but state and local governments continued to deny minority citizens their right to vote.

B. The Voting Rights Act

Congress enacted the Voting Rights Act in 1965 to enforce the Fourteenth and Fifteenth Amendments to the Constitution. The VRA contained broad provisions that sought not only to provide Blacks access to the voting booth, but also to force states to end all discriminatory voting practices, including literacy tests and poll

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32. See Rogers v. Lodge, 458 U.S. 613, 616-17 (1982); see also supra note 21 and accompanying text.

33. See Reynolds v. Sims, 377 U.S. 533, 576-77 (1964) (establishing the one-person, one-vote principle by holding that every voting district in a state must be constructed as nearly of equal population as practicable); see also infra text accompanying notes 47-49.

34. See, e.g., South Carolina v. Katzenbach, 383 U.S. 301, 310-13 (1966) (listing various practices designed to deprive Black citizens of the vote); Gomillion v. Lightfoot, 364 U.S. 339, 341-42 (1960) (forbidding racial gerrymandering of districts); Smith v. Allwright, 321 U.S. 649 (1944) (declaring White primaries unconstitutional); Guinn and Beal v. United States, 238 U.S. 347 (1915) (invalidating grandfather clauses); see also supra note 20 and accompanying text.


36. See Katzenbach, 383 U.S. at 314 (“Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration.”).


38. Katzenbach, 383 U.S. at 315-16 (outlining the stringent remedies the VRA aimed at voting discrimination). “After enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshalled an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively.” Id. at 337.

39. According to Sen. Jacob Javits, the VRA’s purpose was “not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination. . . . The bill would attempt to do something about accumulated wrongs and the continuance of the wrongs.” S. REP. NO. 97-417, at 5 (1982) (quoting 111 CONG. REC. 8295 (1965)).
taxes.\textsuperscript{40} In addition, the VRA required that jurisdictions with a history of discrimination which depressed political participation receive federal preclearance before adopting any new voting requirement or procedure.\textsuperscript{41}

Although Congress ensured that Black citizens had the right to register and cast a ballot, many jurisdictions adopted discriminatory measures designed to circumvent the empowerment of minority voters.\textsuperscript{42} As a result, the courts and executive branch had to address the issue of vote dilution to ensure that Black citizens were provided effective political power.\textsuperscript{43} Challenges to such state voting procedures occur under Sections 2 and 5 of the VRA, as well as under the Fourteenth and Fifteenth Amendments.\textsuperscript{44}

Section 2 authorizes claims by private citizens against a state for unlawful vote dilution.\textsuperscript{45} In \textit{Reynolds v. Sims},\textsuperscript{46} decided the year before the VRA was passed, the Supreme Court held for the first time that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."\textsuperscript{47} Five years later, in \textit{Allen v. State Board of Elections},\textsuperscript{48} the Court relied on the \textit{Reynolds} one-person, one-vote decision to conclude that diluting the voting strength of racial minorities violated the VRA.\textsuperscript{49}

\textsuperscript{40} 42 U.S.C. § 1973 (1965). Section 2 originally provided that "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." \textit{Id.}

\textsuperscript{41} \textit{Id.} at § 1973c; see \textit{supra} note 13.

\textsuperscript{42} See \textit{Allen v. State Bd. of Elections}, 393 U.S. 544 (1969) (creating at-large voting system for county officeholders); see also \textit{supra} notes 20-21 and accompanying text.


\textsuperscript{44} See Bernard Grofman, \textit{Would Vince Lombardi Have Been Right if He Had Said: "When it Comes to Redistricting, Race isn't Everything it's the Only Thing?"}, 14 \textit{Cardozo L. Rev.} 1237, 1239 (1993).


\textsuperscript{46} 377 U.S. 533 (1964).

\textsuperscript{47} \textit{Id.} at 555; see \textit{supra} note 33 and accompanying text.

\textsuperscript{48} 393 U.S. 544 (1969).

\textsuperscript{49} See \textit{id.} at 565-66, 569. The \textit{Allen} Court stated that:

The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot . . . . Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.

\textit{Id.} at 569.
In 1980, however, the Supreme Court abruptly changed the landscape of vote dilution litigation with its decision in *City of Mobile v. Bolden*. In *Bolden*, the Court held that plaintiffs in vote dilution cases must prove that the challenged system was enacted or maintained in order to deprive Blacks of political power. By requiring plaintiffs to prove intent, litigation challenging discriminatory voting practices under the Constitution and Section 2 of the VRA dried up.

In response to *Bolden*, Congress added an important amendment to Section 2 in 1982, eliminating the requirement of discriminatory intent and providing that any voting procedure that lessens the opportunity of minority voters to elect the candidates of their choice violates Section 2 of the VRA. In *Thornburg v. Gingles*, however, the Supreme Court established three preconditions plaintiffs challenging an apportionment plan under Section 2 must prove: (1) that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district;" (2) that it is "politically cohesive;" and (3) that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." If plaintiffs show that

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50. 446 U.S. 55 (1980); see supra note 21 and accompanying text.
51. See id. at 66.
52. Laughlin McDonald, *The 1982 Amendments of Section 2 and Minority Representation*, in *CONTROVERSIES*, supra note 6, at 67 ("Because of the plaintiff's onerous new burden of proof, litigation challenging discriminatory voting practices under the Constitution and section 2 dried up.").
55. Also referred to as the "Gingles factors."
56. Gingles, 478 U.S. at 50.
57. Id. at 51.
58. Id. The legislative history of section 2, particularly the Senate Report, indicates that a "variety of factors, depending upon the kind of rule, practice, or procedure called into question," are relevant in determining if a plan "results" in discrimination. S. Rep. No. 97-417, at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 206-07. Typical factors include:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
“racial and ethnic cleavages . . . necessitate majority-minority districts to ensure equal political and electoral opportunity,” the remedy is race-conscious districting.59

Under Section 5 of the VRA, covered jurisdictions must submit their election plans for preclearance to the Department of Justice or the District Court for the District of Columbia to illustrate that they neither abridge the minority vote nor dilute minority voting power in violation of Section 2.60 To obtain preclearance, the Department of Justice encourages states to “maximize” minority voting power by creating majority-minority districts.61 The purpose of Section 5, according to the Supreme Court’s interpretation in Beer v. United States,62 is to ensure that no changes in voting laws “lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”63

II. Redistricting under the VRA and Tension with the EPC

The Supreme Court initially deferred to states when analyzing the creation of majority-minority voting districts.64 The Court found no injury, under the EPC, to plaintiffs who alleged that race was used for its own sake in drawing a majority-minority voting

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5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. This list is referred to as the “Senate Factors,” and is relied on by courts applying the “totality of the circumstances” test set forth in section 2 of the VRA. Gingles, 478 U.S. at 37; see supra note 12.


60. Section 5 requires that covered jurisdictions submit redistricting plans to the Attorney General for preclearance before they can enforce the plans. 42 U.S.C. § 1973c. If the Attorney General denies preclearance, states may attempt to obtain a declaratory judgment granting preclearance from the federal district court for the District of Columbia, or they may petition that court before requesting preclearance from the Attorney General. Id. Section 5 requirements apply to “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . .” 42 U.S.C. § 1973c, as amended.


63. Id. at 141; see supra note 13.

district.\textsuperscript{65} In Shaw v. Reno and its progeny, however, the Court has transformed voting rights litigation by applying strict scrutiny analysis to majority-minority voting districts and then striking them down on equal protection grounds.\textsuperscript{66}

A. Initial Deference to the VRA

In deciding whether to approve reapportionment plans, the Department of Justice\textsuperscript{67} interpreted the Beer nondilution requirement as imposing an affirmative duty on states to maximize minority voting strength and to create majority-minority districts.\textsuperscript{68} The Supreme Court implicitly approved such actions in United Jewish Organizations v. Carey ("UJO")\textsuperscript{69} when it upheld New York's intentional use of race to enhance minority representation in the state legislature. Three of the eight participating justices in UJO found that the intentional use of race was not unconstitutional if the state neither intended nor accomplished vote dilution.\textsuperscript{70} Moreover, the UJO plurality held that a state could consider race when districting to satisfy the requirements of the VRA.\textsuperscript{71} As a result,

\textsuperscript{65} Id. at 154 n.14 (stating that petitioners argue "that the history of the area demonstrates that there could be—and in fact was—no reason other than race to divide the community at this time.").

\textsuperscript{66} See supra notes 9-11 and accompanying text.

\textsuperscript{67} See supra note 60 and accompanying text (explaining that states may obtain preclearance of their redistricting plan from the Attorney General rather than a federal court).


\textsuperscript{69} 430 U.S. 144 (1977). In UJO, a New York redistricting plan was submitted to the Attorney General, pursuant to section 5, who objected to it because the plan appeared to dilute the vote of minorities, specifically Blacks and Puerto Ricans. See id. at 148-50. State officials responded to this objection by redrawing the district lines, whereby the percentage of minority voters in districts where minorities already constituted a majority increased substantially. See id. at 151. The Attorney General did not object to the new plan, but a group of Hasidic Jews sued, alleging that their vote had been diluted by the new plan. See id. at 152. Moreover, they alleged that there was "no reason other than race" that the community was divided at the time. Id. at 154 n.14; see supra notes 64-65 and accompanying text.

\textsuperscript{70} Id. at 165 (opinion of Justice White, joined by then-Justice Rehnquist and Justice Stevens) (finding that the plan, by deliberately drawing nonWhite districts, did not minimize or unfairly cancel out White voting strength, because under the contested redistricting plan, Whites continued to be fairly represented relative to their share of the population).

\textsuperscript{71} UJO, 430 U.S. at 155-65 (opinion of Justice White, joined by Justices Brennan, Blackmun, and Stevens). As Justice White observed, "[w]here it occurs, voting for or against a candidate because of his race is an unfortunate practice. But it is not rare . . . . It does not follow, however, that the State is powerless to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls." Id. at 166-67.
B. Shaw v. Reno and its Progeny

1. Shaw I: The Supreme Court Applies Strict Scrutiny to a Majority-Minority Redistricting Plan

Although some commentators consider the Voting Rights Act to be the most important and successful civil rights bill ever passed,73 criticism of the statute has increased dramatically in recent years.74 Critics of the VRA allege that the race-conscious remedies in vote dilution litigation75 violate the notion that the Constitution is color-blind.76

The Supreme Court appeared to agree with these critics in Shaw I77 when it departed from the lenient standard it created in UJO and created a new cause of action under the EPC.78 In a five-to-four decision, the Shaw I Court stated that, regardless of motivation, where a legislative redistricting plan is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting," it must undergo the same

72. Id.
73. See Davidson & Grofman, supra note 4, at 386.
74. See Grofman, supra note 44, at 1247 ("But there can be little doubt that, since the mid-1980s, there has been a backlash against the Voting Rights Act.").
75. See id. at 1248. See, e.g., Thornburg v. Gingles, 478 U.S. 30, 42-61 (1986) (noting that states must consider race because they must ensure that their redistricting plan does not scatter minorities among majority-white districts, thus diluting minority voting power); UJO, 430 U.S. at 167-68 (permitting the consideration of race when redrawing the lines of voting districts).
76. Grofman, supra note 44, at 1248. The concept of a color-blind Constitution first arose in Justice Harlan's dissent in Plessy v. Ferguson, 163 U.S. 537, 559 (1896) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.") (Harlan, J., dissenting). See also Shaw I, 509 U.S. 630, 657 (1993) ("Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire."). In some cases, however, the Court has been willing to accept race-conscious remedies. See, e.g., United States v. Paradise, 480 U.S. 149, 185-86 (1987) (affirming court-ordered quota imposed to remedy public employer's past discrimination); Wygant v. Jackson Bd. of Educ., 476 U.S. 275 (1986) (noting that a public employer may voluntarily use a race-conscious plan to remedy past racial discrimination by that public employer).
78. UJO was substantially narrowed by the Court's decision in Shaw I. See infra notes 81-83 and accompanying text.
strict scrutiny applied when other state laws classify citizens by race.\textsuperscript{79}

The \textit{Shaw I} Court stated that bizarrely shaped districts lack traditional districting principles and therefore raise an inference of unconstitutional racial discrimination.\textsuperscript{80} Moreover, the Court distinguished \textit{UJO} as a vote dilution case\textsuperscript{81} and emphasized that redistricting legislation that classifies citizens on the basis of race involves a different, "special" type of injury, which eliminates the need for the plaintiffs to establish vote dilution or deprivation.\textsuperscript{82} The Court found that "a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract."\textsuperscript{83}

Although the majority expressed no view as to whether the intentional creation of majority-minority districts would always give rise to an equal protection cause of action\textsuperscript{84} it nonetheless instructed that, once plaintiffs successfully prove that a state legislature racially gerrymandered its congressional redistricting plan, courts should review the plan with "close judicial scrutiny."\textsuperscript{85} This strict scrutiny standard requires that a state offer sufficient proof

\textsuperscript{79} \textit{Shaw I}, 509 U.S. at 641-47. The \textit{Shaw I} case arose when the North Carolina legislature developed a redistricting plan which created new congressional voting districts to reflect population increases indicated in the 1990 census. \textit{See id}. at 633-34. The Attorney General objected to the plan, pursuant to section 5, noting that the addition of another majority-minority district would prevent dilution of the minority vote, and that the drawing of such a district was feasible. \textit{See id}. at 634-35. The legislature thus created a new plan, adding a second majority-minority district, which gained the approval of the Attorney General, but also generated much controversy. \textit{See id}. at 635-36.

\textsuperscript{80} \textit{Id}. at 646-47. Traditional districting principles include "compactness, contiguity, and respect for political subdivisions." \textit{Id}. at 647. "We emphasize that these criteria are important not because they are constitutionally required—they are not—but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." \textit{Id}. at 646 (citations omitted).

\textsuperscript{81} \textit{Id}. at 652. \textit{But see UJO}, 430 U.S. 144, 154 n.14 (1977) (alleging that there was "no reason other than race" that the community was divided at the time, a \textit{Shaw I}-type equal protection challenge).

\textsuperscript{82} \textit{Shaw I}, 509 U.S. at 649-50 ("Classifying citizens by race, as we have said, threatens special harms that are not present in our vote-dilution cases.").

\textsuperscript{83} \textit{Id}. at 648.

\textsuperscript{84} \textit{See id}. at 649. Similarly, the Court expressed no view whether the creation of majority-minority districts to comply with the VRA is a compelling state interest because, in this case, the statute did not require such a district to be drawn. \textit{See id}. at 653-54.

\textsuperscript{85} \textit{Id}. at 657. For a discussion of the two-step analysis that courts must apply when examining state actions under the EPC, \textit{see supra} notes 27-31 and accompanying text.
that it narrowly tailored its redistricting plan to satisfy a compelling governmental interest.86

2. Miller v. Johnson: The Supreme Court Expands its Holding in Shaw I

After Shaw I, courts split widely when interpreting what constitutes a compelling governmental interest and how a state could narrowly tailor a redistricting plan to achieve that interest.87 Courts also disagreed when interpreting the plaintiffs' burden of proof in cases alleging that race-conscious redistricting plans violated the EPC. In particular, the courts disagreed on the degree of race consciousness that would trigger strict scrutiny.88

In Miller v. Johnson,89 the Supreme Court attempted to resolve the uncertainty created by Shaw I. It held that if the plaintiff could establish, through either direct or circumstantial evidence,90 that "race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a

86. See Shaw I, 509 U.S. at 658; see also supra note 28 and accompanying text.
87. See, e.g., Vera v. Richards, 861 F. Supp. 1304, 1339-41 (S.D. Tex. 1994) (holding that the legislature did not narrowly tailor the districts to achieve a compelling interest because there was evidence of oddly-shaped boundaries); Johnson I, 864 F. Supp. 1354, 1393 (S.D. Ga. 1994) (finding that compliance with the VRA might be compelling, but holding that the state's redistricting plan was not "reasonably necessary" to achieve compliance, because it exceeded the requirements of the Act); Shaw v. Hunt, 861 F. Supp. 408, 476 (E.D.N.C. 1994) (holding that compliance with the VRA constituted a sufficiently compelling interest that justified racially gerrymandering the voting districts); Hays v. Louisiana, 839 F. Supp. 1188, 1209 n.67 (W.D. La. 1993) (holding that a plan creating additional majority-minority districts would be reasonably necessary only if a state needed to add another majority-minority district to prevent a reduction of minority voting strength).
88. See, e.g., DeWitt v. Wilson, 856 F. Supp. 1409, 1413 (E.D. Cal. 1994) ("[I]n redistricting, consciousness of race does not give rise to an [EPC] claim of racial gerrymandering . . . ."); Johnson I, 864 F. Supp. at 1372 (holding that race must be the "overriding, predominant force determining the lines of the district" to prove racial gerrymandering); Vera, 861 F. Supp. at 1338 (explaining that race must be a "primary consideration"); Hays, 839 F. Supp. at 1195 (interpreting Shaw I to require that race need only be a tangible factor to invoke strict scrutiny). Cf. Bridgeport Coalition for Fair Representation v. City of Bridgeport, 26 F.3d 271, 278 (2d Cir. 1994) (applying Shaw I to a city council redistricting plan, and holding that it did not trigger strict scrutiny because race was not the city's sole motivation when designing the plan).
89. 515 U.S. 900 (1995). In Miller, the Court confronted the constitutionality of Georgia's Eleventh Congressional District, and struck it down by yet another five-to-four decision.
90. The Miller Court stated that "[s]hape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." Id. at 913.
particular district,” then the districting plan would be subject to strict scrutiny.91 The Miller Court stated, however, that a majority-minority redistricting plan created to comply with the VRA could withstand strict scrutiny, but only where there was “convincing evidence” that remedial action was reasonably necessary to satisfy the requirements of the statute.92

Agreeing with the district court that race was the predominant factor motivating the state legislature’s drawing of Georgia’s Eleventh Congressional District, the Miller Court addressed the requirements of strict scrutiny.93 The Miller Court concluded that the majority-minority district was not required “under a correct reading of the [VRA]”94 because it was part of an ameliorative apportionment plan. Therefore, an additional majority-minority district could not be compelled by Section 5 because that provision only prohibits retrogression of minority voting rights or power.95 The Miller Court added that the Justice Department’s interpretation of Section 5 as authorizing it to preclear only those reapportionment plans that maximized majority-minority districts created constitutional difficulties for Section 5 and brought the VRA “into tension with the Fourteenth Amendment.”96

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91. Id. at 916. “[A] plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations.” Id.
92. Id. at 920-21.
93. See id. at 916-17.
94. Id. at 921. The Miller Court stated:

Whether or not in some cases compliance with the Voting Rights Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination, it cannot do so here. As we suggested in Shaw I, compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws.

Id. The Court noted, however, that a compelling state interest existed when a state attempted to “eradicate[e] the effects of past racial discrimination.” Id. at 920 (citing Shaw I, 113 S. Ct. at 2831). But in this case, the defendants did not argue “that it created the [majority-minority] district to remedy past discrimination . . . .” Id.
95. See id. at 923; see also supra note 63 and accompanying text.
96. Id. at 927. Moreover, the Court stated that “[t]here is no indication Congress intended such a far-reaching application of § 5, so we reject the Justice Department’s interpretation of the statute and avoid the constitutional problems that interpretation raises.” Id.; see supra note 61 and accompanying text.
3. **Muddy Waters: The Supreme Court Decisions in Shaw II and Bush v. Vera**

The *Miller* Court did not decide whether compliance with the Voting Rights Act constituted a compelling governmental interest. Moreover, it did not specify in which instances a state may draw majority-minority districts to remedy potential or adjudicated violations of Section 2 of the VRA. In its 1995 Term, the Supreme Court struck down majority-minority congressional districts in North Carolina\(^7\) and Texas.\(^8\) The Court, however, did not specify the constitutional parameters of drawing boundaries to improve representation for minorities who have been historically shut out.

In *Shaw II*, North Carolina sought to prove three compelling state interests to sustain its contested minority-controlled congressional district: (1) to eradicate the effects of past and present discrimination; (2) to comply with Section 5 of the VRA; and (3) to comply with Section 2 of the VRA.\(^9\) Although the Court recognized that a state’s interest in remedying the effects of past or present racial discrimination may justify a government’s use of racial distinctions, it pointed out that for the interest to rise to a compelling level it must be specifically identified.\(^10\)

As in *Miller*, the *Shaw II* Court did not reach the question of whether compliance with the VRA, standing alone, was a compelling interest. It found that an additional majority-minority congressional district was not necessary under a correct reading of the statute, and thus it was not a narrowly tailored remedy.\(^11\) In rejecting North Carolina’s Section 5 defense, the Court noted that the same Justice Department policy of maximizing the number of majority-Black districts that was rejected in *Miller* was present in this case.\(^12\) With respect to the state’s Section 2 defense, the Court held that the majority-minority district could not remedy any potential Section 2 violation because “no one . . . could reasonably suggest that the district contains a ‘geographically compact’ population of any race.”\(^13\)

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\(^10\) See id. at 1902-03 ("[A]n effort to alleviate the effects of societal discrimination is not a compelling interest.").
\(^11\) See id.
\(^12\) See id. at 1904 (citations omitted); see also supra note 96 and accompanying text.
\(^13\) Id. at 1906 (citations omitted); see supra note 56 and accompanying text.
In Shaw II's companion case, Bush v. Vera, Justice O'Connor delivered a plurality opinion for the Court which applied strict scrutiny to three newly-created majority-minority districts in Texas. With utter disregard for traditional redistricting principles, the state formed these districts, whose contours were unexplainable in terms other than race. In rejecting the state's defense that it drew the minority-controlled districts to comply with VRA requirements, the Court "assume[d] without deciding that compliance with the results test [of Section 2] can be a compelling state interest," but found that the districts' bizarre shape and lack of compactness defeated any claim that they were narrowly tailored.

Justice O'Connor also filed a significant concurring opinion, however, to express her view that the state interest in avoiding liability under Section 2 of the VRA is compelling. Moreover, she would have held that "[i]f a state has a strong basis in evidence for concluding that the Gingles factors are present," and creates a majority-minority "district that 'substantially addresses' the potential liability . . . and does not deviate substantially from a hypothetical court-drawn § 2 district for predominantly racial reasons, . . . its districting plan will be deemed narrowly tailored."

Although Justice O'Connor concluded that Section 2 does not require a non-compact majority-minority district, Justice Kennedy observed in his concurrence, "neither does [Section 2] forbid it, provided that the rationale for creating it is proper in the first instance." Justice Kennedy also noted that "[d]istricts not drawn

104. See Bush, 116 S. Ct. at 1958-60
105. See id.
106. Id. at 1960.
107. See id. at 1960-61. The Court noted, however, that "[a] § 2 district that is reasonably compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat rival compact districts . . . in endless 'beauty contests.'" Id. at 1960 (emphasis in original).
108. See id. at 1968 (O'Connor, J., concurring); see also id. at 1989 (Stevens, J., joined by Ginsburg and Breyer, J.J., dissenting); id. at 2007 (Souter, J., joined by Ginsburg and Breyer, J.J., dissenting).
109. Id. at 1970.
110. See id. ("[D]istricts that are bizarrely shaped and non-compact, and that otherwise neglect traditional districting principles and deviate substantially from the hypothetical court-drawn district, for predominantly racial reasons, are unconstitutional.").
111. Id. at 1972 (Kennedy, J., concurring).
for impermissible reasons or according to impermissible criteria may take any shape, even a bizarre one."\textsuperscript{112}

C. Lower Court Reactions to Miller, Shaw II, and Bush

As a result of the Supreme Court's decisions in Miller, Shaw II, and Bush, lower courts have applied strict scrutiny to strike down majority-minority districts after finding that race was the predominant factor in drawing the district's boundaries.\textsuperscript{113} District courts also have rejected new challenges to majority-minority voting districts while attempting to conform their decisions with the analytical framework established in Shaw I and its progeny.\textsuperscript{114} In what may be an unanticipated consequence, however, some courts have required plaintiffs in Section 2 vote dilution cases to show that

\textsuperscript{112} Id. Justice Kennedy also observed, that "[t]he first Gingles condition refers to the compactness of the minority population, not the compactness of the contested district." Id. at 1971.

\textsuperscript{113} See, e.g., Diaz v. Silver, 978 F. Supp. 96, 117 (E.D.N.Y. 1997) (declaring the mostly Hispanic Twelfth Congressional District in New York unconstitutional, after applying strict scrutiny, because race and ethnicity were the dominant factors used to draw it); Moon v. Meadows, 952 F. Supp. 1141, 1151 (E.D. Va. 1997) (striking down a majority-minority congressional district as unconstitutional racial gerrymander because the state subordinated traditional districting principles to accomplish its goal of a safe Black district); Smith v. Beasley, 946 F. Supp. 1174, 1210-11 (D.S.C. 1996) (striking down, on equal protection grounds, majority-minority state legislative districts because state failed to prove that districts at issue were specifically drawn to achieve a compelling state interest inremedying effects of past or present discrimination, and the districts were not narrowly tailored to remedy any potential section 2 violation or to avoid retrogression as prohibited by section 5); Hays v. Louisiana, 936 F. Supp. 360 (W.D. La. 1996) (holding Miller to be commanding precedent, and striking down a majority-minority district as a racial gerrymander that could not be demonstrated to be narrowly tailored to achieve a compelling governmental interest).

\textsuperscript{114} See, e.g., Theriot v. Parish of Jefferson, 966 F. Supp. 1435, 1449-50 (E.D. La. 1997) (holding that strict scrutiny was not warranted because changes in district configuration were driven primarily by politics); King v. State Bd. of Elections ("King I"), 979 F. Supp. 582 (N.D. Ill. 1996), vacated, 117 S. Ct. 429 (1996). In King I, a three-member panel of the U.S. District Court for the Northern District of Illinois held Illinois' Chicago-based Fourth Congressional District, the first Hispanic-majority congressional district in the Midwest, to be constitutional, despite its "extraordinary" shape, because it was justified under the VRA. 979 F. Supp. at 616-17. The Supreme Court, however, set aside the King I opinion and ordered the Federal District Court in Chicago to reconsider its decision in light of the Court's rulings in Shaw II and Bush. 117 S. Ct. 429 (1996); see also Linda Greenhouse, Setback for Hispanic Congressional District, N.Y. TIMES, Nov. 13, 1996, at A4. On remand, a three-judge panel held that the Fourth Congressional District was narrowly tailored to remedy a potential violation of or achieving compliance with the VRA and, therefore did not violate the EPC. See King v. State Bd. of Elections ("King II"), 979 F. Supp. 619, 627 (N.D. Ill. 1997).
their districting plan comports with Shaw I and its progeny in order to satisfy the first Gingles precondition.115

1. What Compactness is Required?

Some post-Miller/Bush courts have dismissed Section 2 claims because the plaintiffs could not show that the majority-minority district they would create was compact enough to survive an equal protection challenge.116 Other courts have opined that it is a mistake to conflate the Gingles threshold requirement of a geographically compact minority population with the principle of compactness of district shape which is used to assess whether racial gerrymandering has occurred.117 The latter courts have noted that the first Gingles factor, which requires that a minority group be sufficiently compact to constitute a majority in a single member district,118 is an inquiry into causation that necessarily classifies voters by their race.119 In Miller, however, compactness was merely one of many factors whose presence bore on the ultimate question of whether race was the predominant factor motivating the draw-

115. See, e.g., Milwaukee Branch of the N.A.A.C.P. v. Thompson, 935 F. Supp. 1419, 1424-25 (E.D. Wis. 1996) (finding that a proposed remedy under section 2 that departs from traditional redistricting principles solely to create a majority-Black district is impermissible under the Gingles standard), aff'd, 116 F.3d 1194 (7th Cir. 1997), petition for cert. filed, 66 U.S.L.W. 3338 (U.S. Oct 31, 1997) (No. 97-753); Reed v. Town of Babylon, 914 F. Supp. 843, 871 (E.D.N.Y. 1996) (finding that a plaintiff seeking to meet its burden of showing compactness under the first Gingles precondition should not be permitted to rely on a plan that would have no chance of being found to be narrowly tailored to redress the violation).

116. See supra note 115 and accompanying text.

117. See, e.g., Clark v. Calhoun County, 88 F.3d 1393, 1406 (5th Cir. 1996); King I, 979 F. Supp. at 614. For example, in King I, the panel noted that the question raised by Gingles is whether the minority population (and not the district drawn to accommodate that population) is geographically compact and sufficiently numerous to constitute a majority in a single member district. See 979 F. Supp. at 614. By contrast, the King I court determined that there is a second measure of compactness (i.e., a traditional race-neutral districting principle) that concerns whether a district drawn to remedy a section 2 violation satisfies the requirements of the EPC, and to conflate the two into a single measurement confuses the liability with the damages analysis, and represents an unwarranted extension of Shaw I. See id. Similarly, the Clark court found that Bush and Shaw II support the conclusion that Miller's emphasis on purpose does not apply to the first Gingles factor because in neither case did the Court suggest that a district drawn for predominantly racial reasons would necessarily fail the Gingles test. See Clark, 88 F.3d at 1406-07.

118. See supra note 56 and accompanying text.

119. See, e.g., Clark, 88 F.3d at 1406-07. Moreover, the Clark court ruled that to the extent that the plaintiffs' proposed remedy to the Section 2 violation may have to survive an equal protection challenge, and show that race was not used at the expense of traditional political concerns any more than reasonably necessary, that remedy was not ripe for review at the liability stage. See id. at 1407-08.
ing of particular district lines. Moreover, the Supreme Court has never provided clear guidance for determining what "compact" means or how the analysis regarding district shape should interrelate with the inquiry that focuses on population.

2. The Plot Thickens: A Redistricting Plan, Compelled by Miller, That Reduces the Number of Majority-Minority Districts is Challenged under the VRA

In Miller, the Supreme Court declared Georgia's Eleventh Congressional District unconstitutional. As a result of this decision, the Miller plaintiffs also successfully challenged Georgia's Second Congressional District, based on proof that the majority-minority district contravened the EPC because it was drawn to segregate voters according to their race. As to the remedy, the Georgia district court initially deferred to the Georgia legislature, allowing it an opportunity to draw a new congressional map. When the legislature was unable to redraw the map and adjourned, however, it effectively left the task to the district court.

The district court devised a plan that reduced Georgia's majority-minority congressional districts from three to one. Although the district court considered the possibility of creating a second majority-minority district, it concluded that to do so would subordinate Georgia's traditional districting policies by considering race predominantly. Moreover, the district court found that Section 2 did not require it to create a second majority-minority district in Georgia because of the "geographic dispersion of its minority population and lack of any significant vote polarization."

In a five-to-four decision, the United States Supreme Court affirmed the Georgia district court's plan. One of the questions presented to the Court was whether a court-ordered plan that fragments the African-American population in two majority-Black districts and disperses it throughout the state, thereby reducing the number of majority-Black districts from three to one, is retrogres-

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120. See supra note 91 and accompanying text.
121. See supra notes 89-96 and accompanying text.
124. See id.
125. See id. at 1561.
126. See id. at 1566.
127. Id.
sive and dilutes Black voting strength in violation of Sections 2 and 5 of the VRA.\textsuperscript{129}

In holding that the district court's remedial redistricting plan did not violate Section 2 of the VRA, the Abrams Court found that none of the Gingles preconditions,\textsuperscript{130} which set out the basic framework for establishing a vote dilution claim, were met.\textsuperscript{131} The Abrams Court also rejected the appellants' contention that the district court plan violated Section 5 of the VRA. Specifically, it found that the appellants' proposed benchmarks (the Georgia legislature's 1991 and 1992 redistricting plans) for measuring retrogression were impermissible because they were never in effect and constitutionally defective.\textsuperscript{132}

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\textsuperscript{129} See Brief for Appellants at *i, Abrams v. Johnson, 116 S. Ct. 1823 (Nos. 95-1425, 95-1460), 1996 WL 416713 (1996). The Abrams appellants argued that the court-ordered plan violated section 2 because the alternative remedial plans submitted to the district court showed that it was clearly possible to draw two reasonably compact majority-Black congressional districts in Georgia. See id. at *43. The Department of Justice submitted a proposed majority-minority district that was roughly pear-shaped, while Abrams offered two proposals for minority-controlled districts that were roughly wine bottle-shaped. See Paul L. McKaskle, In the U.S. Supreme Court: The Voting Rights Act and the Scope of Shaw v. Reno, 12-9-96 WLN 13086. In all of the appellants' proposals, however, the Black population was not contiguous, and counties were split up, contrary to traditional districting principles in Georgia. See id. Appellants also argued that the totality of the circumstances, including evidence of past discrimination and its continuing effects, strongly supported a finding that the court's plan would result in discrimination in violation of section 2. See Brief for Appellants at *44 (citing Johnson v. De Grandy, 512 U.S. 997, 1018 (1994)).

\textsuperscript{130} See supra notes 55-58 and accompanying text.

\textsuperscript{131} See Abrams, 117 S. Ct. at 1936 ("In fact, none of the three Gingles factors, the threshold findings for a vote dilution claim, were established here.") (citing Bush v. Vera, 116 S. Ct. 1941, 1959-1961 (1996)). Specifically, the Abrams Court found that the district court did not commit a clear error when it determined that the Black population was not sufficiently compact for a second majority-Black district and, thus, the first Gingles factor was not satisfied. See id. Moreover, the Abrams Court found that the district court did not clearly err in finding insufficient racial polarization, given the evidence of significant White crossover voting, to meet the second and third Gingles factors. See id. at 1936-37. The Court particularly noted the results of the 1996 general elections in which all three Black incumbents won elections under the court plan, two in majority-White districts running against White candidates. See id. at 1937.

\textsuperscript{132} See id. at 1938-39. The Abrams Court, in fact, agreed with the district court that the 1982 plan, in effect for a decade, was the appropriate benchmark, and found that the appellants did not show that Black voters suffered a retrogression in their voting strength under the court plan measured against the 1982 plan. See id. at 1939. Moreover, the Court rejected appellants' assertion that, even using the 1982 plan as a benchmark, the district court's plan was retrogressive because under the 1982 plan one of the ten districts was majority-Black, while under the district court's plan one of eleven districts was majority-Black. See id. ("Under that logic, each time a State with a majority-minority district was allowed to add one new district because of population
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The dissent in Abrams primarily complained that the majority decision departed dramatically from the Georgia legislature’s preference for two majority-minority districts, which the district court was not free to disregard. The Abrams dissenters also disagreed with the majority’s conclusion that Sections 2 and 5 of the VRA did not require a second majority-minority district in Georgia. Finally, the Abrams dissent argued that the majority decision exacerbated the concern that Shaw I and its progeny—particularly, the “predominant racial motive” test—improperly would shift redistricting authority from legislatures to courts and prevent the legitimate use of race as a redistricting factor.

III. Erecting a Safety Net for Redistricting’s “Tightrope Walkers”

The Supreme Court should clarify the relationship between its new equal protection cause of action and the requirements of the Voting Rights Act because they are in tension, sending conflicting messages to legislators, litigants, and courts involved in the redistricting process.

growth, it would have to be majority-minority. This the Voting Rights Act does not require.”).

133. See Abrams, 117 S. Ct. at 1943 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting) (citing Upham v. Seamon, 456 U.S. 37, 43 (1982)). In Upham, the Supreme Court ruled that a district court drawing congressional districts is “not free to disregard the political program of the . . . Legislature.” 456 U.S. at 43.

134. See id. at 1946. Specifically, the Abrams dissent suggested that the district court improperly analyzed the “compactness” of the proposed majority-minority districts by conflating Shaw I and its progeny compactness, which concerns the shape or boundaries of a district, with section 2 compactness, which concerns a minority groups compactness. Id. at 1947. For a discussion of the confusion among the lower courts regarding the proper “compactness” analysis, see supra Part II.C.1. The dissenters also found Georgia’s discriminatory history and the fact that African-American representatives have come almost exclusively from majority-minority districts strongly support the existence of racially polarized voting, despite the fact that the African-American incumbents were reelected in the 1996 general elections. See Abrams, 117 S. Ct. at 1947 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting). Moreover, the dissent argued that the question of whether the evidence showed that the failure to create a second majority-minority would violate section 2 of the VRA never needed to be answered because the proper question is “whether the evidence is strong enough to justify a legislature’s reasonable belief that that was so.” Id. at 1948 (“A legal rule that permits legislatures to take account of race only when § 2 really requires them to do so is a rule that shifts the power to redistrict from legislatures to federal courts (for only the latter can say what § 2 really requires).”)


136. Abrams, 117 S. Ct. at 1949 (“Thus, given today’s suit, a legislator might reasonably wonder whether he can ever knowingly place racial minorities in a district . . . .”)
A. Tension Between the *Shaw* Equal Protection Analysis and the Requirements of the VRA

Congress created the Voting Rights Act to enforce the Fourteenth and Fifteenth Amendments by eradicating the continued discrimination against minority groups in the voting process and ensuring that minorities were not denied their constitutional right to vote.\textsuperscript{137} For three decades after the VRA, the Supreme Court's principal concern with respect to the role of race in representation was vote dilution, resulting in great deference to the VRA.\textsuperscript{138} With the recent decisions in *Shaw* I and its progeny, however, the Court has developed a new, analytically distinct, approach to race and representation that analyzes majority-minority congressional districts with strict scrutiny, under the Equal Protection Clause, if traditional districting principles are subordinated to race.\textsuperscript{139}

The two approaches are in tension because, while the remedy to Section 2 vote dilution is the adoption of majority-minority districts,\textsuperscript{140} racially motivated districting is subject to strict scrutiny by the Supreme Court.\textsuperscript{141} The Court, however, makes assumptions about the place of race in politics that are at odds with the necessary precondition of vote dilution litigation: that voting is racially polarized.\textsuperscript{142} Unfortunately, the Court's laudable goal of removing race from politics conflicts with the finding in many vote dilution cases that race plays a significant role in politics through the deci-

\textsuperscript{137} See, e.g., South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966) ("The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting."). *See supra* Part I.B.


\textsuperscript{139} See *supra* Part II.B. For an interesting and original article positing the creation of majority-minority United States Senate districts, see Terry Smith, *Rediscovering the Sovereignty of the People: The Case for Senate Districts*, 75 N.C. L. Rev. 1, 60 (1996) ("Whatever may be the effects of *Shaw* and its progeny on majority-minority House districts, these precedents do not preclude the creation of majority-minority or minority enhanced Senate districts, for such districts can be drawn in accordance with traditional districting criteria."); *see also* Jeanmarie K. Grubert, Note, *The Rehnquist Court's Changed Reading of the Equal Protection Clause in the Context of Voting Rights*, 65 *Fordham L. Rev.* 1819, 1821 (1997) (arguing that racial classifications that benefit a racial minority are constitutionally permissible under the EPC).

\textsuperscript{140} See Johnson v. De Grandy, 512 U.S. 997, 1019-20 (1994); *see also supra* note 59 and accompanying text.

\textsuperscript{141} See *supra* Part II.B.

\textsuperscript{142} See Thornburg v. Gingles, 478 U.S. 30, 50-51; *see also supra* notes 54-58 and accompanying text.
sions of voters.\textsuperscript{143} Thus, the Court’s new approach forces governments to be color-blind when voters are not.

1. \textit{Redistricting’s Catch-22}

By considering racially motivated actions that increase the representation of racial minorities to be as problematic as actions that decrease minority political strength, the Supreme Court presents state legislatures with a Catch-22. When states create majority-minority districts to satisfy Sections 2 and 5 of the VRA, which require that the legislature consider minority voters when drawing district lines,\textsuperscript{144} their redistricting plan is vulnerable to constitutional attack on equal protection grounds. How states can comply with the VRA and avoid violating the EPC remains unclear, as race almost always predominates when states reapportion their electoral districts to comply with the federal statute.

2. \textit{The Supreme Court’s Implicit Challenge of Vote Dilution Doctrine}

\textit{Shaw v. Reno} and its progeny do not directly challenge the vote dilution doctrine. The Supreme Court still permits the use of race to eradicate the effects of past racial discrimination, and allows jurisdictions to use race to comply with the VRA.\textsuperscript{145} Regardless of the merits of the Court’s new approach to redistricting in cases where the plaintiffs do not allege vote dilution, to the extent that \textit{Shaw I} and its progeny compel strict scrutiny of electoral districts drawn pursuant to Section 2 of the VRA, the Court unnecessarily intrudes on the vote dilution doctrine pronounced in \textit{Thornburg v. Gingles}.\textsuperscript{146}

In \textit{Gingles}, the Supreme Court established a comprehensive framework for analyzing vote dilution claims. An essential requirement under the \textit{Gingles} analysis is that a minority group be able to show that it is “sufficiently large and geographically com-

\textsuperscript{143} See, e.g., \textit{Rogers v. Lodge}, 458 U.S. 613, 616-17 (1982); see also KEITH REEVES, \textit{VOTING HOPES OR FEARS?} 100 (1997) (“In the entire checkered history of this country, only nine blacks have ever won election to the U.S. Congress from districts where whites were overwhelmingly in the majority.”); supra note 21 and accompanying text.

\textsuperscript{144} See supra Part I.B for a discussion of VRA requirements under sections 2 and 5.


\textsuperscript{146} 478 U.S. 30 (1986); see supra notes 54-58 and accompanying text.
pact to constitute a majority in a single-member district.\textsuperscript{147} In Shaw I and its progeny, a district's lack of compactness has been a major factor for the Court, in deciding both whether to apply strict scrutiny and whether the majority-minority district can survive heightened judicial review.\textsuperscript{148} If a minority group has established a vote dilution claim under Gingles, however, a court should not inquire further into the compactness of a district's shape, and the motivations behind it, because the group already has shown its numerosity and geographic compactness.

Moreover, a finding of a Section 2 violation under Gingles is causally related to the fact that the minority group is geographically compact and constitutes a politically cohesive unit, though the White majority votes sufficiently as a bloc to defeat the minority's preferred candidate.\textsuperscript{149} A finding of vote dilution under Gingles also is causally related to racially adverse social and historical conditions, including the history of an electoral system's past discrimination.\textsuperscript{150} Therefore, once a plaintiff establishes a Section 2 violation under the Gingles framework, the Court's equal protection concerns, regarding the constitutionality of a majority-minority district drawn with race as the predominant motive, are satisfied. Thus, a Shaw I-type strict scrutiny review of that district represents an implicit challenge of the vote dilution doctrine.

B. Abrams v. Johnson: A Missed Opportunity for the Supreme Court to Resolve Tension and Permit the EPC and VRA to Coexist in Harmony

To resolve the tension between its equal protection analysis in Shaw v. Reno and its progeny, and the requirements of the VRA, the Supreme Court should have used Abrams v. Johnson\textsuperscript{151} to clarify both the contours of vote dilution claims, and how majority-minority districts (as remedies to violations of Section 2 of the VRA) can survive strict scrutiny. By failing to explain the scope and limits of Shaw I and its progeny, the Court has delayed the resolution of important issues, leaving state legislatures and private

\begin{itemize}
\item \textsuperscript{147} Gingles, 478 U.S. at 50; see supra note 56 and accompanying text.
\item \textsuperscript{148} See supra Part II.B.
\item \textsuperscript{149} See Gingles, 478 U.S. at 51; see also supra notes 56-58 and accompanying text.
\item \textsuperscript{150} The history of official discrimination in the state or political subdivision affecting the minority group's ability to participate in the democratic process is part of the "totality of the circumstances" analysis courts use to determine if a section 2 violation exists once the Gingles preconditions are established. See supra note 58.
\item \textsuperscript{151} 117 S. Ct. 1925 (1997). See supra Part II.C.2 for a discussion of the Abrams litigation.
\end{itemize}
litigants to question whether the creation of majority-minority voting districts, pursuant to the VRA, are constitutional under the EPC.

1. Majority-Minority Districts, Drawn to Comply with the VRA, Can Survive Strict Scrutiny

One of the most significant issues the Abrams Court should have resolved is whether compliance with Section 2 of the VRA constitutes a compelling state interest permitting the creation of minority-controlled districts. The outcome of this question likely depends on Justice O'Connor, who represents the swing vote in the Shaw v. Reno line of cases.

In Bush v. Vera, Justice O'Connor, the author of the plurality opinion, also wrote a very important separate concurring opinion, where she expressed her view that compliance with the results test of Section 2 is a compelling state interest. Because the four Bush dissenters also determined that a majority-minority congressional district, drawn to avoid liability under the VRA, serves a compelling interest, Justice O'Connor could have provided the determinative vote for a holding that a second minority-controlled district in Georgia was compelled by the VRA, and thus was constitutional regardless of racial motivation.

Logic supports such a result. Strict scrutiny should not outlaw a race-based remedy to a violation of the VRA, because the statute compels race-based districting when there is a violation of Section 2. If the Supreme Court will not recognize race-conscious districting as constitutional under the EPC, then it must be prepared to strike down the VRA itself as unconstitutional. However, considering congressional intent, for the Court to find that the VRA

153. See id. at 1989 (Stevens, J., joined by Ginsburg and Breyer, JJ., dissenting); see also id. at 2007 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting); supra note 107 and accompanying text.
154. See Johnson v. De Grandy, 512 U.S. 997, 1020 (1994). “[A]dherence to Gingles to remedy violations of Section 2 necessarily implicates race” because of the showing minority groups must make in the first instance to establish the violations. Sanchez v. Colorado, 97 F.3d 1303, 1327 (10th Cir. 1996), cert. denied, 117 S. Ct. 1820 (1997); see also Clark v. Calhoun County, 88 F.3d 1393, 1408 (5th Cir. 1996) (“Redistricting to remedy found violations of § 2 of the Voting Rights Act by definition employs race.”); supra notes 54-59 and accompanying text.
155. See supra notes 37-41 and accompanying text.
violates the Fourteenth Amendment's equal protection guarantee would be "cruelly ironic."\(^{156}\)

2. The Meaning and Role of Compactness in Redistricting

For a majority of the Supreme Court to find that compliance with Section 2 permits a majority-minority district drawn with race as the predominant motive, the Justices will have to be satisfied that the Gingles preconditions are met. Specifically, a majority of the Court must be convinced that a majority-minority district has a "sufficiently large and geographically compact" Black population, and that racially polarized voting exists in the district.\(^{157}\) Although the Abrams appellants' proposals for a second majority-minority district were roughly pear or wine bottle shaped,\(^{158}\) this should not have prevented the Court from finding that a second "reasonably compact" minority-controlled congressional district could be created in Georgia.

In her concurrence in Bush, Justice O'Connor stated that districts that are bizarrely-shaped and non-compact for predominantly racial reasons are unconstitutional.\(^{159}\) If Justice O'Connor meant that an oddly shaped majority-minority district, drawn to remedy a Section 2 violation, is presumptively unconstitutional, then her statement reflects a mistaken view of the compactness required under Section 2.\(^{160}\) Justice Kennedy asserted correctly in his concurrence in Bush that the first Gingles factor refers to the compactness of the minority population, not the contested district, and that Section 2 does not forbid a non-compact majority-minority district.\(^{161}\)

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157. See supra notes 56-58 and accompanying text.
158. See supra note 129.
159. See Bush, 116 S. Ct. at 1970 (O'Connor, J., concurring); see also supra note 110 and accompanying text.
160. Such a definition of compactness is also substantially more stringent than the lower courts' interpretation of the Gingles compactness requirement. See Bernard Grofman, Expert Witness Testimony and the Evolution of Voting Rights Case Law, in CONTROVERSIES, supra note 6, at 218-19 (stating that lower courts generally interpret the compactness requirement loosely to mean only that the minority population must be "sufficiently geographically concentrated so that a district could be created in which the minority is a majority").
161. See Bush, 116 S. Ct. at 1971-72 (Kennedy, J., concurring); see also supra notes 111-12 and accompanying text. The Abrams dissent also asserted that it is a mistake to conflate Shaw I and its progeny compactness, which concerns district shape or boundaries, with section 2 compactness, which concerns a minority group's compactness. See Abrams v. Johnson, 117 S. Ct. 1925, 1947 (1997) (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting); see also supra note 132.
Justice Kennedy holds the legally principled position because it conforms with the Supreme Court's prior decision in Gingles. Justice Kennedy's assertion also adheres to the Court's previous declaration in Reynolds v. Sims that public officials "represent people, not trees or acres."\textsuperscript{162} The Court, therefore, should direct the lower federal courts that the Section 2 compactness inquiry applies to the geographical compactness of the minority population, while the EPC compactness question asks whether the district drawn subordinates traditional race-neutral principles (i.e., compactness of district shape) more than is "reasonably necessary" to satisfy the VRA.\textsuperscript{163}

Ironically, if the Court requires majority-minority districts to have a particular shape, these districts may actually stand out in contrast to majority-White districts that do not face such restrictions.\textsuperscript{164} Moreover, the Court's recent decisions have essentially triple-counted geographic compactness by using it to (1) decide whether plaintiffs have shown that racial considerations predominated, thus triggering strict scrutiny;\textsuperscript{165} (2) decide whether minority voters could have made a prima facie showing of liability under Section 2 of the VRA, thus establishing a potential compelling interest for the challenged plan;\textsuperscript{166} and (3) decide whether the challenged districts are narrowly tailored in that they avoid unduly subordinating traditional districting principles, including compactness.\textsuperscript{167}

Although the distinction between compactness of district shape, a traditional districting principle, versus compactness of minority population, a necessary Gingles precondition, may seem to be arti-

\textsuperscript{162} Reynolds v. Sims, 377 U.S. 533, 562 (1964); see also id. at 580 ("Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal-population principle. Again, people, not land or trees or pastures, vote.").

\textsuperscript{163} See supra notes 117-120 and accompanying text.

\textsuperscript{164} See Bush, 116 S. Ct. at 1990 (Stevens, J., dissenting) (citing Pamela S. Karlan, Still Hazy After All These Years: Voting Rights in the Post-Shaw Era, 26 CUMB. L. REV. 287, 309 (1995-96)). Moreover, topography (mountain ranges, rivers, bays), lines of communication and transportation, local government boundaries and the "one person, one vote" requirement justify the departure from districts that are nearly square in shape. See Paul L. McKaskle, The Voting Rights Act and the "Conscientious Redistrictor", 30 U.S.F. L. REV. 1, 64 (1995).

\textsuperscript{165} See, e.g., Shaw I, 509 U.S. 630, 641-47 (1993); see supra note 79 and accompanying text.

\textsuperscript{166} See e.g., Shaw II, 116 S. Ct. 1894, 1906 (1996); see supra note 103 and accompanying text.

\textsuperscript{167} See, e.g., Bush v. Vera, 116 S. Ct. 1941, 1960-61 (1996); see supra note 107 and accompanying text.
ficial because a geographically compact population should produce a compact district, it already has split the lower federal courts addressing Section 2 claims (which were not even triggered by a Shaw redistricting decision).168 Some courts have conflated the two issues of compactness and unfairly rejected Section 2 liability because the plaintiffs' proposed remedy either departed from traditional redistricting principles or had no chance of surviving strict scrutiny.169 Other courts correctly have kept separate the issue of Section 2 liability from the analysis of whether the proposed remedy satisfies the requirements of the EPC.170 It is important to keep separate the equal protection analysis of a majority-minority district drawn to remedy a Section 2 violation from the Gingles analysis of whether there is a violation of Section 2 in the first instance, because a district drawn to avoid liability under the VRA may be able to survive strict scrutiny even if traditional districting principles were subordinated to race.

3. Guideposts for the Legislators, Litigants, and Courts Walking Redistricting's Tightrope

Because the Supreme Court decided Abrams without resolving whether majority-minority voting districts are constitutional race-based remedies for violations of Section 2, and without clarifying the meaning and role of compactness, it failed to relieve the tension between its equal protection analysis, under Shaw I and its progeny, and its vote dilution doctrine. At a minimum, therefore, the Court should provide some guideposts to future legislators and vote dilution litigants seeking to create majority-minority districts.

For example, the Supreme Court could instruct lower courts that majority-minority districts, drawn with race as the predominant factor, can survive strict scrutiny if two conditions are met: (1) the district is necessary to cure a VRA violation; and (2) the legislature uses race as the predominant factor only after trying in good faith to cure the violation without subordinating race to traditional districting principles.171 Although such a holding would not completely resolve the tension between the VRA and EPC, the Court would at least demonstrate its continued commitment to the VRA,

168. See supra Part II.C.1.
169. See supra note 115 and accompanying text.
170. See supra notes 117-120 and accompanying text.
as well as to the enforcement of its race-conscious remedies where necessary to achieve its goals of protecting minority voting rights and power.\textsuperscript{172}

The Supreme Court also could read a heightened compactness requirement into its Gingles analysis, prohibiting majority-minority districts that are non-compact in shape because they cannot survive narrow tailoring scrutiny under equal protection analysis.\textsuperscript{173} This approach is inappropriate, however, because the creation of a minority-controlled district, pursuant to the VRA, is meant to establish a normal, color-blind state of affairs in a place where racially polarized voting has subsumed minority voting rights and power. Indeed, the compactness inquiry should be reduced where past racial discrimination is shown, because the breadth of the remedy ought to fit the injury proven.\textsuperscript{174}

Critics of the VRA may argue that the statute already has achieved its goals, given that all the minority candidates in districts that were redrawn as a result of Shaw I and its progeny were re-elected to Congress in 1996.\textsuperscript{175} One election, however, is not dispositive proof that minority groups are able to elect representatives of their choice in predominantly White districts.\textsuperscript{176} Moreover, the success of these minority candidates in the 1996 election may more accurately bespeak the power of incumbency.\textsuperscript{177} The real test of whether majority-minority districts are still necessary will come

\begin{footnotesize}
\begin{enumerate}
\item See supra Part I.B.
\item See supra notes 109-10 and accompanying text.
\item Congress has made clear that, in fashioning a remedy to a section 2 violation, a "court should exercise its traditional equitable powers to fashion relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and elect candidates of their choice." S. REP. No. 97-417, at 31 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 208.
\item See Thornburg v. Gingles, 478 U.S. 30, 74-76 (1986). Indeed, the open racism revealed in the release of the "Texaco tapes" clearly shows that discriminatory practices by the White majority in this country are still a significant problem that requires the redress of remedial statutes. See Kurt Eichenwald, Texaco Executives, On Tape, Discussed Impeding a Bias Suit, N.Y. TIMES, Nov. 4, 1996, at A1. Texaco executives, recorded on tape, referred to plaintiffs in an impending employment discrimination suit as "Black jelly beans" upset about being "glued to the bottom of the bag." Id. at D4. Moreover, the problem of minority representation is acutely felt in the Black community as fourteen percent of a total voting age population of 10.4 million Black men nationwide are currently or permanently barred from voting either because they are in prison or have been convicted of a felony. See Fox Butterfield, Many Black Men Barred From Voting, N.Y. TIMES, Jan. 30, 1997, at A12; see also supra note 143 and accompanying text.
\item See Cynthia A. McKinney, A Product of the Voting Rights Act, WASH. POST, Nov. 26, 1996, at A15 ("[W]ithout the ability to represent the old [majority-minority]
from the minority candidates who vie for seats after the incumbents from former majority-minority districts leave office.

**Conclusion**

In *Shaw v. Reno* and its progeny, the Supreme Court has redefined the voting rights debate, subjecting majority-minority districts, drawn to comply with the VRA, to strict scrutiny under the EPC. To resolve the conflicting demands that legislators, litigants, and courts now face when attempting to redraw congressional district lines, the Court should hold that creating a majority-minority district to remedy a Section 2 violation is a compelling state interest that is narrowly tailored.

Moreover, the Supreme Court should instruct the lower courts to keep the analysis of compactness for Section 2 liability separate from the equal protection analysis of the proposed remedy. Without these clarifications, legitimate vote dilution claims may be rejected unfairly, and congressional redistricting will remain akin to a tightrope walk without a safety net.