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Cover Page Footnote
J.D. candidate 2005, Fordham University School of Law; Ph.D., History, Columbia University, 1997. The author wishes to thank the following persons for assistance in the research and writing of this Note: Judy A. Keenan of the Equal Employment Opportunity Commission in New York, who suggested the topic; and Prof. Michael Lanzarone of the Fordham University School of Law, who served as the author’s faculty advisor during the research and writing of this Note.

This article is available in Fordham Urban Law Journal: https://ir.lawnet.fordham.edu/ulj/vol31/iss6/1
PLAYING WITH WORK: MUST "WORK" BE TREATED AS A “MAJOR LIFE ACTIVITY” FOR PURPOSES OF THE AMERICANS WITH DISABILITIES ACT?

Daniel A. McMillan*

INTRODUCTION

In two recent decisions, *Sutton v. United Airlines, Inc.*¹ and *Toyota Motor Manufacturing, Kentucky v. Williams*,² the Supreme Court sharply limited the reach of the Americans with Disabilities Act of 1990 ("ADA" or "the Act"),³ by narrowing the definition of "disability" under the Act.⁴ In both cases the Court also signaled that it may further narrow the definition of a disabled person, by excluding from this definition all persons whose infirmities interfere with only their ability to work, and not, for example, with their ability to travel or socialize. Under the ADA, a "disability" is defined, in pertinent part, as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."⁵ Under current agency regulations and case law in the lower courts, "work" or "working" is considered a "major life ac-

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² 534 U.S. 184 (2002).
⁴ In *Sutton*, the Court held that the determination of whether an individual has a disability should take into account any mitigating measures, for example corrective lenses or prosthetic limbs. 527 U.S. at 482. The Sutton sisters, who were badly nearsighted without eyeglasses, but who had 20/20 vision when wearing eyeglasses, wanted to become commercial airline pilots. 527 U.S. at 475. United Airlines rejected their application because they did not meet the company’s standards for uncorrected vision. *Id.* at 475-76. The Court ruled that because the plaintiffs had no difficulty seeing with their glasses on, they were not “disabled” under the ADA, and therefore failed to state a claim. *Id.* at 488-89. This decision ran directly counter to the EEOC’s interpretation of the ADA in its regulations, an interpretation which the Court termed “impermissible.” *Id.* at 482 (citing 29 C.F.R. § 1630.2(j) (1998)).
tivity” for the purposes of the ADA’s disability definition. The Supreme Court, however, has never held that work qualifies as a major life activity, and the Court has signaled in Sutton and Toyota that it may hold that it does not. If the Court does so hold, the social and economic impact could be devastating, leaving several million Americans unable to claim the Act’s protection against discrimination in the workplace.

This Note examines and evaluates the principal arguments for and against construing the ADA to include work among the major life activities. Part I briefly discusses the history of the ADA and the definition of disability under the Act as explicated in regulations by executive branch agencies. A discussion follows of the Sutton and Toyota decisions and their implications for the status of work as a major life activity under the Act. Part II critiques the Court’s reasoning in Sutton and Toyota, and then looks to two other sources for guidance in construing the Act: the language of the Act itself and congressional intent to the extent that this intent is documented in the legislative history. Part III weighs the opposing arguments and arrives at a resolution. This Note concludes that the ADA must be construed to include work as a major life activity, because any other construction would contradict both the plain language of the statute and the clear intent of Congress.

I. BACKGROUND AND ISSUE

A. History of the ADA

The developments that led to the passage of the Americans with Disabilities Act originated in part in the civil rights struggles of the 1960s. Inspired by the victories of African Americans and other groups, a movement of the disabled developed in the 1970s using

7. See 527 U.S. 471 (1999); see also 534 U.S. 184 (2002).
8. This central question distinguishes this Note from an earlier published work, Argun M. Ulgen, Comment, From Household Bathrooms to the Workplace: Bringing the Americans with Disabilities Act Back to Where It Belongs: An Analysis of Toyota Motor Manufacturing v. Williams, 30 FORDHAM URB. L.J. 761 (2003). Ulgen does not address the status of work as a major life activity under the ADA, focusing instead on the importance of work tasks as part of the major life activity of performing manual tasks.
many of the same tactics pioneered by these oppressed groups, including public demonstrations, civil disobedience, and lawsuits.\textsuperscript{10} Advocates for the disabled also pressed for federal legislation proscribing discrimination against disabled individuals. Between 1973 and 1990, Congress passed several laws against such discrimination, of which the most important was the Rehabilitation Act of 1973.\textsuperscript{11} Almost all of these laws limited their coverage to activities conducted by the federal government, or to those supported at least in part by federal funds.\textsuperscript{12}

Disability issues gained a higher public profile in the 1980s, as seen most obviously in the work of a Presidential commission, the National Council on the Handicapped (since renamed the National Council on Disability). Two reports by the Council, issued in 1986\textsuperscript{13} and 1988,\textsuperscript{14} respectively, assessed the bleak condition of disabled Americans, and called for comprehensive legislation to combat discrimination against the disabled.\textsuperscript{15} The second report, issued in 1988, included a draft of the legislation which later became the ADA,\textsuperscript{16} and bills were introduced in both houses of Congress later that year.\textsuperscript{17} The 100th Congress adjourned without either house taking action on the bill,\textsuperscript{18} but a revised version was introduced in both houses the following year.\textsuperscript{19} After separate House and Senate versions were reconciled in conference committee,\textsuperscript{20} the Americans with Disabilities Act passed in both houses by the lopsided margins of 377 to 28 in the House, on July 12, 1990, and 91 to 6 in the Senate, on July 13.\textsuperscript{21}

Throughout the Congressional deliberations leading to the passage of the ADA, two themes predominated. Members of Congress and the reports of the standing committees hailed the ADA as a landmark civil rights law, a long overdue companion piece to

\textsuperscript{10} Id. at 427-28.
\textsuperscript{11} Id. at 428-29.
\textsuperscript{12} Id.
\textsuperscript{15} Burgdorf, supra note 9, at 432.
\textsuperscript{16} On the Threshold of Independence, supra note 14.
\textsuperscript{17} Burgdorf, supra note 9, at 433.
\textsuperscript{18} Id.
\textsuperscript{19} Id.; see S. 933, 101st Cong. (1989); H.R. 2273, 101st Cong. (1989).
\textsuperscript{20} Burgdorf, supra note 9, at 433-34.
\textsuperscript{21} Id.
the Civil Rights Act of 1964. The Congress also presented the ADA as an employment bill, declaring that discriminatory exclusion from the workplace inflicted the greatest injuries suffered by the disabled, while depriving the nation of badly needed labor, and burdening the public treasury with billions of dollars every year in support payments. The Act's greatest significance, however, probably lay in the extent of its coverage. Almost all previous disability discrimination bills covered only activities funded by the federal government. The ADA, in contrast, covers the private sector, as well as state and local governments.

B. The ADA's Provisions

The Americans with Disabilities Act defines a category of disabled individuals, and protects them from discrimination in employment, in access to services, including transportation provided by public entities, in access to services and public accommodations provided by private entities, and in access to telecommunications. Access to public buildings, workplaces, and services is frequently mandated in the form of architectural and technological standards, for example, wheelchair ramps or amplified telephone transmission for the hearing-impaired that remove impediments to access. In the workplace, a disabled individual, if otherwise qualified for employment, is entitled to "reasonable accommodations" from her employer in the job application process, in access to employee benefits, and in the actual process of work. For example, an employer could allow a blind employee to bring a guide dog to work.

The ADA's definition of "disability" originated in a 1974 amendment to the Rehabilitation Act of 1973, and reads as follows:

22. See infra Part II.F.2; see also Burgdorf, supra note 9, at 413-14.
24. Burgdorf, supra note 9, at 432.
27. Id. §§ 12131-12165 (2000).
31. Id. § 1212(a)-(b).
32. Amendments to the Rehabilitation Act of 1973, Pub. L. No. 93-516 (1974). Section 111(A) of the Amendment amended the Rehabilitation Act at section 7(6) (definition of handicapped person), adding to the existing definition—which depended only upon an individual's "employability"—the language:
The term ‘disability’ means, with respect to an individual –
A) a physical or mental impairment that substantially limits one
or more of the major life activities of such individual;
B) a record of such an impairment; or
C) being regarded as having such an impairment.33

The Act itself does not define “major life activity.” The Rehabilitation Act, however, authorized the Department of Health, Education and Welfare (HEW) to issue regulations implementing Title V of that Act, and these regulations established what has become the basic,34 though by no means exhaustive,35 list of major life activities under the Rehabilitation Act and the ADA. According to the HEW regulations, “‘Major life activities’ means functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, learning, and working.”36

Substantially the same list of major life activities, in each case including work, appears in the regulations issued by the three agencies charged with the principal responsibility for implementing the varied titles of the ADA: the Equal Employment Opportunity Commission (EEOC),37 the Department of Justice,38 and the Department of Transportation.39 The ADA did not, however, explicitly grant authority to any of these agencies to issue regulations implementing the generally applicable provisions of the Act, for example the definition of disability. Instead, the ADA charges each agency with issuing regulations to implement specific Titles of the Act, for example, the EEOC for Title I (private-sector employ-
Consequently, the Supreme Court has held that no agency has been delegated authority under the ADA to define "disability," and the Court has declined to consider "what deference [these regulations] are due, if any."\textsuperscript{41}

C. The Supreme Court's Doubts About Work as a Major Life Activity

In \textit{Sutton}, Justice O'Connor explained that because the parties accepted that the term "major life activities" included working, the Court did not reach the question of whether it did.\textsuperscript{42}

We note, however, that there may be some conceptual difficulty in defining "major life activities" to include work, for it seems "to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] . . . then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap."\textsuperscript{43}

Here, Justice O'Connor quotes from the Solicitor General's oral argument in \textit{School Board v. Arline} (1987).\textsuperscript{44} I will return below to the argument that making work a "major life activity" rests on circular reasoning.\textsuperscript{45} Readers who find it difficult to understand the above quoted passage should not assume that the problem lies with them. The Court's 2002 opinion in \textit{Toyota} likewise alluded to this problem in dictum: "Because of the conceptual difficulties inherent in the argument that working could be a major life activity, we have been hesitant to hold as much, and we need not decide this difficult question today."\textsuperscript{46}

The \textit{Sutton} court also stated that "even the EEOC has expressed reluctance to define 'major life activities' to include working and has suggested that working be viewed as a residual life activity, considered, as a last resort, 'if an individual is not substantially limited with respect to any other major life activity' only."\textsuperscript{47}

\begin{itemize}
\item[40.] 42 U.S.C. § 12116 (2000).
\item[42.] \textit{Id.} at 492.
\item[43.] \textit{Id.} (quoting oral argument of the Solicitor General in \textit{School Board v. Arline}, 480 U.S. 273 (1987)).
\item[44.] 480 U.S. at 273.
\item[45.] See infra Part II.A.
\item[46.] Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184, 200 (2002). The \textit{Toyota} Court did not explicitly refer to the circularity argument made in \textit{Sutton}.
\item[47.] \textit{Sutton}, 527 U.S. at 492 (quoting 29 C.F.R. § 1630.2(j) (1998)) (emphasis added by Court)).
\end{itemize}
The Court's unanimous decision in Toyota also undermined the status of work as a major life activity by establishing a new and more stringent test for determining what constitutes a major life activity under the ADA. After several years of working at the Toyota plant in Georgetown, Kentucky, Ella Williams developed severe carpal tunnel syndrome and tendinitis in her hands, wrists, and arms. No longer able to perform the work which had caused her injuries, Williams sought and received a transfer to a position at which she inspected automobiles for flaws in exterior paint and finish. These new tasks did not exacerbate her injuries. Later, however, Toyota reorganized the quality control unit to which she belonged, and required her to supplement her inspection work with the task of applying highlight oil to the cars. This new task inflamed her tendonitis and produced new injuries, reflected in pain in her neck and shoulders. Williams requested that her work assignment be limited to inspection. By her account, Toyota refused this accommodation. In any case, on December 6, 1996, her treating physicians placed Williams under a no-work-of-any-kind restriction. Toyota fired Williams in January 1997.

Williams filed suit under the ADA, lost in District Court on summary judgment, and appealed to the Court of Appeals for the Sixth Circuit. On appeal, the Sixth Circuit reversed, granting Williams partial summary judgment on the question of whether she had a “disability” as defined by the ADA. The Court of Appeals held that Williams was substantially limited in the major life activity of

48. Toyota, 534 U.S. at 198. The Court declared that the tasks comprising the activity must be “of central importance to most people’s daily lives.” Id. The specific tasks of most individuals’ jobs, on the court’s reasoning, would not meet this test, because there are so many different kinds of employment, and each person’s work differs from that of most other people. Id. at 201. Strictly speaking, the court did not declare this to be a new test for determining which activities are “major life activities,” but the logic of the Court’s reasoning clearly indicates that the Court may apply this test as such. Id. at 197, 201-02.

49. Id. at 187-88.
50. Id. at 188-89.
51. Id. at 189.
52. Id.
53. Id.
54. Id.
55. Id. Williams claimed that Toyota forced her to continue doing the work that was exacerbating her injuries, but by Toyota’s account, Williams simply stopped going to work. Id.
56. Id. at 189-90.
57. Id. at 190.
58. Id. at 190-91.
59. Id. at 191-92.
performing manual tasks.\textsuperscript{60} Toyota appealed, and the Supreme Court reversed, vacating the Sixth Circuit's grant of summary judgment, and remanded for further proceedings.\textsuperscript{61} In so doing, the Court established a new standard for determining whether an individual is "substantially limited" in a major life activity.\textsuperscript{62} The reasoning behind this new standard, if followed to its logical conclusion, would remove work from the list of major life activities recognized under the ADA.

In \textit{Toyota}, the sole issue before the Court was the standard for determining whether an individual is "substantially limited" in the major life activity of performing manual tasks.\textsuperscript{63} After summarizing the EEOC regulations\textsuperscript{64} which explain the term "substantially limits,"\textsuperscript{65} the Court ignored the agency's definition and proceeded to construct its own from dictionary entries for "substantial,"\textsuperscript{66} "substantially,"\textsuperscript{67} and "major,"\textsuperscript{68} corresponding to the phrases "substantially limits" and "major life activities" in the ADA definition of disability.\textsuperscript{69} From the dictionary definitions of "substantially" and "substantial," the Court reasoned that "[t]he word 'substantial' thus clearly precludes impairments that interfere in only a minor way with the performance of manual tasks from qualifying as disabilities."\textsuperscript{70} The Court then observed that "'[m]ajor' in the phrase 'major life activities' means important," quoting Webster's Third New International Dictionary "defining 'major' as 'greater in dignity, rank, importance, or interest.'"\textsuperscript{71} "'Major life activities,'" continued the opinion of the Court, "thus refers to

\begin{itemize}
  \item \textsuperscript{60}Williams v. Toyota, 224 F.3d 840, 843 (6th Cir. 2000), rev'd. 534 U.S. 184 (2002).
  \item \textsuperscript{61}Toyota, 534 U.S. at 202-03.
  \item \textsuperscript{62}Id. at 197-98.
  \item \textsuperscript{63}Id. at 187.
  \item \textsuperscript{64}29 C.F.R. § 1630.2(j)(1) reads:
  The term substantially limits means: (i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity.
  \item \textsuperscript{65}Toyota, 534 U.S. at 195-96 (citing Equal Employment Opportunity Commission, 29 C.F.R. § 1630.2(j)(1) (2004)).
  \item \textsuperscript{66}Id. at 196 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1976)).
  \item \textsuperscript{67}Id. (citing WEBSTER'S, supra note 66, at 2280).
  \item \textsuperscript{68}Id. (citing WEBSTER'S, supra note 66, at 1363).
  \item \textsuperscript{69}Id.
  \item \textsuperscript{70}Id. at 197.
  \item \textsuperscript{71}Id. (quoting WEBSTER'S, supra note 66, at 1363).
\end{itemize}
those activities that are of central importance to daily life.” 72 Having set out to revise the definition of “substantially limits,” the Court ended by establishing a new criterion for determining what does or does not qualify as a major life activity under the ADA, a criterion which Justice O’Connor reaffirmed in two sentences of the opinion of the Court. She writes, “in order for performing manual tasks to fit into this category [major life activities], a category that includes such basic abilities as walking, seeing, and hearing, the manual tasks in question must be central to daily life.” 73

In the case of Ella Williams, the Court observed that she was able to perform many manual tasks that were central to most people’s daily lives, including dressing herself, bathing, brushing her teeth, and performing household chores. 74 Conversely, the job tasks which caused her injuries and inspired her lawsuit, described as “repetitive work with hands and arms extended at or above shoulder levels for extended periods of time,” were not an important part of most people’s daily lives. 75

Although work, broadly defined, is surely central to most people’s daily lives, the specific jobs that most people perform are not. Because most people never do welding, police work, or retail sales, to take a few examples, it is difficult to see how “work” could survive the “daily lives” test to remain a major life activity under the ADA. The Court has thus defined “work” so narrowly, equating it with the specific tasks that an individual performs in his particular job, that virtually no one’s work can be considered central to daily life. Taken to its logical conclusion, the Court’s reasoning therefore must remove work from the list of major life activities that help define disability under the ADA.

The Toyota court did not acknowledge this consequence of its reasoning, and indeed the holding did not claim to address the criteria for defining “major life activity.” The Court held only “that to be substantially limited in [the major life activity of] performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.” 76 The Court also stated that in order for “performing manual tasks” to qualify as a

72. Id.
73. Id.
74. Id. at 201-02.
75. Id. at 201.
76. Id. at 198 (2002). The Court also added that “[t]he impairment’s impact must also be permanent or long term.” Id.
major life activity, "the manual tasks in question must be central to daily life."\textsuperscript{77}

II. EVALUATING THE ARGUMENTS FOR AND AGAINST

This Part examines the explicit and implicit objections raised to retaining work as a major life activity. A discussion will then proceed, in the following order, to the varied sources that may be used when construing the statute: the ADA statute itself; regulations issued by executive branch agencies pursuant to the statute's charge; and the Act's preamble and legislative history as evidence of Congressional intent.

A. The Problem of Circularity

In Sutton, the Supreme Court stated:

\begin{quote}
[T]here may be some conceptual difficulty in defining "major life activities" to include work, for it seems "to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others]... then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of [a] handicap."\textsuperscript{78}
\end{quote}

The passage in internal quotation, taken from the oral argument in School Board v. Arline,\textsuperscript{79} confuses the issue by stating that when work is claimed as a major life activity, the claimant's exclusion from work constitutes the impairment which excludes the claimant from work. This passage is so baffling because it makes no sense on its face, and because it incorrectly characterizes the experience of being disabled. A disabled person is excluded from work because she has an impairment, for example paralysis or bad eyesight, that limits her ability to work. This characterization of disability is no different than that which applies to any of the other major life activities. If an impairment limits a major life activity of an individual, the individual is disabled under the ADA. Whatever may be said of this definition of disability, it certainly is not circular.

Justice O'Connor's use of this passage from the Arline oral argument is all the more difficult to understand, given that O'Connor pointed out the conceptual difficulty in defining "major life activi-

\textsuperscript{77} Id. at 197.
\textsuperscript{79} 480 U.S. at 273.
ties" because of the problem that the argument may be circular.80 Observing that the United States had argued that making work a major life activity was to use circular reasoning, however, the Arline Court stated, "[t]he argument is not circular, however, but direct."81

B. The EEOC's "Reluctance" About Work

After raising the circularity question, the Sutton court added that "even the EEOC has expressed reluctance to define 'major life activities' to include working and has suggested that working be viewed as a residual life activity, considered, as a last resort, only 'if an individual is not substantially limited with respect to any other major life activity.'"82 But, the terms "reluctance" and "residual life activity" appear nowhere in the EEOC's discussion cited by the Court, and the Court's procrustean editing of the relevant passage implies a very different tone from that conveyed in the original, which reads as follows:

If an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered. If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working. For example, if an individual is blind, i.e., substantially limited in the major life activity of seeing, there is no need to determine whether the individual is also substantially limited in the major life activity of working.83

Although the EEOC does not directly state its reason for making this recommendation, the reason can be readily inferred from the paragraphs that follow the quoted passage. It is simply more difficult and complicated to claim a disability defined by work as the major life activity, because "work," unlike seeing or walking, for example, resists easy definition. Losing one's ability to pitch major league baseball, or fly a space shuttle, obviously doesn't make one "substantially limited" in work. On the other hand, a manual laborer who can no longer lift heavy objects clearly seems substantially limited in work. The EEOC has developed tests for determining whether an individual is substantially limited in the

80. Sutton, 527 U.S. at 492.
81. 480 U.S. at 283 n.10.
82. Sutton, 527 U.S. at 492 (quoting 29 C.F.R. § 1630.2(j) (1998)) (emphasis added by Court).
major life activity of work. The agency advises that such an individual must be "substantially restricted" in the ability to perform a "class of jobs" (jobs similar to one another) or a "broad range of jobs in various classes." This test is also supplemented by three other factors pertaining to the number of jobs in the geographic area to which the individual has access.

The courts have often found it difficult, if not impossible, to apply these tests with any consistency. For plaintiffs seeking relief under the Act, arguing from work as the major life activity necessarily imposes a more onerous evidentiary burden than is the case with other major life activities, in which a doctor's opinion can suffice to establish the disability. Rather than attribute to the EEOC a "reluctance" to consider work a major life activity, it seems more reasonable to infer that because it can be more difficult to litigate a claim based on work, and because the outcome in the courts is more difficult to predict, the EEOC wanted only to advise potential claimants that they should use some other major life activity if feasible.

C. Toyota Revisited

As discussed above, in Toyota the Supreme Court established a new standard for judging whether or not an activity qualifies as a "major life activity" under the ADA. The Court first examined dictionary definitions of "substantial" and "substantially," to interpret the meaning of "substantially limits" in the ADA's definition of disability. The opinion then continued, ""[m]ajor' in the

84. Id.
85. Id. The agency gives this example of a "range of jobs":
[S]uppose an individual has an allergy to a substance found in most high rise office buildings, but seldom found elsewhere, that makes breathing extremely difficult. Since this individual would be substantially limited in the ability to perform the broad range of jobs in various classes that are conducted in high rise office buildings within the geographical area to which he or she has reasonable access, he or she would be substantially limited in working.

Id.
86. Id.
90. Id. at 196-97.
phrase ‘major life activities’ means important. See Webster’s . . . (defining ‘major’ as ‘greater in dignity, rank, importance, or interest.’)”91 The next sentence contains the crucial logical leap: “‘Major life activities’ thus refers to those activities that are of central importance to daily life.”92

As noted above, the Court’s reasoning, if followed to its logical conclusion, might well eliminate work as a major life activity under the ADA, because although “work” is central to most people’s daily lives, the specific jobs which most people perform, whether exotic dancing, law enforcement, or shoe repair, to take three examples, are not “central to most people’s daily lives,” just as Ella Williams’s tasks at the Toyota plant did not meet this standard.93 The Court explicitly rejected the “daily life” standard in Bragdon,94 affirming that sexual reproduction is a major life activity under the ADA, even though it is clearly not a daily activity. In Bragdon, respondent Abbott sought the protection of the ADA on the grounds that she was infected with the HIV virus, and therefore substantially limited in the major life activity of reproduction,95 which does not appear on the regulatory agencies’ lists of major life activities. Petitioner Bragdon contended that Congress wanted the ADA to cover only those aspects of an individual’s life which are economic, public, or daily in character.96 “[This] argument founders on the statutory language,” concluded the Court.97 The Court explained that

Nothing in the [dictionary] definition [of “major”] suggests that activities without a public, economic, or daily dimension may somehow be regarded as so unimportant or insignificant as to fall outside the meaning of the word “major.” The breadth of the term confounds the attempt to limit its construction in this manner.98

Reproduction is obviously not central to most people’s daily lives. Nevertheless, the Court held that “[r]eproduction falls well within

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91. Id. (quoting WEBSTER’S, supra note 66, at 1363).
92. Id. at 197.
93. Toyota, 534 U.S. at 201-02.
95. Id. at 639-41. The Court held that Abbott’s HIV infection “substantially limited” her ability to reproduce in two ways: unprotected sex would impose a risk of infection on her male partner, and her child was at risk of becoming infected while in the womb. Id.
96. Id. at 638-39.
97. Id. at 638.
98. Id.
the phrase 'major life activity.' Reproduction and the sexual dynamics surrounding it are central to the life process itself.99

The Court's holding in Toyota is focused narrowly enough to avoid a direct clash with the Bragdon precedent.100 But, the Court's reasoning in the two cases cannot be reconciled; the two opinions pose the question of whether a "major life activity" must be implicated in daily life, and reach opposing answers. The Bragdon court could anchor its conclusion in "the breadth of the term 'major';"101 the Toyota opinion, in contrast, limits the construction of "major" in precisely the manner rejected in Bragdon, and without offering any justification for doing so.102

D. The Letter of the Statute

The definition of disability, as stated in the ADA itself, supports the claim that a major life activity need not implicate most or all of the areas of an individual's life. The definition begins by stating that "[t]he term 'disability' means, with respect to an individual (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual."103 The emphasized passages indicate that the determination of whether a person has a disability under the ADA "is an individualized inquiry," as the Supreme Court observed in Sutton.104 One can therefore argue that the meaning of "major" must depend, at least in part, on an assessment of which activities are important to the individual claiming a disability. For a great many individuals in the United States, work is the central and defining activity of life. The Sutton Court used the requirement of individualized inquiry for a different purpose than that which is suggested here: to argue that a disability determination had to take into account the effect of any mitigating measures which the individual could take.105 The Court did not consider the implications of using an individualized inquiry for deciding which activities qualify as "major life activities" under the Act.106 Removing work from the list of major life activities,

99. Id.
100. Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184, 198 (2002). The holding was limited to defining the standard for determining whether a person was "substantially limited" in a specific major life activity, such as performing manual tasks. Id.
102. See Toyota, 534 U.S. at 197.
105. Id.
106. See id.
however, would foreclose any individualized inquiry as to the disa-
bility status of many, perhaps millions, of individuals whose impair-
ments limit their access to gainful employment.

An even stronger case for retaining work as a major life activity
rests on the construction section of the ADA, which reads, in pertinent part:

Except as otherwise provided in this chapter, nothing in this
chapter shall be construed to apply a lesser standard than the
standards applied under Title V of the Rehabilitation Act of
1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal
agencies pursuant to such title.\textsuperscript{107}

The HEW's list of major life activities, which includes "working,"
was issued pursuant to Title V of the Rehabilitation Act.\textsuperscript{108} The
HEW list has therefore been written into the statute itself, and has
the force of law. The Supreme Court said as much in \textit{Bragdon}.\textsuperscript{109}
After quoting from the ADA's construction section, the Court con-
cluded that "[this] directive requires us to construe the ADA to
grant at least as much protection as provided by the regulations
implementing the Rehabilitation Act."\textsuperscript{110}

\section*{E. Other Agency Regulations}

The ADA gives three federal agencies or departments the task
of issuing regulations to implement those of the Act's provisions
that lie within each agency's area of responsibility: employment
provisions to the EEOC,\textsuperscript{111} the public services subchapter to the
Attorney General and the Secretary of Transportation,\textsuperscript{112} and the
subchapter on services provided by private entities to the Secretary
of Transportation and the Attorney General.\textsuperscript{113} As Justice
O'Connor pointed out in the opinion of the Court in \textit{Sutton}, the
ADA gives no agency the explicit authority to interpret the Act's
generally applicable terms, which include the critically important
definition of disability.\textsuperscript{114} In \textit{Sutton}, the Court saw no need to

\textsuperscript{107} 42 U.S.C. § 12201(a) (1990) (emphasis added).
\textsuperscript{108} 45 C.F.R. § 84.3(j)(2)(ii) (2004). "Major life activities' means functions such as
caring for one's self, performing manual tasks, walking, seeing, hearing, speaking,
breathing, learning, and working." \textit{Id.}
\textsuperscript{110} \textit{Id.} at 632.
\textsuperscript{112} \textit{Id.} § 12134 (1990).
\textsuperscript{113} \textit{Id.} § 12186 (1990).
"consider what deference [the regulations] are due, if any."^115 Should the status of work as a major life activity be challenged in the courts, however, much may depend on what measure of deference the courts will accord these regulations. All three agencies have elaborated on the definition of "disability" in their regulations to implement the Act, all have done so in nearly identical language; all provide substantially the same list of major life activities, and all name "work" or "working" as one of these.\footnote{116}

There are at least two possible approaches to arguing that the agency regulations that implement the ADA have an implied statutory authority, even though explicit authority is lacking. Justice Breyer developed the first approach in his \textit{Sutton} dissent, when he argued that the EEOC needed the authority to interpret a generally applicable term such as "disability" in order to carry out the provisions of the employment subchapter, especially as the word "disability" appears both in the Act's general provisions and in the employment subchapter.\footnote{117} Justice O'Connor dismissed this interpretation as "imaginative."\footnote{118} A second approach builds on the first, and perhaps strengthens it. Congress has delegated authority to three agencies to implement the Act, and cannot have intended that these agencies should operate with mutually inconsistent definitions of the Act's central terms. Congress must therefore have assumed that the agencies would define critical terms, for example, "major life activity," by consensus, so that definitions would emerge that proved workable in varied contexts. It can therefore be argued that Congress delegated a form of collective statutory authority to the three agencies.

One could also argue, at cross purposes to the arguments for implied authority, that Congress saw no need to let any agency define the Act's terms, because these terms had already been defined by HEW under the Rehabilitation Act. The ADA's section on its construction directly links the ADA's standards to those established under the 1973 Act and the pursuant regulations,\footnote{119} and Congress may have assumed that no further interpretation was necessary.

\footnote{115. \textit{Id.} at 480.}\footnote{116. 29 C.F.R. \S 1630.2(i) (2004); see 28 C.F.R. \S 35.104 (2004); see also 49 C.F.R. \S 37.3 (2004).}\footnote{117. \textit{Sutton}, 527 U.S. at 514.}\footnote{118. \textit{Id.} at 479.}\footnote{119. 42 U.S.C. \S 12201(a) (1990).}
F. Congressional Intent

1. Using the Term “Disability”

There is some evidence, albeit none of it conclusive, to suggest that Congress did not intend to bring the work-disabled under the protection of the ADA. Specifically, the Act’s preamble gives some support to the argument that work is an anomaly within the list of recognized “major life activities,” and that Congress did not intend the Act to cover persons whose impairments only limited them in the workplace. Although a preamble to a statute’s enacting clause is not a part of the statute, and does not control the meaning of the substantive parts, it can be used as a source for understanding the intent of the lawmakers. In the first of nine findings which comprise the preamble to the ADA, Congress used the term “disability” in a way that implies a narrow construction of the term. “[S]ome 43,000,000 Americans,” begins the finding, “have one or more physical or mental disabilities.” The phrase “physical or mental disabilities” short-circuits the Act’s definition of disability, i.e., a physical or mental “impairment” that “substantially limits” a “major life activity.” This finding thus reduces “disability” to “impairment,” collapsing the “limits” and “major life activity” prongs into the “impairment” prong. This phrasing makes no sense when work is a major life activity, because the impairment is not the inability to work, but rather the infirmity (paralysis, blindness, or others) that interferes with work. In contrast, this collapsed definition is readily comprehensible when the major life activity is seeing, hearing, walking, speaking, or learning because the impairment can be equated with a limit on the major life activity: one has bad eyes and is thus limited in seeing; a man is paralyzed, and we know this because he cannot walk.

One can more plausibly argue, however, that Congress simply used “disability” in this finding as a quotable short hand, readily understandable by the general public. Certainly the legislative history demonstrates that Congress understood the Act’s full definition of disability, as will be discussed below.

120. See 42 U.S.C. § 12101.
2. The ADA as a Civil Rights Act

In other findings within the preamble, Congress described the disabled as an isolated and readily distinguishable minority that needed the protection of civil rights legislation comparable to the Civil Rights Act of 1964. This picture of the disabled does not readily encompass the work-disabled, and thus supports the argument that Congress did not intend that work be a "major life activity" under the Act. At several points, the findings invoke, implicitly or explicitly, the canonical language of Carolene Products footnote 4, as it defines what today is called "a suspect classification." The seventh finding states that "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society." This finding implies that an individual's disability is readily apparent to others, and that it interferes with the individual's functioning in many different contexts. It is otherwise hard to see how such an individual would belong to a "discrete and insular minority." Persons whose impairments limit them substantially only in the workplace would be disabled only in the context of work, and neither recognizable as disabled nor isolated from others outside of work. The Congressional findings indirectly support this interpretation by listing the many "critical areas" in which discrimination against the disabled persists: "employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." Most of the major life activities on the standard regulatory list implicate all of the contexts in which people live their lives. For example, a limitation in the major life activity of "seeing" can affect not only work, but also caring for one's self at home, transportation, education, communication, recreation, voting, and so on. People who encounter a woman with impaired eyesight are likely to perceive her principally, or at least importantly, in terms defined by her flawed vision. A man who is paralyzed from the waist

123. Id. § 12101(a)(2)-(7).
124. United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").
126. Id. § 12101(3).
down, his personality traits or other attributes notwithstanding, will often be seen first and foremost as "a paraplegic." Limitations to the major life activities of walking, hearing, speaking, learning, and breathing can likewise have a global impact upon a person's life; impairments which interfere with such activities can mark that individual as disabled in most or all contexts. Such individuals might belong to a "discrete and insular minority," isolated and thwarted at every turn. Someone limited only in the major life activity of working may be in an entirely different position.

An individual limited only in the major life activity of working would not necessarily belong to the "minority" which Congress envisioned in its findings. By definition, his impairment cannot hinder him from doing all types of work, or even most types, for in that case he would already be limited in some other life activity, such as seeing or performing manual tasks. Instead, his impairment need only hinder him from performing a "class" of jobs or a "broad range of jobs" from different classes. To take an example from the EEOC's interpretive guidance to the ADA, a woman who is highly allergic to a substance found in most high rise office buildings, but seldom found elsewhere, would be substantially limited in her ability to do the broad range of jobs found in tall office buildings. If she lived in any urban area where many office jobs were located in tall buildings, she would be substantially limited in the major life activity of working, and would therefore qualify as disabled under the ADA.

Disabled though she might be under the ADA, this woman could walk, drive, or take the bus to work. She could attend school and university without difficulty. She could communicate with others, and participate in recreation and public entertainment. She could gain ready access to health care and public services. She could vote and otherwise participate in politics. The people around her would not identify her as "disabled," she would run no risk of being socially or otherwise isolated, and she could scarcely be said to belong to a "discrete and insular minority." Yet the Congressional findings, which constitute the ADA's preamble, re-

128. Id.
129. Id.
130. Id.
131. Id.
132. Id.
133. See id.
134. Id.
inforce at every turn a picture of a well-defined, isolated group that the Act was intended to benefit. Persons disabled solely in work do not obviously belong to such a minority.

"[H]istorically, society has tended to isolate and segregate individuals with disabilities," begins the second subsection of the findings. Alluding to other globally apparent, immutable attributes, comparable to blindness, deafness, or paralysis, Congress found that "unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to address such discrimination." Congress further found that "census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally."

The legislative history provides further evidence that Congress viewed the disabled as a "discrete and insular minority." The Senators who introduced the ADA in 1989 often invoked the memory of the Civil Rights Act of 1964, commenting that passing the ADA would commemorate that earlier watershed, on its 25th anniversary, in a most fitting manner. At many places in the record of floor debate, legislators described the disabled as a "minority," implicitly comparable to a racial minority such as African-Americans. Senator Edward Kennedy proclaimed that the ADA would help "end this American apartheid." Now, on the 25th anniversary of the 1964 Act, Kennedy claimed it was time to do for the disabled what the earlier Act had done for African-Americans.

The House Education and Labor Committee found the disabled to be the country's "largest minority," and declared that "individuals with disabilities are a discrete, specific minority who have been insulated in many respects from the general public." The

136. Id. § 12101(a)(4).
137. Id. § 12101(a)(6).
141. Id.
143. Id. at 40.
Committee also found that the disabled as a group were politically weak; for this reason it had taken a full twenty-five years since the 1964 Act to pass a law protecting their civil rights.\textsuperscript{144} "In sum," stated the Senate Labor and Human Resources Committee, "the unfortunate truth is that individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society . . . ."\textsuperscript{145}

Persons who are limited only in the major life activity of working may not belong to the minority which Congress imagined. This mismatch of categories argues for striking work from the list of major life activities under the ADA. The repeated Congressional references to a "discrete and insular minority," however, served a purpose unrelated to the substantive provisions of the Act, limiting their value as a guide to Congressional intent. To subject state and local governments to the Act's authority,\textsuperscript{146} Congress needed to invoke its enforcement authority under the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{147} One can therefore argue that Congress deployed the term "discrete and insular minority" chiefly (or only) to shield the Act from attacks on its constitutionality, and not to express its intentions as to how the Act should be construed. This argument gains strength from the recognition that the disabled population of the United States, taken as a whole, does not constitute a "suspect classification" as defined in Carolene Products and subsequent Fourteenth Amendment jurisprudence. The disabled are not insular, as they live scattered among all classes, races, and ethnicities of society. They do not reside in definable geographic enclaves. Congressional findings notwithstanding,\textsuperscript{148} they have not been subject to purposeful unequal treatment, at least not to the extent experienced by African-Americans, women, or even some immigrant groups in the nineteenth and twentieth centuries. The disabled have also not been "relegated to a position of political

\textsuperscript{144} Id.


\textsuperscript{146} 42 U.S.C. §§ 12131-12165 (2000).

\textsuperscript{147} 42 U.S.C. § 12101(b)(4) (2000); see Burgdorf, supra note 9, at 436-39. "It is the purpose of this chapter to invoke the sweep of congressional authority, including the power to enforce the Fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4) (2000).

\textsuperscript{148} 42 U.S.C. § 12101(a)(7) (2000). "Individuals with disabilities . . . have been . . . subjected to a history of purposeful unequal treatment." Id.
powerlessness.”¹⁴⁹ No government in the United States has ever deprived the disabled of the vote, or excluded them as a group from jury service or public office, as Franklin Delano Roosevelt demonstrated.¹⁵⁰

3. The ADA’s Purpose: The Centrality of Work

If the members of Congress often hailed the ADA as a new civil rights act, just as often they hailed it as a program to get the disabled into the workforce.¹⁵¹ They also promised that it would save the Federal and state governments billions of dollars each year in support payments currently made to the unemployed disabled.¹⁵² This central purpose of the Act argues strongly for retaining work as a major life activity under the Act. Addressing the Senate on the day the ADA was brought to the floor, Senator Simon made clear that work enjoyed a special importance among the benefits from which the disabled were so often excluded: “The Rev. Dr. Martin Luther King, Jr., once said, ‘in our society it is murder, psychologically, to deprive a man of a job or an income. You are in substance saying to that man that he has no right to exist.’”¹⁵³ Dr. King’s comment explains why work deserved to be included in the life activities that help define disability: it is almost as necessary to life as are breathing, seeing, or walking. Even a seemingly minor impairment can have grave consequences if it excludes someone from the workplace.

The centrality of work marked federal disability legislation at its inception. The original Rehabilitation Act of 1973 defined disability only as an obstacle to employability.¹⁵⁴ The following year, Congress decided that this definition was too narrow, and created the definition later incorporated into the ADA. In deliberating on the ADA, Congress referred often to recent studies which showed that a great majority of the disabled were unemployed; as a consequence, disproportionate numbers of the disabled lived in poverty. Senator Durenberger admonished that for the disabled, without

¹⁴⁹. Id.
¹⁵¹. See Ulgen, supra note 8, at 765-73.
work "[t]here is no hope, there is no sense of self-worth." Senator Riegle emphasized that the disabled needed independence and self-sufficiency, and also advocated changing the requirements for Social Security disability benefits, to encourage more disabled citizens to return to work.\textsuperscript{156}

Legislators also tended to offer work as a principal reason for mandating disabled access to transportation. Senator Durenberger cited a Harris poll showing that three of ten disabled persons stated that lack of transportation was a reason why they had no employment.\textsuperscript{157} Transportation, he concluded, was "essential if a person is to seek and maintain a job."\textsuperscript{158} The House Public Works and Transportation Committee, after listing benefits that the disabled will enjoy once they can use public transportation, concluded by adding "and most of all, taking pride in a job well done."\textsuperscript{159}

Finding "staggering levels of unemployment and poverty," the House Education and Labor Committee quoted with approval from the conclusions of a recent Louis Harris study of the disabled: "'not working' is perhaps the truest definition of what it means to be disabled in America."\textsuperscript{160} Senator Harkin, as the principal sponsor when the ADA was brought to the Senate floor in 1989, likewise quoted this passage from the Harris poll.\textsuperscript{161} Senator Harkin also cited a statistic from the Harris poll, one which appears at many other points in the legislative record: that some two-thirds of all working-aged disabled Americans were not working, although a large majority of this group wanted to work.\textsuperscript{162}

If work was absolutely essential to the hopes of disabled Americans, securing employment for the disabled promised enormous benefits to American society, in the eyes of legislators and other political leaders. Senator Harkin asserted that the Federal Government spent some $60 billion each year on support payments to persons who could not work because of their disabilities.\textsuperscript{163} By ending discrimination, the ADA could put these people back to work, allowing savings in these disability programs. The disabled who returned to work would now also be able to pay income tax,

\begin{itemize}
\item \textsuperscript{155} S. 4994, 101st Cong. (May 9, 1989).
\item \textsuperscript{156} S. 4997, 101st Cong. (May 9, 1989).
\item \textsuperscript{157} S. 4994.
\item \textsuperscript{158} Id.
\item \textsuperscript{159} H.R. Rep. No. 101-485, pt. 1, at 58.
\item \textsuperscript{160} Id. pt. 2, at 32.
\item \textsuperscript{161} S. 4979.
\item \textsuperscript{162} Id.; see also id. (statement of Sen. Durenberger).
\item \textsuperscript{163} S. 4986, 101st Cong. (May 9, 1989); see S. 4987, 101st Cong. (May 9, 1989).
\end{itemize}
improving the government's fiscal condition, and could also purchase more consumer goods, stimulating the economy.\textsuperscript{164} Senator Simon, including in his calculation the cost of state welfare programs for the disabled, asserted that discrimination against the disabled cost the United States some $300 billion every year.\textsuperscript{165} The significance of this particular argument may be diminished by its obvious tactical utility: in the floor debate just cited, Harkin invoked these economic benefits in the context of arguing that the ADA's regulations would not impose excessive costs on business and government.\textsuperscript{166}

Other legislators argued that the United States faced a shortage of skilled labor in coming decades, and would sacrifice considerable economic growth by failing to draw on the talents of the disabled.\textsuperscript{167} Senator Durenberger set a dramatic tone, proclaiming that "America over the next two decades will be in a fight for economic survival," and could not afford to waste the talents of the disabled.\textsuperscript{168}

Congress clearly indicated that a central purpose of the ADA was to make it possible for disabled Americans to secure and retain gainful employment. It is therefore difficult to see how Congress could have countenanced removing work, of all the major life activities, from the Act's definition of disability. Moreover, Congress repeatedly and explicitly stated that work was a major life activity, as will be seen in the next section.

4. \textit{Naming the Major Life Activities}

When crafting the ADA, Congress made clear that work counted as a major life activity for the purpose of defining disability by repeating the standard agency list of major life activities, at several points throughout the deliberations concerning the ADA.\textsuperscript{169} In analyzing the draft legislation, the House Committee on Education and Labor explained that "[a] 'major life activity' means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, and participating in community activities."\textsuperscript{170} Similar or identical lists, all containing "work" or "working," appear in the reports of the

\textsuperscript{164} S. 4986, 101st Cong. (May 9, 1989); see S. 4987, 101st Cong. (May 9, 1989).
\textsuperscript{165} S. 4995, 101st Cong. (May 9, 1989).
\textsuperscript{166} S. 4986; see S. 4987.
\textsuperscript{167} See, e.g., S. 4995 (statement of Sen. Simon).
\textsuperscript{168} S. 4994, 101st Cong. (May 9, 1989).
\textsuperscript{170} Id.
House Judiciary Committee\textsuperscript{171} and the Senate Labor and Human Resources Committee.\textsuperscript{172}

The House Judiciary Committee gave a telling example of a disability rooted in the major life activity of working: if a painter were instructed by her employer to work with a specific paint that caused "severe allergies, such as skin rashes and seizures, the person would be substantially limited in a major life activity."\textsuperscript{173} This example indicates that Congress did not just accept the idea that work was a major life activity. Congress embraced work as part of the disability definition, and did so emphatically, by choosing as an example a person who clearly would not be disabled outside the workplace.

Congress also signaled its intention to include work among the major life activities by repeatedly invoking the pertinent regulations which implemented the Rehabilitation Act\textsuperscript{174} and the 1988 Fair Housing Act Amendments.\textsuperscript{175} These regulations included work on lists of major life activities.\textsuperscript{176} In introducing the ADA, on behalf of thirty-two sponsors of both parties, Senator Harkin referred his colleagues to these regulations for an explanation of such terms as "impairment" and "major life activity."\textsuperscript{177} The Senate committee that reported on the bill likewise embraced the agency analysis of the term disability (used interchangeably with "handicap" as contained in these regulations), and declared its intent that this analysis "apply to the definition of the term 'disability' included in this legislation."\textsuperscript{178} Observing that the regulations issued under the Rehabilitation Act used the term "handicap" instead of "disability," the Committee emphasized that the term "handicap" was being discarded only because it offended many persons with disabilities: "[n]o change in definition or substance is intended nor should be attributed to this change in phraseology."\textsuperscript{179} Identical language, referencing the same regulations and explaining the change in terminology, appears in the report of the House Education and Labor Committee.\textsuperscript{180} The intent of Congress could not be

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\textsuperscript{174} 45 C.F.R. § 84.3(j)(2)(ii) (1989).
\textsuperscript{175} 24 C.F.R. § 100.201 (1989).
\textsuperscript{176} 45 C.F.R. § 84.3(j)(2)(ii) (1989); 24 C.F.R. § 100.201 (1989).
\textsuperscript{177} S. 4986, 101st Cong. (May 9, 1989).
\textsuperscript{179} Id.
clearer: the agency regulations, and the list of major life activities they contained, were to have the force of law.

III. ARGUMENTS THAT WORK, AND ARGUMENTS THAT WORK TOO HARD

The Supreme Court contends that the argument for making work a major life activity does not withstand closer examination. It makes no sense for the Court to cite the passage which the Court quotes approvingly in Sutton. In the preceding sentence to the passage, the Court acknowledges the conceptual difficulty of defining "major life activities" and the possibility of circularity. Additionally, the Court itself had commented in a footnote in Arline, a prior case, that "[t]he argument is not circular, however, but direct." The Sutton court also contended that "even the EEOC" had expressed "reluctance" about keeping work as a major life activity under the Act. The Court based this contention on a highly selective reading of the agency's regulations, and overlooked the most obvious explanation for the EEOC's recommendation that plaintiffs and judges first ask whether a claimant is limited in another major life activity, before conducting the analysis with respect to work: work is more difficult to define, so that claiming it as a major life activity requires a more complicated analysis, and imposes greater evidentiary burdens upon the plaintiff.

In Toyota the Court clearly implied that any "major life activity" under the ADA would have to include those activities that are central to most people's daily lives. Followed to its logical conclusion, this new standard would exclude work from the definition of "major life activities." Yet the Court itself explicitly considered and rejected this "daily life" standard in Bragdon, and held that

181. See supra Part II.A.
182. See supra Part II.A.
185. This is based chiefly on the difficulty experienced by the courts in determining whether or not plaintiffs are substantially limited in the major life activity of work. See generally Russell, supra note 87.
186. See supra notes 89-94.
187. This is assuming that one also adopts the Court's position that an individual's work is "not central to daily life," on the reasoning that the specific tasks comprising an individual's job are not part of daily life for most people, who necessarily perform different tasks in different jobs. See generally Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184, at 200-01. (2002).
reproduction and childrearing constituted a major life activity under the ADA, although reproduction is clearly not central to daily life. The Court's reasoning in Toyota also breaks down on its own terms, when the Court quotes dictionary definitions of “major” as “‘greater in dignity, rank, importance, or interest,’” and in the next sentence declares: “[m]ajor life activities’ thus refers to those activities that are of central importance to daily life.” The definition stated for “major” is broad and inclusive, and the Court has stated no reason for insisting that “daily life” is an important, much less essential, component of this definition. The Court's rigid interpretation of “major” is also inconsistent with the individualized nature of the disability determination, which, in the Act's language, is to be made “with respect to an individual,” assessing the limitations an impairment imposes on “the major life activities of such individual.”

The three governmental agencies charged with implementing the ADA have all stated in their regulations that work is a major life activity. Although the Court in Sutton held that these regulations, insofar as they address the Act's definition of disability, do not have the force of law, the courts have traditionally accorded their views some deference, in recognition of their specialized expertise in the law and policy relevant to their areas of authority.

The Act’s preamble and legislative history, as evidence of Congressional intent, may place the inquiry on firmer ground. At first glance, the Act's preamble, and some of the legislative history, seems to suggest that Congress did not have the work-disabled in mind when drafting the statute. By stating in the preamble that “some 43,000,000 Americans have one or more physical or mental disabilities,” Congress collapsed the three components of the disability definition (“impairment,” “substantially limits,” “major life activity”) into the impairment prong. Under this compressed definition, many major life activities are still comprehensible, for example, where the impairment is an inability to see. The major

188. See Bragdon v. Abbott 524 U.S. 624, 638-41 (1998); see supra notes 95-96 and accompanying text.
190. Id.
191. Id. at 198.
life activity of work, however, makes little sense under such a definition, because any impairment that might limit work, for example bad eyesight, is conceptually distinct from the activity itself. This compressed definition of disability, however, is probably just that: a quotable shorthand intended to make the ADA comprehensible and attractive to the general public. Attaching a larger significance to this passage in the preamble makes little sense. Other language in the preamble raises a more troubling issue.

At several points in the preamble, Congress described disabled Americans as "a discrete and insular minority," a category that probably would not include persons whose disability only limited their major life activity of work.\(^{195}\) When referring to "discrete and insular minorities," however, Congress had a very specific agenda, one that had little to do with crafting the Act's substantive provisions: by repeatedly intoning the language of leading Fourteenth Amendment cases, in a manner that seems almost ritualistic, Congress sought to buttress its constitutional authority to impose the ADA upon state and local governments. It is difficult to see why Congress, without such a motive, would describe the disabled as a "discrete and insular minority, . . . relegated to a position of political powerlessness," because the disabled in this country are neither insular nor powerless.

Even if one assumes that Congress actually thought of the disabled as being a minority in the Carolene Products sense of the term, this does not necessarily argue for removing the work-disabled from the protection of the Act. Congress enacted the ADA with more than one purpose in mind, and these purposes are not mutually exclusive. Congress has stated clearly that a central purpose of the Act was to remove barriers that prevented the disabled from securing and retaining gainful employment.\(^{196}\) At more than one point, Congress adopted the statement of Lou Harris that "'not working' is perhaps the truest definition of what it means to be disabled in America."\(^{197}\) For the disabled, Congress observed, work was essential to a decent standard of living and a basic self-respect. For society, continued exclusion of the disabled from the workforce meant the loss of skilled labor and the annual drain of billions of dollars in support payments. In light of this purpose, Congress could not have intended that work be stricken from the

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195. See supra notes 125-46 and accompanying text.
196. See supra notes 147-64 and accompanying text.
197. See supra note 160.
ADA's definition of disability. Congress also explicitly stated that work was part of that definition.

The legislative history makes clear that Congress relied upon the list of major life activities developed by regulatory agencies pursuant to the Rehabilitation Act of 1973 and the Fair Housing Act Amendments of 1988. These regulations include work on the list of major life activities, and Congressional committees also repeated these lists verbatim in their reports, as did members of Congress in floor debate. Congress also effectively incorporated this regulatory list into the ADA itself, in the Act's section on construction, which states:

Except as otherwise provided in this chapter, nothing in this chapter [i.e., the ADA as a whole] shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973... or the regulations issued pursuant to such title.198

Quoting this provision in Bragdon, in the context of determining whether or not reproduction is a major life activity under the ADA, the Supreme Court concluded that "[this] directive requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act."199 Therefore, the major life activity of work is part of the ADA, just as surely as if it had been named in the plain language of the statute.

CONCLUSIONS

The Supreme Court has questioned whether work should continue to be treated as a major life activity under the ADA, stating two grounds for doubt: that making work a major life activity rests on a circular argument, and that the EEOC itself has expressed "reluctance" to include work in the Act's definition of disability. Neither claim withstands scrutiny. The Court's Toyota standard for defining major life activities, that they must include activities "central to daily life," founders on its own illogic, and cannot be reconciled with precedent.

The Act's section on construction incorporates into the Act regulations that include work on a list of major life activities. The courts are bound to follow this mandated construction of the statute. If a court does not regard this construction as authoritative,

199. See supra note 111.
evidence of Congressional intent still points overwhelmingly to one conclusion: Congress intended that work be considered a major life activity under the ADA, and saw work as central to the Act's overriding objectives. Therefore, it is an impermissible construction of the Americans with Disabilities Act to hold that work is not a major life activity under this Act. And, even if such a construction were permissible, it would at best be highly implausible.
INTRODUCTION

When a moving company arrived in Montgomery last summer to relieve the Alabama State Judicial Building of a two-and-a-half ton granite monument entrenched in its rotunda, the movers were greeted by shouts of “Pray the wheels crumble!” and “Lord, it’s never too late to repent.” One protester even demanded: “Cowards! Open the door! Let me in there!” The monument was inscribed with a translation of the Ten Commandments from the King James Bible and was often the site of prayer services attended by government officials and other members of the public. Its shape—two adjacent tablets, each rounded at the top—recalled...
that most ancient of religious documents, which in keeping with its namesake, summons divine authority to literally command its readers to obey between ten and twelve religious duties.\textsuperscript{6} Installed in 2001 by former Alabama Supreme Court Chief Justice Roy Moore, shortly after his election and campaign as the "Ten Commandments Judge,"\textsuperscript{7} the monument and its removal signaled the end of an ordeal that lasted more than a decade.\textsuperscript{8} This legal sideshow featured everything from popular protest\textsuperscript{9} and wasteful lawsuits\textsuperscript{10} to threats of civil disobedience by Moore\textsuperscript{11} and a governor's rhetoric recalling Alabama's notorious stand against desegregation.\textsuperscript{12} It was only pursuant to multiple federal court orders,\textsuperscript{13} the last com-

\footnotesize
which we owe to each other\textsuperscript{2}). \textit{But see} Ronald Youngblood, \textit{Counting the Ten Commandments}, \textit{Biblical Rev.}, Dec. 1994, at 34 (noting that the "more likely explanation for there being two stone tablets" is that, in accordance with "ancient covenant practices," there were "[t]wo complete copies" of the original Decalogue, each of which "contained all ten of the commandments," with one copy belonging to God and the other "belong[ing] to the vassal (Israel)!").

6. As explained below, what some denominations consider a formal Commandment, others do not; likewise, what certain sects view as two separate Commandments, others view as only one. \textit{See infra} notes 27-90 and accompanying text.

7. Glassroth, 335 F.3d at 1288.

8. Moore made his name as a Decalogue-brandishing bureaucrat while serving as a state circuit court judge in Etowah County. \textit{Id.} at 1284. Elected in 1992, he soon hung behind the bench in his courtroom a wooden plaque into which he had personally hand-carved a version of the Ten Commandments. \textit{Id.;} Marlon Manuel, \textit{Atlanta J. and Const.}, Nov. 1, 1998, at 14A. Moore regularly invited clergy members to lead prayer at jury-organizing sessions, \textit{Glassroth}, 335 F.3d at 1284, and when the American Civil Liberties Union requested that he discontinue the practice and remove the plaque he refused and litigation ensued. \textit{See State ex rel. James v. ACLU of Ala.}, 711 So. 2d 952, 967 (Ala. 1998). After a higher Alabama court judge ordered him to remove the plaque, Moore flouted the order, winning the attention and support of then-governor Fob James. \textit{See} Robert R. Baugh, \textit{Applying the Bill of Rights to the States: A Response to William P. Gray, Jr.}, 49 \textit{Ala. L. Rev.} 551, 551 (1998).

9. \textit{See supra} notes 1-2 and accompanying text.

10. \textit{Glassroth}, 335 F.3d at 1284 (referring to "two high-profile lawsuits in 1995 . . . one filed by a nonprofit organization seeking an injunction and the other brought by the State of Alabama seeking a declaratory judgment that then-Judge Moore's actions were not unconstitutional").


12. \textit{See} Baugh, \textit{supra} note 8, at 511 n.3 (comparing James' vow to forcibly prevent the removal of Moore's hand-carved Decalogue from the courtroom to the actions of former Alabama governor George Wallace, who, in 1963, "stood in the schoolhouse door at the University of Alabama to prevent the registration of two black students").

ing in no uncertain terms from the Eleventh Circuit, that Moore's penchant for Decalogue-posting ceased.

The Alabama spectacle and other cases involving the posting of the Ten Commandments on government property scream out for a clear response to the question: On which side of Thomas Jefferson's "wall of separation between church and State" do public displays of the Ten Commandments fall? This Note seeks to answer the question by analyzing the text of the Ten Commandments as a religious document. Because many of the Commandments explicitly purport to mandate and forbid particular theological beliefs and worship, and because the document is vulnerable to a number of conflicting sectarian interpretations, I will argue that the Establishment Clause of the First Amendment forbids its public posting.

Part I of this Note discusses the religious obligations set forth in apodictic fashion in the Decalogue. It also explains that three major religions—Judaism, Catholicism, and Protestantism—each maintain a disparate and conflicting version of the document, notwithstanding the endeavors of some to elide all differences in so-called "ecumenical" or hybrid versions of the text. Part II considers the case law in the area, discussing the relevant applications of the Establishment Clause to Ten Commandments displays. Part III then examines the split between courts regarding the constitutional implications of publicly posting a version of the Ten Commandments inspired by Protestant translation and enumeration. Part III also looks at the posting of the hybrid versions of the Commandments and the split between courts over whether the putative amalgamation of the versions fairs any better under constitutional

14. Glassroth, 335 F.3d at 1303 ("The rule of law does require that every person obey judicial orders . . . . The chief justice of a state supreme court, of all people, should be expected to abide by that principle. We do expect that . . . when the time comes Chief Justice Moore will obey that order. If necessary, the court order will be enforced. The rule of law will prevail.").

15. See Gettleman, supra note 1. Since refusing to obey court orders to remove the monument, Judge Moore has been removed from office. Jeffrey Weiss, Ten Commandments are back; But this courthouse display isn't stirring up as much trouble, DALLAS MORNING NEWS, Feb. 14, 2004, at 4G. In place of the old monument, the Alabama Supreme Court created a display of "historical documents" alongside English and Hebrew versions of the Ten Commandments. The display included copies of the Magna Carta, the Declaration of Independence, and the Bill of Rights among other documents. Id.


17. U.S. CONST. AMEND. I ("Congress shall make no law respecting an establishment of religion . . . ").
scrutiny. Finally, Part IV suggests an answer to each split, arguing both that the choice of the recognized Protestant version impermissibly endorses one denomination over all others and that the ecumenical version of the Commandments is no less constitutionally infirm.

PART I. THE DECALOGUE, ITS VARIOUS INTERPRETATIONS, AND ITS POSTING IN AMERICA

Because some may be unfamiliar with the Ten Commandments, section A of this part of the Note briefly discusses their place in Western religion. Section B then analyzes the text of the Commandments themselves, focusing on both the theological nature of the edicts and the substantive differences between the authoritative versions of the Decalogue propagated by the major religious denominations. Finally, Section C considers the various hybrid versions of the Ten Commandments in America and proposes federal and state legislation seeking to guarantee their public posting.

A. Background

According to the Hebrew Bible, the ancestors of the Jewish people, referred to as the Hebrews, were enslaved in Egypt until a deity known as "YHVH," or God, brought them out of the land through a series of miracles. Amidst thunder and lightning, and atop a cloud-covered mountain outside Egypt, the narrative states, God gave two stone tablets to the leader of the Hebrews, Moses. On the tablets, God inscribed what many refer to—not without a

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18. According to studies by associates at the Graduate School of the City of New York, just under two million Americans considered themselves to be followers of the Buddhist, Hindu, Sikh, or Taoist religions in 2001, while another approximately 1.9 million considered themselves atheists or agnostics. Largest Religious Groups in the USA, at http://www.adherents.com/rel_USA.html#religions (last visited Oct. 5, 2004) [hereinafter Adherents.com]. More than 27 million labeled themselves "secular." Id.

19. At least one other law student has undertaken an in-depth analysis of the Ten Commandments. See Tarik Abdel-Monem, Note, Posting the Ten Commandments as a Historical Document in Public Schools, 87 IOWA L. REV. 1023, 1041-43 (2002). Although I hope and believe that I have added a new perspective, particularly with respect to the differing versions of the Commandments, I recognize that a law Note is not the place for an exhaustive theological treatise on the Ten Commandments. For a more thorough examination of the religious, moral, and historical issues surrounding the Decalogue, see generally WALTER J. HARRelson, THE TEN COMMANDMENTS AND HUMAN RIGHTS 15-18 (1997) and his discussion of other secondary sources.


controversy in its own right\textsuperscript{22}—as the Ten Commandments.\textsuperscript{23} Although most sects of the major western religions accept the basis of this account, they are wedded to their particular interpretations of the Hebrew text.\textsuperscript{24} This is true not only with respect to the choice of translation of the Bible as a whole—the King James version for Protestants, for instance\textsuperscript{25}—but also with respect to the divisions, enumeration, and translation of the Decalogue in particular.\textsuperscript{26}

\begin{enumerate}

\item \textsuperscript{23} \textit{Deuteronomy} 10:4; see Youngblood, supra note 5, at 30. The Bible actually refers to the Ten Commandments as the \textit{aseret haddevarim}, "the ten things," while current Jewish sources refer to them as \textit{aseret hadibrot}, or "the ten utterances." See \textsc{Etz Hayim: Torah and Commentary} 441 (Jewish Publication Society ed., 2001) (hereinafter \textsc{Etz Hayim}). To further complicate the issue, scholars debate whether these ten "things" or "utterances" were the same Ten Commandments that we are familiar with today, as there is evidence of "another Decalogue" located in \textit{Exodus} 34:14-26. \textsc{Harrelson, supra} note 19, at 27-33.

\item \textsuperscript{24} See Lemon v. Kurtzman, 403 U.S. 602, 628-29 (1971) (detailing the conflict between Protestants and Catholics over the use of the King James version of the Bible in public schools).

\item \textsuperscript{25} See id.

\item \textsuperscript{26} See ACLU Neb. Found. v. City of Plattsmouth, 358 F.3d 1020, 1032 (8th Cir. 2004) (citing one source which discusses a nineteenth-century massacre resulting from a debate over which denomination's version of the Commandments should be posted in public schools). Although I have found no book-length scholarly treatment of the different versions of the Decalogue corresponding to the major religious denominations, scholars routinely refer to differences and conflicts between each denomination's version of the Ten Commandments. \textit{E.g.}, \textsc{Harrelson, supra} note 19, at 40 (displaying chart comparing versions of the Ten Commandments); Bernard Meislin, \textit{The Role of the Ten Commandments in American Judicial Decisions}, \textsc{in Jewish Law Association Studies} III, at 190, 205-09 (A. M. Fuss, ed., 1987) (same) [hereinafter Meislin, \textit{Role of the Ten Commandments}]; \textsc{Youngblood, supra} note 5, at 34-35 (same); \textit{see} Bill Broadway, \textit{A New Judgment Day for Decalogue Displays; As Issue Nears High Court, Argument Develops over Differing Versions of Ten Commandments}, \textsc{Wash. Post}, Oct. 23, 2004, at B9. There are also disagreements over accounts of the Decalogue within religious groups. \textsc{Etz Hayim, supra} note 23, at 442. Irrespective of this fact, however, this Note focuses on the tension between the major religions themselves on the issues of division, enumeration, and translation of the Decalogue. Of course, these divergences in translation are more significant than those that inevitably arise from differences in style and word choice. \textit{Cf.} Brief of Amicus Curiae American Jewish Congress at 6, \textsc{Glassroth v. Moore}, 335 F.3d 1282 (11th Cir. 2003) (Nos. 02-16708-DD, 02-16949DD) (explaining that these divergences reflect a "theological difference of great moment," and are not merely "insignificant differences of style and word choice inevitable in any translation"); \textsc{Harrelson, supra} note 19, at 38.
B. Religious Obligations Within—and Sectarian Disputes Over—the Decalogue

1. The Duty to Worship God Alone

The first obligation enumerated in the Decalogue is a purely religious one: "I the LORD am your God who brought you out of the land of Egypt, the house of bondage." These words constitute a requirement to "believe in God's existence . . . [i.e. to believe in] a cause and motive force behind all that exists," to "accept the yoke of God's sovereignty [and] to recognize God as the Supreme Authority." Thus, anyone sympathetic to the notion that God might not exist, including atheists and agnostics, are guilty of "a sin against the virtue of religion" through their beliefs. According to one research group, 902,000 atheists and 991,000 agnostics lived in America in 2001.

Although Judaism and Christianity are in agreement that God alone must be worshiped, they differ with regard to how this tenet is expressed in the revelatory text. The prevailing Hebrew version of the Decalogue makes the words "I am the LORD thy God, who brought thee out of the land of Egypt, out of the house of bondage," the First Commandment, while Christian denominations often consider this verse a prologue to the rest of the text. In addition, Christian versions of the Decalogue often omit the reference to redemption from Egypt. As one commentator observed, this difference is not only "important and real," but "theologically inspired." It reflects the fact that the Exodus story is fundamen-


28. See Etz Hayim, supra note 23, at 442 (internal quotation marks omitted). But see id. (noting that other Jewish commentators over the years have disagreed that this Commandment, in itself, orders readers to believe in God).


32. See Meislin, Role of the Ten Commandments, supra note 26, at 205.

33. See Harrelson, supra note 19, at 43-45; Meislin, Role of the Ten Commandments, supra note 26, at 205; see also Glassroth v. Moore, 335 F.3d 1282, 1285 (11th Cir. 2003) (noting that Moore's Decalogue monument began with the phrase "I am the Lord thy God" and omits the reference to slavery in Egypt).

34. Harrelson, supra note 19, at 38.
tal to the Jewish faith, while it occupies a less prominent role in Christianity.\textsuperscript{35}

The Second Commandment in Judaism is thus the First Commandment according to most Christian denominations.\textsuperscript{36} It prohibits polytheism and any other religious practice not centered on the author-deity: "You shall\textsuperscript{37} have no other gods beside me."\textsuperscript{38} While the Commandment can also refer, metaphorically, to an obligation to refrain from "rever[ing] a creature in place of God . . . [such as] power, pleasure, race . . . etc,"\textsuperscript{39} the most obvious reading regards beliefs in other "gods or demons" and clearly forbids "false pagan worship."\textsuperscript{40} Thus, the text explicitly rejects the beliefs maintained by Wiccans and other arguably polytheistic and nontheistic faiths, such as Buddhism and Hinduism.\textsuperscript{41} There were 1,082,000 Buddhists, 766,000 Hindus, and 307,000 Wiccans\textsuperscript{42} residing in the United States in 2001;\textsuperscript{43} other non-biblical faiths such as Sikhism and Native American religions grew at rates greater than one-hundred percent between 1990 and 2000.\textsuperscript{44}

\begin{footnotes}

\item 36. See id. at 205-06.

\item 37. The King James version of the Bible, used by most English-speaking Protestants, renders all affected Commandments as "thou shalt" rather than "you shall." \textit{Exodus} 20:3-5, 7, 13-17 (King James). Some homilies attach religious significance to this point:

Yes, it is true that God was speaking to Moses and at the same time to the more than one million Israelites. But He did not speak as an individual would be [sic] to a mass of people, as from "me" to "you all," as from "me" singular to "you" plural. No. What we have here is more than a million people being spoken to as to each man and woman and child, using the second person singular "thou."


\item 38. \textit{Exodus} 20:3 (Jewish Publication Society); see Harrelson, \textit{ supra} note 19, at 40 (displaying traditional Catholic and Protestant division); \textit{The Torah: A Modern Commentary, supra} note 27, at 534 (displaying traditional Jewish division).

\item 39. \textit{Catechism, supra} note 30, at 515.

\item 40. Id.


\item 42. Adherents.com, \textit{ supra} note 18. Included in this number are those Americans who consider themselves "Druids" or "Pagans." Id.

\item 43. Id.

\item 44. Id.
\end{footnotes}
2. "Graven Images"

According to the Jewish version of the Decalogue, the following passage is a continuation of the injunction against polytheism:

You shall not make for yourself a sculptured image, or any likeness of what is in the heavens above, or on the earth below, or in the waters under the earth. You shall not bow down to them or serve them. For I the LORD your God am an impassioned God, visiting the guilt of the parents upon the children, upon the third and upon the fourth generations of those who reject Me, but showing kindness to the thousandth generation of those who love Me and keep My commandments.\textsuperscript{45}

In most Protestant sects (and in Eastern Orthodox Christianity), however, the prohibition of polytheistic belief stands alone as the First Commandment, while the duty to refrain from creating "graven images,"\textsuperscript{46} comprises the Second Commandment in its entirety.\textsuperscript{47} More significantly, according to Catholic sources, the injunction against graven images is either encompassed within the First Commandment (the injunction against polytheism) or omitted entirely.\textsuperscript{48} This fact not only distinguishes the numbering of the Catholic version—each successive Catholic Commandment is one ordinal number behind its counterpart in the Protestant and Jewish versions—but also reflects deep divisions at the core of Protestant and Catholic identity.\textsuperscript{49}

On the one hand, the Commandment against graven images played a crucial role in the Protestant Reformation.\textsuperscript{50} In what was "[o]ne of the earliest, and certainly one of the most intense controversies to erupt in the sixteenth century,"\textsuperscript{51} according to one historian of Christianity, Reformed Church leaders brandished their Second Commandment to advocate the removal of paintings and

\textsuperscript{45.} Exodus 20:4-6 (Jewish Publication Society) (verse numbers omitted). To complicate matters, some scholars and religionists posit an "original" version of the Commandments, written on the stone tablets themselves, which is more concise. See Harrelson, supra note 19, at 33-34.

\textsuperscript{46.} Exodus 20:4-6 (King James).

\textsuperscript{47.} Harrelson, supra note 19, at 40.

\textsuperscript{48.} Id.

\textsuperscript{49.} Cf. Meislin, Role of the Ten Commandments, supra note 26, at 190. Interestingly, the Lutheran faith follows the Catholic tradition in this respect, omitting the Commandment against graven images from its Decalogue and maintaining the Catholic enumeration. See David C. Steinmetz, The Reformation and the Ten Commandments, 43 Interpretation 256, 257 (1989).

\textsuperscript{50.} Steinmetz, supra note 49, at 257.

\textsuperscript{51.} Id.
sculptures. They argued that the use of religious icons could and did lead to veneration of inanimate objects, fettering meaningful religious worship. In fact, John Calvin and other fathers of Protestantism also saw the rejection of the Eucharist—a rejection central to the doctrine of most Reformed Churches—as inextricably linked to the directive of the Second Commandment. “[T]he veneration of the elements of bread and wine” was, for these leaders, like “the veneration of images and icons . . . substituting the creature for the creator, robbing God of the glory that belongs to God alone.”

On the other hand, Catholic authorities not only gainsaid this logic, but also held fast to the essential value of religious images to “‘admonish and remind’ Christians to direct their worship” properly. Like the Eucharist, which remains a fundamental practice of Catholicism to the present day, holy images were “sensible signs that point to transcendent realities.” Accordingly, Catholic doctrine today encourages “the veneration of icons—of Christ, but also of the Mother of God, the angels, and all the saints,” so long as it is “‘a respectful veneration,’ not the adoration due to God alone.” This logical but subtle explanation has caused Catholic authorities to deal with the Commandment in a variety of ways. Thus, while some scholars argue that the Church has essentially “excised the injunction against graven images,” others—including Catholic authorities themselves—argue that Catholicism continues to incorporate the essential message of the injunction within its First Commandment. In either case, the prohibition of images is less prominent in Catholic tradition than in most Protestant traditions, at the very least not accounting for an apodictic Commandment in and of itself.

52. Id. at 258.
53. Id. Luther’s ideology, which supported the use of images in worship, was the exception to this general trend. See id. at 259.
54. Id. at 258-65.
55. Id. at 262.
56. Id. at 263 (quoting sixteenth century Catholic theologian John Eck); see CATECHISM, supra note 30, at 516-17.
57. Steinmetz, supra note 49, at 263.
58. CATECHISM, supra note 30, at 516-17.
59. Meislin, Role of the Ten Commandments, supra note 26, at 190.
60. CATECHISM, supra note 30, at 516. Still other Catholic sources interpret the proscription to bar only the “carv[ing of] idols for yourselves,” not the creation of an “image” or a “likeness” which resembles the deity. Exodus 20:4 (New American Bible) (emphasis added). But see CATECHISM, supra note 30, at 516 (using the word “image” in discussing the Commandment).
Predictably, the differences between Protestants and Catholics on this point were and continue to be a major source of anti-Catholic sentiment. In his 1923 screed, *The Decalogue*, an Archdeacon of Westminster Abbey devoted more than a fifth of his argument to the Commandment against graven images.

Much of this section was an attack on Catholicism. The Anglican clergyman alleged that “the Church of Rome” feared and shunned the Commandment, either “following it up with laboured misrepresentations” or “omit[ting] it wholly.” Such renderings were, according to the author, a “mental degradation... unintelligible outside the Church of the dark ages, and the Roman Church which is their legitimate successor.” Given this error in such a fundamental doctrine, it was no wonder that Catholicism sanctioned acts akin to the worship of “the golden calves in Palestine” and the practices of “the cultivated heathens in the first four centuries.”

Today, anti-Catholic websites parrot these accusations of heresy, while some Catholic websites respond in kind, attacking particular sects of Protestants for even discussing the Commandment and its place in Catholicism.

3. *Other Religious Obligations in the Decalogue*

The Third Commandment according to Judaism and most denominations of Protestantism is, for the above reasons, the Second Commandment in Catholicism. This Commandment has been

61. See R.H. Charles, *The Decalogue: Being the Warburton Lectures Delivered in Lincoln’s Inn and Westminster Abbey, 1919-1923*, at 74-75 (T. & T. Clark, ed. 1926) (declaring that “no Christian Church, whether Anglican, Reformed or Eastern, omits the second Commandment save that of Rome... What she has to do is to justify... [this] omission...”); see also Catholics Take Out One of the Ten Commandments!, at http://www.jesus-is-lord.com/tencomma.htm (last visited Oct. 10, 2004) (declaring that Catholics’ “perverted Bibles have something that approximates the commandment to not make images, but since their leaders tell them they are too spiritually dumb to understand the Bible, they don’t read it (or read it with muddy eyeballs)” [hereinafter Jesus-is-lord.com].

63. Id. at 70.
64. Id. at 84.
65. Id. at 75.
66. See, e.g., Jesus-is-lord.com, supra note 61.
68. See Harrelson, supra note 19, at 40.
described as the "vaguest" edict in the pericope, and its meaning is disputed. In Jewish tradition, the duty, at least on its face, is narrow: "You shall not swear falsely by the name of the LORD your God; for the LORD will not clear one who swears falsely by His name." For followers of Christianity, however, the obligation is more general, forbidding any manner of "tak[ing] the name of the LORD thy God in vain." Any attempt to criticize God is thus forbidden by the Commandment, as an individual may not "introduce [the name of God] into his own speech except to bless, praise, and glorify it."

The Fourth Commandment in Judaism and Protestantism (Third Commandment in Catholicism) admonishes the reader to:

Remember the Sabbath day and keep it holy. Six days you shall labor and do all your work, but the seventh day is a Sabbath of the LORD your God: you shall not do any work—you, your son or daughter, your male or female slave, or your cattle, or the stranger who is within your settlements. For in six days the LORD made heaven and earth and sea, and all that is in them, and He rested on the seventh day; therefore the LORD blessed the Sabbath day and hallowed it.

While the text of this Commandment is not often debated, Jews and Christians differ on the manner in which the Sabbath is commemorated. While Christians observe Sunday as the Sabbath, religious Jews observe the Sabbath on Saturday and adhere to a host of complex Sabbath regulations not incorporated into Christian religious law.

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70. See id. at 25.
71. But see The TORAH: A MODERN COMMENTARY, supra note 27, at 540 (noting that "others render [the Hebrew verb as] 'take in vain' or 'abuse,'” suggesting a possible broader interpretation).
72. Exodus 20:7 (Jewish Publication Society).
73. Exodus 20:7 (King James); cf. Exodus 20:7 (New American Bible).
74. CATECHISM, supra note 30, at 518. Catholicism also holds that the Commandment forbids even the "improper use" of the names of "the Virgin Mary and all saints." Id. at 519.
75. Exodus 20:8-11 (Jewish Publication Society) (verse numbers omitted); see Youngblood, supra note 5, at 34-35 (charting differences between the Fifth (Fourth) Commandments in Exodus and Deuteronomy); cf. Deuteronomy 5:12-15 (Jewish Publication Society) (differing from the Exodus version in its statement that the Sabbath must be "observe[d]") rather than "remember[ed]" and explaining the rationale of the Commandment as a commemoration of God's redeeming the Hebrews from slavery in Egypt, rather than His creating the world).
76. Steinmetz, supra note 49, at 263.
4. Commandments Not Regarding Worship

While the Fifth (Fourth) Commandment, which obligates respect for one’s parents, is interpreted relatively uniformly across denominational lines, the translation of the Sixth (Fifth) Commandment is yet another contentious issue. As understood in the accepted Jewish version, the decree prohibits only “murder,” for most Christians, however, the decree is broader, declaring, “Thou shalt not kill.” As one Jewish commentator notes, “’[k]ill’ and ‘murder’ are words whose integrity is carefully guarded.” Whereas the former “designates any taking of human life,” the latter “is reserved for unauthorized homicide, usually of a malicious nature.” Thus, the Jewish version of the Commandment does not speak to “homicide of . . . a judicial or military nature.” For at least some Jews, this fact epitomizes the difference between their own faith, “a realistic, hard-headed system, committed to a law of justice,” and Christianity, which “naively and unrealistically” nurtures “a chaos of love.”

The Seventh (Sixth) Commandment, which forbids adultery, the Eighth (Seventh) Commandment, which prohibits stealing, and the Ninth (Eighth) Commandment, which enjoins bearing false witness, are again translated in a relatively uniform manner, other than differences in verse division.

At the last verse, however, the Catholic division of the Commandments again differs from the general Protestant and Jewish versions. What the Jewish and Protestant traditions count as the entire Tenth Commandment, “You shall not covet your neighbor’s wife, or his male or female slave, or his ox or his ass, or anything

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77. See Exodus 20:12 (Jewish Publication Society); Exodus 20:12 (King James); Exodus 20:12 (New American Bible).
80. See Exodus 20:13 (King James); Exodus 20:13 (New American Bible).
81. Bliststein, supra note 78, at 159.
82. Id.
83. Id.
84. See id.
85. There is some controversy as to whether this Commandment actually prohibits kidnapping rather than stealing. See Brief Amicus Curiae American Jewish Congress at 6, Glassroth v. Moore, 335 F.3d 1282 (11th Cir. 2003) (Nos. 02-16708-DD, 02-16949-DD).
86. Harrelson, supra note 19, at 40; see Exodus 20:13 (Jewish Publication Society); Exodus 20:13-16 (King James); Exodus 20:13-16 (New American Bible).
that is your neighbor's,\textsuperscript{87} the Catholic Church divides into two.\textsuperscript{88} It is not clear exactly where in the text this division arises, but Catholic authorities state that "the ninth commandment forbids carnal concupiscence,"\textsuperscript{89} while "the tenth forbids coveting another's goods."\textsuperscript{90}

C. Hybrid Decalogues and the Posting of the Ten Commandments in America

1. "Unique" Versions

Despite the difficulty inherent in defining the Ten Commandments, many Americans have long been fascinated by them.\textsuperscript{91} Capitalizing on this fact, Hollywood producer Cecil B. DeMille, whose biblical extravaganza "The Ten Commandments" hit theaters at the height of the Cold War, worked with an organization called the Fraternal Order of Eagles ("FOE") to publicize his film. Together, FOE and DeMille erected as many as 2000 graphite monuments, each engraved with "unique" versions of the Decalogue, and often accompanied by elaborate dedication rituals including clergy.\textsuperscript{92} Before embarking on the project, however, FOE official and juvenile judge E.J. Ruegemer discussed the plan with "representatives" of the three major religious groups in America at the time: Protestantism, Catholicism, and Judaism.\textsuperscript{93} To counter

\begin{itemize}
    \item \textsuperscript{87} Exodus 20:14 (Jewish Publication Society); Exodus 20:17 (King James).
    \item \textsuperscript{88} See Harrelson, supra note 19, at 40; Youngblood, supra note 5, at 34-35.
    \item \textsuperscript{89} Catechism, supra note 30, at 602.
    \item \textsuperscript{90} Id.
    \item \textsuperscript{91} As Meislin recognized, some early Americans held the Ten Commandments in such high regard that they chose to believe, incorrectly, "that the Decalogue . . . [was] incorporated in the common law." Bernard J. Meislin, Jewish Law in American Tribunals 25 (1976) [hereinafter Meislin, Jewish Law]. This ideology "died hard," but did eventually give way to the "conventional Anglican viewpoint" that "Old Testament laws were consigned no 'farther than (to) that people to whom they were given.'" Id. at 25-27 (citation omitted) (alteration in original). Yet scholars and judges still debate the degree to which the Decalogue actually infiltrated the early American legal system. Compare Steven K. Green, The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law, 24 J. L. & Religion 525, 558 (2000) (concluding that "the most that could be said about the relationship of the Ten Commandments to the law is that the former has influenced legal notions of right and wrong . . . [b]ut to insist on a closer relationship . . . lacks historical support"), with Stone v. Graham, 449 U.S. 39, 45 (1980) (Rehnquist, J., dissenting) (asserting that it is "undeniable . . . that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World").
    \item \textsuperscript{92} State v. Freedom from Religion Found., 898 P.2d 1013, 1016-17 (Colo. 1995); Broadway, supra note 26; see Books v. City of Elkhart, 235 F.3d 292, 294-95 (7th Cir. 2000).
    \item \textsuperscript{93} Books, 235 F.3d at 294.
\end{itemize}
the concerns of sectarian rivalry engendered by the lack of an authoritative version of the Commandments, the representatives attempted to create a hybrid version that would satisfy all religious bents.

Apparently, the task was not easily accomplished. In the succeeding years, FOE created at least three distinct versions of the Commandments in its attempt to hue closest to none of the standard Jewish, Protestant, or Catholic versions of the text. Thus, a monument erected in Elkhart, Indiana and ordered removed in 2001 was engraved with an FOE-fashioned text unburdened by the traditional restriction to ten distinct statements:

The Ten Commandments
I AM the LORD thy God.
Thou shalt have no other gods before me.
Thou shalt not make to thyself any graven images.
Thou shalt not take the name of the Lord thy God in vain.
Remember the Sabbath day, to keep it holy.
Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.
Thou shalt not kill.
Thou shalt not commit adultery.
Thou shalt not steal.
Thou shalt not bear false witness against thy neighbor.
Thou shalt not covet thy neighbor's house.
Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's.

Another monument, located on state capitol grounds in Denver, Colorado and ruled constitutional by the Colorado State Supreme Court in 1995, displays a different text, which enumerates ten distinct obligations:

THE TEN COMMANDMENTS
I AM the LORD thy God
   I. Thou shalt have no other gods before me.
   II. Thou shalt not take the name of the Lord thy God in Vain.

94. See Freedom from Religion Found., 898 P.2d at 1016-17.
95. Id.
96. The first of these three versions is transcribed in Books, 235 F.3d at 296, the second in Freedom from Religion Foundation, 898 P.2d at 1016, and the third in Indiana Civil Liberties Union v. O'Bannon, 259 F.3d 766, 768-69 (7th Cir. 2001).
98. Id. at 296.
III. Remember the Sabbath day to keep it holy.
IV. Honor thy father and thy mother that thy days may be long upon the land which the Lord thy God giveth thee.
V. Thou shalt not kill.
VI. Thou shalt not commit adultery.
VII. Thou shalt not steal.
VIII. Thou shalt not bear false witness against thy neighbor.
IX. Thou shalt not covet thy neighbor's house.
X. Thou shalt not covet thy neighbor's wife, nor his maidservant, nor his servants, nor his cattle, nor anything that is thy neighbor's.

The similarities as well as the differences between the monuments are significant. While the Elkhart text apparently includes the words, "I AM the LORD thy God," as the First Commandment, in accordance with the traditional Jewish enumeration, the Denver monument seems to include it only as an introduction, in the manner of most Christian versions. Neither text, however, contains the reference to redemption from Egypt alongside these words, as does the prevailing Jewish rendering. In addition, the Elkhart monument follows Jewish and Protestant traditions by treating the prohibition of graven images as a distinct Commandment, whereas the text of the Denver monolith, like the Catholic Decalogue, omits it. Yet, both monuments contain two separate Commandments regarding coveting, as Catholicism teaches, and neither monument translates the Commandment regarding homicide as a proscription against "murder." Instead, both texts declare, "Thou shalt not kill," choosing the prevailing Christian translation over the standard Jewish version.

2. Laws on Decalogue Displays

In recent years, legislators have sought to ensure the constant display of the Ten Commandments in a variety of public settings. While a smattering of laws requiring the posting of the Decalogue were enacted before 1999, school shootings, such as that perpetrated in Columbine, Colorado, facilitated a burgeoning of at-

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100. Id. at 1016.
101. See supra notes 27-35 and accompanying text.
102. See supra notes 27-35 and accompanying text.
103. See supra notes 36-67 and accompanying text.
104. See supra notes 87-90 and accompanying text.
105. See supra notes 78-84 and accompanying text.
106. See supra notes 78-84 and accompanying text.
tempts to enact such laws.\textsuperscript{107} Most conspicuously, the House of Representatives proposed the Ten Commandments Defense Act,\textsuperscript{108} which purported to overrule Supreme Court precedent by asserting the right to post the Decalogue as a power reserved to the states under the Tenth Amendment.\textsuperscript{109} The Act, which the Senate declined to consider, did not offer guidance on which version of the Ten Commandments was to be posted and what restrictions, if any, controlled its placement.\textsuperscript{110} Following in the footsteps of the national body, two states passed similar legislation in 2000\textsuperscript{111} and another ten states considered similar bills in 2001,\textsuperscript{112} including an attempt by Alabama to amend the state constitution to allow for Decalogue posting.\textsuperscript{113} Although many of the state bills are specific enough to include manner and appearance requirements and an accompanying document requirement,\textsuperscript{114} none specify which version of the Ten Commandments must be posted.\textsuperscript{115}

Such laws have apparently fueled the litigious fire. Since 1999, courts have decided a litany of cases involving the public display of the Decalogue, a majority of which have resulted in victories for plaintiffs seeking removal of Ten Commandments displays.\textsuperscript{116} On the other hand, the Third Circuit,\textsuperscript{117} the Fifth Circuit,\textsuperscript{118} and the Colorado Supreme Court\textsuperscript{119} have upheld the display of a plaque


\textsuperscript{109} Thollander, supra note 108, at 206.

\textsuperscript{110} Hensley, supra note 107, at 814.

\textsuperscript{111} Indiana and South Dakota. Id. at 802-03.

\textsuperscript{112} Id. at 802.

\textsuperscript{113} Id. at 803.

\textsuperscript{114} Id. at 814-26.

\textsuperscript{115} Id. It should be noted, however, that the replacement display in the Alabama Supreme Court building has apparently attempted to address this issue by displaying the original Hebrew text of the Ten Commandments adjacent to the King James translation. See National Public Radio (National Public Radio radio broadcast, Feb. 8, 2004 (1:00 pm)), available at LEXIS, News Library.

\textsuperscript{116} See the cases discussed at length in Part III of this Note as well as ACLU of Ohio Foundation, Inc. v. Ashbrook, 375 F.3d 484 (6th Cir. 2004), McGinley v. Houston, 361 F.3d 1328 (11th Cir. 2004), and Indiana Civil Liberties Union v. O’Bannon, 259 F.3d 766 (7th Cir. 2001), among others.

\textsuperscript{117} Freethought Soc’y v. Chester County, 334 F.3d 247, 270 (3d Cir. 2003).

\textsuperscript{118} Van Orden v. Perry, 351 F.3d 173, 182 (5th Cir. 2003).

\textsuperscript{119} State v. Freedom from Religion Found., 898 P.2d 1013, 1027 (Colo. 1995).
and two monuments, respectively, all of which boldly pronounce the religious duties of the Decalogue.

PART II. BUTTRESSING THE WALL: THE SUPREME COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE

Because the maintenance of the wall separating church and state is a tricky business, it has required a delicate balance of principles and analysis rather than the simple application of a bright-line rule. This part of the Note will seek to adumbrate this balance as it is conveyed by the Supreme Court's interpretation of the constitutional command: "Congress shall make no law respecting an establishment of religion . . . ." Part A discusses the framework with which to analyze Establishment Clause issues. Part B then looks to the first of three prongs of the framework, which prohibits governmental acts motivated by a predominantly religious purpose. Part C explains the second prong, which forbids any government from advancing or endorsing religion, while Part D describes the last prong of the test, requiring governments to refrain from entangling themselves in religious issues and sectarian disputes.

A. The Lemon Test

It was not until 1971, almost twenty-five years after the Court held the Establishment Clause to apply against the states, that the Court could articulate a test to analyze claims of Establishment Clause violations. In Lemon v. Kurtzman, the Court concluded that to pass muster under the Establishment Clause, "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive

120. It is a necessary business, nonetheless. Although the "wall metaphor" has been questioned at times, see Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting), the Court long ago decided that it was an entirely appropriate standard for which to strive. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947). Indeed, if anything, the difficulties in separating church from state require more, not less, judicial vigilance. See County of Allegheny v. ACLU, 492 U.S. 573, 591 (1989) (recognizing the duty of the Court to protect against the "myriad, subtle ways in which Establishment Clause values can be eroded") (citations omitted).

121. See Allegheny, 492 U.S. at 591 (finding that the values protected by the Establishment Clause are "not susceptible to a single verbal formulation").

122. U.S. CONST. AMEND. I.


government entanglement with religion." Thus, the Lemon test included a purpose prong, an effect prong, and an entanglement prong, all of which the government had to pass in order to avoid a violation. Although advocates of a closer relationship between church and state—as well as some separationists—have vociferously derided Lemon, the Court has continued to use it, analyzing both statutes and governmental actions to ensure they conform to Lemon's strictures.

B. Religious Purpose Written in Stone

Nine years after the Lemon decision, the Court in Stone v. Graham relied on the first prong of the Lemon test to invalidate a Kentucky statute compelling the display of a "permanent copy of the Ten Commandments" on the walls of every state public school classroom. Refusing to be "blind[ed]" by the legislature's "'avowed' secular purpose," the majority demonstrated that the "pre-eminent purpose" of the statute was "plainly religious" and therefore unconstitutional. The Court first observed that the Decalogue is "undeniably a sacred text in the Jewish and Christian faiths." While the Commandments could be appropriately used in a "study of history, civilization, ethics, comparative religion or the like," the Court explicitly distinguished such a case from that of mere display: "Posting of religious texts on the wall serves no such educational function." The concomitant posting of a disclaimer purporting to recognize the "secular application of the Ten Commandments" as a foundational legal text, simply could not change the text itself. Although some Commandments addressed "arguably secular matters," the Court explained that "the first part of the Commandments" did not. Commandments requiring reverence of "the Lord God," refraining from "idolatry," "not using the Lord's name in vain" and "observing the Sabbath

125. Id. at 612-13 (internal quotation marks and citations omitted).
128. See Hensley, supra note 107.
130. Id. at 41.
131. Id.
132. Id. at 42.
133. Id.
134. See id. at 41.
135. See id. at 41-42.
Day," were "religious duties," pure and simple, and they betrayed the legislature's lack of a sufficient secular purpose.\textsuperscript{136}

While four justices dissented from the denial of plenary review,\textsuperscript{137} only one, Justice Rehnquist, wrote an extensive dissent. Without challenging the Court's analysis of the text of the Decalogue, Justice Rehnquist declared that the majority should have deferred to the state's avowed purpose.\textsuperscript{138} It was "undeniable,"\textsuperscript{139} he asserted, that the Kentucky Legislature was correct in describing the impact of the Ten Commandments on American law as "significant," a fact which should have validated the state's avowed secular purpose.\textsuperscript{140}

C. The Endorsement Test and Holiday Displays

In the 1980's, the Court decided two cases of holiday displays, \textit{Lynch v. Donnelly}\textsuperscript{141} and \textit{County of Allegheny v. ACLU},\textsuperscript{142} which focused on and refined the effect prong of the \textit{Lemon} test. In a nebulous opinion,\textsuperscript{143} the majority in \textit{Lynch} upheld the display of a nativity scene in a privately-owned park.\textsuperscript{144} The Court focused on the "context" of the display, which included items deemed secular, such as "a Santa Claus house," a "teddy bear" and a large "SEASONS GREETINGS" banner.\textsuperscript{145} Purporting to apply the \textit{Lemon} framework, the Court's analysis left questions about why and how the display conformed to its purpose and effect prongs.\textsuperscript{146}

The concurring opinion of Justice O'Connor, however, was clearer. Justice O'Connor's rationale, which clarified the second prong of \textit{Lemon}\textsuperscript{147} and which the Court later adopted in \textit{Allegheny},

\begin{itemize}
\item \textsuperscript{136} See id. at 42.
\item \textsuperscript{137} Chief Justice Burger and Justice Blackmun dissented because they would have given the case plenary hearing. \textit{Id.} at 43. Justice Stewart dissented from the reversal. \textit{Id.}
\item \textsuperscript{138} \textit{Id.} (Rehnquist, J., dissenting).
\item \textsuperscript{139} \textit{Id.} at 45 (Rehnquist, J., dissenting).
\item \textsuperscript{140} \textit{Id.}
\item \textsuperscript{141} 465 U.S. 668 (1984).
\item \textsuperscript{142} 492 U.S. 573 (1989).
\item \textsuperscript{143} See id. at 594 (Blackmun, J., concurring) (criticizing the \textit{Lynch} majority opinion for exhibiting a rationale that was "none too clear").
\item \textsuperscript{144} \textit{Lynch}, 465 U.S. at 687.
\item \textsuperscript{145} See id. at 671, 679.
\item \textsuperscript{146} \textit{See Allegheny}, 492 U.S. at 594.
\item \textsuperscript{147} As originally put forth in her \textit{Lynch} concurrence, Justice O'Connor purported to reinterpret both the purpose and effect prongs of \textit{Lemon}. See \textit{Lynch}, 465 U.S. at 691 (O'Connor, J., concurring) (proposing a more "proper inquiry under the purpose prong of \textit{Lemon}"). Since \textit{Allegheny}, lower courts have split on how to properly interpret the Supreme Court's adoption of Justice O'Connor's analysis. Some courts view it as eliminating the purpose prong of \textit{Lemon}, see Freethought Society v. Chester
suggested that the Establishment Clause "prohibits government from . . . 'making adherence to a religion relevant in any way to a person's standing in the political community.'" Thus the Court was required to decide whether a display "communicated a message of government endorsement or disapproval of religion." If the display effectively branded "nonadherents" as "outsiders, not full members of the political community," it would violate this endorsement test. Likewise, if the display assured "adherents" that they were "insiders, favored members of the political community," this too would violate the test.

Clarifying this inquiry in her Allegheny concurrence, Justice O'Connor indicated that judges must determine what the content of the message is to the "reasonable observer." In another concurrence in a later case, Justice O'Connor fleshed out this notion to some degree, suggesting that this "hypothetical observer" should be "presumed to possess a certain level of information that all citizens might not share," including the context and history of a religious display. Such information, then, could help the observer determine whether the message discloses "disapproval of his or her particular religious choices . . . ."

In Allegheny itself, the Court again analyzed holiday displays, considering both a crèche and a display featuring a menorah and a Christmas tree. This time, the Court found the crèche to be unconstitutional and the display featuring the menorah and Christ-

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County, 334 F.3d 247, 250 (3d Cir. 2003) (noting that Justice O'Connor's analysis requires "collaps[ing] the 'purpose' and 'effect' prongs [of Lemon] into a single inquiry"), and others view it as informing Lemon's effect prong, keeping the original purpose prong intact. See Books v. City of Elkhart, 235 F.3d 292, 304 (7th Cir. 2000). Thus, there is still a question of whether Justice O'Connor's inquiry is truly independent of the Lemon inquiry from which it evolved. See Freethought Soc'y, 334 F.3d 247, 250 (undertaking both the original Lemon inquiry and Justice O'Connor's modified analysis "in an abundance of caution").


149. Lynch, 465 U.S. at 692 (O'Connor, J., concurring); see also Allegheny, 492 U.S. at 592 (stating that "in recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorse'ing' religion, a concern that has long had a place in Establishment Clause jurisprudence") (citations omitted).


151. See id. (O'Connor, J., concurring).

152. Allegheny, 492 U.S. at 630 (O'Connor, J., concurring).


155. Id. at 578.
mas tree permissible.\textsuperscript{156} Although \textit{Allegheny} did not overrule \textit{Lynch}, and indeed continued to use "context" as the controlling standard,\textsuperscript{157} the case was significant for two reasons relevant to Decalogue display. First, as noted above, a majority of the court accepted the zero-tolerance rationale of Justice O'Connor's \textit{Lynch} concurrence, promising, at least in theory, to root out all instances of government endorsement or disapproval of the "reasonable observer's" religious choices.\textsuperscript{158} Accordingly, the court described the crèche as an outright display of government approval of Christianity, unabated by secular context, while the menorah and Christmas tree sent a decidedly secular winter holiday message. The Court also cited \textit{Larson v. Valente}\textsuperscript{159} for the proposition that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."\textsuperscript{160} Thus, government displays "may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions)."\textsuperscript{161} With this holding, the Court suggested that denominational bias is a relevant factor militating against the government in the calculus of the constitutionality of religious displays.

\textbf{D. Entanglement and "The Clearest Command of the Establishment Clause"}

In the \textit{Larson} case, a Minnesota statute imposed registration and reporting requirements only on those religious organizations that received more than fifty percent of their funding from outside organizations.\textsuperscript{162} Holding that the rule "engender[ed] a risk of politicizing religion,"\textsuperscript{163} the Court purported to set aside the \textit{Lemon} test, holding that any rule "granting a denominational pref-

\textsuperscript{156} Id. at 578-79.
\textsuperscript{157} One of the Court's principal determinations was that the crèche stood "alone" as the "single element of the display on the Grand Staircase," unlike the menorah, whose religious status was tempered by the secular Christmas tree. \textit{Id.} at 598.
\textsuperscript{158} \textit{Id.} at 601.
\textsuperscript{159} 456 U.S. 228 (1982).
\textsuperscript{160} \textit{Allegheny}, 492 U.S. at 605 (quoting \textit{Larson}, 456 U.S. at 244).
\textsuperscript{161} \textit{Id.} (parentheses in original). Indeed, this factor proved essential in distinguishing \textit{Allegheny} from \textit{Marsh v. Chambers}, 463 U.S. 783 (1983), where the Court upheld the practice of legislative prayer. \textit{Id.} at 795. The majority in \textit{Allegheny} stressed that the "unique history," which saved the nonsectarian legislative prayer in \textit{Marsh}, is unavailing when a practice "demonstrates the government's allegiance to a particular sect or creed." \textit{Allegheny}, 490 U.S. at 603.
\textsuperscript{162} \textit{Larson}, 456 U.S. at 230.
\textsuperscript{163} \textit{Id.} at 253 (internal quotations omitted).
ference” was “suspect” and could only be valid if it passed strict judicial scrutiny. Because Minnesota could not show that its law was closely tailored to fit its stated governmental objective, the “clearest command of the Establishment Clause” invalidated the legislation.

But, the Court also implicitly recognized another rationale for its decision. Noting that, of the three prongs of the Lemon test, the third prong was “most directly implicated in the present case,” the Court discussed “the problems of entanglement” generally, even when there is no direct evidence of discrimination between groups. Any “state inspection and evaluation of the religious content of a religious organization,” the court concluded, “is fraught with the sort of entanglement that the Constitution forbids.” The mere fact of such a close “relationship” between church and state was “pregnant with dangers of excessive government direction . . . of churches.”

1. Sectarian Aid and Kiryas Joel

In subsequent Establishment Clause decisions, the Supreme Court as well as other state and federal courts have employed both of the rationales discussed in Larson to strike down government legislation respecting religion and religious groups. On the one hand, in Kiryas Joel v. Grumet, the Court struck down a statute because of its tendency to prefer one religious denomination over other groups. Finding that the statute, which created a separate school district to include only the members of a particular Orthodox Jewish sect, impermissibly aided a particular religion, the Court concluded that it “failed the test of neutrality.” Because there was “no assurance that the next similarly situated group seeking a school district of its own will receive one,” the Court itself had to intervene “to foreclose religious favoritism” by invalidating even the first attempt to establish such a scenario. “The legislature,” the Court explained, “might fail to exercise govern-

164. Id. at 246.
165. Id. at 244, 255.
166. Id. at 252.
167. Id. at 255 (emphasis added) (citations omitted).
168. Id.
170. Id. at 709-10.
171. Id. at 693.
172. Id. at 709.
173. Id. at 703.
174. Id. at 710.
mental authority in a religiously neutral way.” Speaking in tones reminiscent of its “clearest command” language in Larson, the Court found such a possibility to be anathema to “a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion.”

2. Government Involvement in Religious Affairs and Disputes: The Kosher Cases

On the other hand, however, at least four justices in Kiryas Joel were also troubled by their observation that the redistricting was “substantially equivalent to defining a political subdivision . . . by a religious test.” This refusal to accept such “a purposeful and forbidden fusion of governmental and religious functions” because of the “fusion” itself (and regardless of neutrality concerns) was a veiled reference to the entanglement prong of the Lemon test, as Justice Blackmun noted.

Indeed, courts have used Lemon’s entanglement prong to invalidate other laws in the same vein. Most notably, a state high court and two federal appeals courts have applied the prong to strike down “kosher fraud” statutes, which seek to codify Jewish dietary restrictions in secular law by penalizing food vendors that improperly claim to follow such restrictions. Thus, in Ran-Dav’s County Kosher, Inc. v. State, the Supreme Court of New Jersey recognized that kosher fraud statutes were invalid because they allowed “enforcement by religious personnel of a sectarian or religious law.” Not only had the state created an Advisory Committee “consist[ing] entirely of rabbis,” but it also charged the committee with a purely religious job: “polic[ing] the . . . religious pu-

175. Id. at 703.
176. Id.
177. Id. at 702. Though Justice Kennedy did not formally join the plurality on this point, his concurrence seemed to speak to the same issue. Id. at 728 (Kennedy, J., concurring) (noting that one such fundamental limitation imposed by the Establishment Clause is that government may not use religion as a criterion to draw political or electoral lines).
178. See id. at 710 (Blackmun, J., concurring). Justice Blackmun also argued that the Court’s neutrality test was essentially an application of Lemon’s second prong. Id. (Blackmun, J., concurring).
181. Id. at 159.
182. Id. at 158.
ritory” of kosher food. This arrangement allowed the resolution of disputations that were “ineluctably religious in tenor and content,” and created an impermissible “interrelationship between government and religion,” which the entanglement prong of the Lemon test forbade. For comparable reasons, the Fourth Circuit and the Second Circuit struck down similar legislation.

**PART III. CIRCUIT SPLITS: TO POST OR NOT TO POST**

While all courts agree that the Decalogue is, at least primarily, a religious document, there is disagreement as to whether, or to what extent, other factors somehow mitigate the affront to the Establishment Clause represented by the public display of theological obligations. This part of the Note will detail the competing arguments on this question. Because, however, there are two discrete versions of the Ten Commandments that generally lead to litigation when posted—the Protestant version (or approximations thereof) and the amalgamation texts created by FOE—this Note deals with each separately. Section A of this Part outlines the split in cases of displays closely resembling the Protestant Decalogue, paying close attention to how courts come out on the question of whether the sectarian bent of the text is constitutionally significant. Section B describes the split in FOE-monument cases, focusing especially on

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183. Id. at 157.
184. Id. at 159.
185. See id. at 158 (citations and internal quotation marks omitted).
186. See Commack Self Serv. Kosher Meats, Inc. v. Weiss, 294 F.3d 415 (2d Cir. 2002); Junkins, supra note 179, at 1087-91 (discussing Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337 (4th Cir. 1995)).
187. Freethought Soc'y v. Chester County, 334 F.3d 247, 265 (3d Cir. 2003) (noting that “the case has yet to be made that the Ten Commandments themselves have lost their primary religious significance or that they have taken on a primarily secular purpose”). The terms “religious” and “secular” themselves are difficult to define in the abstract. See George C. Freeman III, The Misguided Search for the Constitutional Definition of “Religion,” 71 Geo. L.J. 1519, 1553 (1983) (quoting William James for the proposition that religion likely has “no one essence”) (citations omitted). The Supreme Court has said relatively little on the matter. Id. at 1524-28.
188. Of course, there are other issues disputed between and within circuits, as exhibited by the dissent in ACLU Nebraska Foundation v. City of Plattsmouth, 358 F.3d 1020, 1043-50 (8th Cir. 2004) (Bowman, J., concurring in part and dissenting in part) (disputing the majority's conclusions on: 1) the definition or at least the parameters of the “reasonable observer” in religious display cases; 2) whether the symbols on the FOE monument enhances or mutes religious significance; 3) how to, and whether to, weigh historical value of a monument; 4) whether the purpose prong of the Lemon test constitutes an inquiry independent of Justice O'Connor's endorsement/disapproval analysis).
whether the purported hybrid of Christian and Jewish versions in any way answers the concerns of the Establishment Clause.

A. New Testament “Summaries” and The King James Version of the Decalogue

Of the Circuit Courts that have decided cases involving a Protestant version of the Ten Commandments, at least two, the Eleventh Circuit and the Third Circuit, have given consideration to the question of whether the sectarian bent of the text should inform the constitutional inquiry. Although the cases involved different facts relevant to the context of the monument, both opinions referred to testimony and briefing on the fact that the posted text derived from Protestantism. In addition, two district courts, one weighing in on either side of the debate, help flesh out both sides of the argument.

1. The Eleventh Circuit Approach

In deciding Glassroth v. Moore, the case of the “Ten Commandments Judge” discussed above, a unanimous panel of the Eleventh Circuit recognized the importance of the various versions of the Decalogue in ordering the removal of the display. First, in its rendition of the facts, the court recounted Roy Moore’s sanctimonious rise to chief justice of the state supreme court, and then considered the details of the monument that he installed upon arrival. In this context, the panel noted that Moore’s display featured “[e]xcerpts from Exodus 20:2-17 of the King James Version of the Holy Bible, the Ten Commandments.” The opinion then described the text of the monument:

The left [tablet] reads:
I AM THE LORD THY GOD
THOU SHALT HAVE NO OTHER GODS BEFORE ME
THOU SHALT NOT MAKE UNTO THEE ANY GRAVEN IMAGE

189. The Sixth Circuit also dealt with the issue of a Protestant version of the Decalogue. See ACLU of Ky. v. McCreary County, 354 F.3d 438, 443 n.2 (6th Cir. 2003) (quoting the posted version of the Commandments, which concluded with the words “King James Version”).
190. 335 F.3d 1282 (11th Cir. 2003).
191. See supra notes 1-15 and accompanying text.
192. Glassroth, 335 F.3d at 1285 n.1, 1299 n.3.
193. Id. at 1285.
194. Id.
THOU SHALT NOT TAKE THE NAME OF THE LORD
THY GOD IN VAIN
REMEMBER THE SABBATH DAY, TO KEEP IT HOLY
The right [tablet] reads:
HONOUR THY FATHER AND THY MOTHER
THOU SHALT NOT KILL
THOU SHALT NOT COMMIT ADULTERY
THOU SHALT NOT STEAL
THOU SHALT NOT BEAR FALSE WITNESS
THOU SHALT NOT COVET

Calling attention to the fact that the monument contained eleven statements and not ten, the court found that the question of how to divide the relevant text had caused "[d]ifferent faiths [to] dispute" the issue. "For example, many Jews and some Christians consider the 'First Commandment' to be 'I am the Lord thy God,'" while most Christians understand the First Commandment as an injunction against worship of "all other gods before me," the Second Commandment for Jews. The court also recognized that there is disagreement as to whether the beginning of the edict is properly rendered, "Thou shalt" or "You shall." The testimony on the issue of conflicting interpretations of the Decalogue, therefore, disclosed a "significance" to which the court would return in its analysis.

In its application of the Lemon framework, the court took due note of both Moore's testimony admitting his religious purposes and the lack of sufficient secular content around the large monument, failing to mute the monument's religious message. The court did not, however, stop at this cursory level of analysis. Quoting Larson v. Valente, it explained that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." By posting one particular version of the Exodus pericope, the defendant was tak-
ing a side in the "deep theological disputes"\textsuperscript{206} that "lurk[ ] behind the disparate accounts."\textsuperscript{207} While recognizing that some of the differences between the versions "might seem trivial or semantic,"\textsuperscript{208} the court found that even the general decision to take excerpts from "the King James Version of the Bible, which is a Protestant version," was problematic.\textsuperscript{209} This was true because "Jewish, Catholic, Lutheran, and Eastern Orthodox faiths use different parts of their holy texts" to compose their versions of the Commandments,\textsuperscript{210} and because of "the conflict between Catholics and Protestants,"\textsuperscript{211} resulting from the use of the Protestant Bible in public schools in the nineteenth century.\textsuperscript{212} This centuries-old conflict was anathema to a court that observed the strictures of the separation of church and state.\textsuperscript{213}

Finally, the court considered "but one example" of the myriad conflicts in the interpretation of the Commandments.\textsuperscript{214} Having mentioned the dispute over the First Commandment,\textsuperscript{215} the panel now focused on "the Hebrew translation of the Sixth [Fifth for Catholics] Commandment."\textsuperscript{216} Because it prohibited "only murder"\textsuperscript{217} it directly contradicted the King James version, which enjoined "all killings."\textsuperscript{218} Demonstrating that this dispute was not a mere divergence in linguistic style but a serious theological row, the court cited the testimony of a rabbi in a previous Ten Commandments display case.\textsuperscript{219} The rabbi testified to his belief that "this ['Thou shalt not kill'] version of the Sixth Commandment,"\textsuperscript{220} far from being an acceptable variant of the injunction against mur-

\textsuperscript{206} Id. (quoting Steven Lubet, \textit{The Ten Commandments in Alabama}, 15 Const. Comment. 471, 474-76 \& n.18 (1998)).

\textsuperscript{207} Id.

\textsuperscript{208} Id.

\textsuperscript{209} Id.

\textsuperscript{210} Id.

\textsuperscript{211} Id. (citing Lemon v. Kurtzman, 403 U.S. 602, 628-29 (1971)).

\textsuperscript{212} Id.

\textsuperscript{213} Id. (noting that the Catholic version, like the Lutheran version but unlike the mainstream Protestant version displayed by Moore, treats the proscription against killing or murder as "the Fifth Commandment, not the Sixth").

\textsuperscript{214} Id.

\textsuperscript{215} See supra notes 32-35 and accompanying text.

\textsuperscript{216} Glassroth, 335 F.3d at 1299 n.3.

\textsuperscript{217} Id.

\textsuperscript{218} Id.; see supra notes 78-84 and accompanying text.

\textsuperscript{219} Id. (citing Harvey v. Cobb County, 811 F. Supp. 669, 677 (N.D. Ga. 1993)).

\textsuperscript{220} Id. (alteration in original).
der,"221 was rather a "mistranslation of the original Hebrew,"222 which "frequently appear[ed] in Christian versions."223

To elaborate, the court might have also considered, as did a district court in Georgia examining another Decalogue-display case, the practical implications of a governmental decision to choose the Christian translation of this Commandment over the standard Jewish version.224 The difference between "kill" and "murder," the district court pointed out, is "extraordinarily important."225 Not only was there a vast theoretical chasm in the relative breadth of the two verbs, but the distinction also had real world consequences. Posting a biblical tenet prohibiting all killing "implicates some of the most controversial social issues of the day, including war, abortion and capital punishment."226

2. The Third Circuit Approach

In contrast to the Eleventh Circuit, the Third Circuit, in Freethought Society v. Chester County,227 chose not to give serious consideration to the words of the Decalogue itself.228 Deciding that a plaque, which contained "a Protestant version"229 of the Commandments, could remain affixed to the wall of a county courthouse,230 the unanimous panel made only brief reference to the text of the plaque in the facts section of the opinion.231

In that section, the court quoted the more elaborate version of the biblical text displayed on the courthouse wall:

THE COMMANDMENTS
THOU SHALT HAVE NO OTHER GODS BEFORE ME.
THOU SHALT NOT MAKE UNTO THEE ANY GRAVEN IMAGE, OR ANY LIKENESS OF ANY THING THAT IS IN HEAVEN ABOVE, OR THAT IS IN THE EARTH BE-NEATH, OR THAT IS IN THE WATER UNDER THE EARTH:

221. Id.
222. Id.
223. Id.
225. Id.
226. Id.
227. 334 F.3d 247 (3d Cir. 2003).
228. Id. at 247. The two cases were filed at roughly the same time. Freethought Society was filed on June 26, 2003. Glassroth was filed five days later. 335 F.3d at 1282.
229. Freethought Soc'y, 334 F.3d at 249.
230. Id. at 270.
231. Id. at 252-53.
THOU SHALT NOT BOW DOWN THYSELF TO THEM, NOR SERVE THEM:
For I the Lord Thy God am a Jealous God, Visiting the Iniquity of the Fathers upon the Children unto the Third and Fourth Generation of Them that Hate me. And Shewing Mercy unto Thousands of Them that Love Me and Keep My Commandments.

THOU SHALT NOT TAKE THE NAME OF THE LORD THY GOD IN VAIN:
For the Lord will not Hold him Guiltless that Taketh His Name in Vain.

REMEMBER THE SABBATH DAY, TO KEEP IT HOLY.
SIX DAYS SHALT THOU LABOR AND DO ALL THY WORK:
BUT THE SEVENTH DAY IS THE SABBATH OF THE LORD THY GOD: IN IT THOU SHALT NOT DO ANY WORK, THOU, NOR THY SON, NOR THY DAUGHTER, THY MANSERVANT, NOR THY MAIDSERVANT, NOR THY CATTLE, NOR THY STRANGER THAT IS WITHIN THY GATES:
For in Six Days the Lord Made Heaven and Earth, the Sea, and All That in Them is, and Rested the Seventh Day, Wherefore the Lord Blessed the Sabbath Day, and Hallowed it.

HONOR THY FATHER AND THY MOTHER:
That Thy Days May be Long upon the Land which the Lord Thy God Giveth Thee.

THOU SHALT NOT KILL.
THOU SHALT NOT COMMIT ADULTERY.
THOU SHALT NOT STEAL.
THOU SHALT NOT BEAR FALSE WITNESS AGAINST THY NEIGHBOUR.
THOU SHALT NOT COVET THY NEIGHBOUR’S HOUSE.
THOU SHALT NOT COVET THY NEIGHBOUR’S WIFE, NOR HIS MANSERVANT, NOR HIS MAIDSERVANT, NOR HIS OX, NOR HIS ASS, NOR ANY THING THAT IS THY NEIGHBOUR’S.

SUMMARY
THOU SHALT LOVE THE LORD THY GOD WITH ALL THINE HEART, AND WITH ALL THY SOUL AND WITH ALL THY MIND.

THOU SHALT LOVE THY NEIGHBOUR AS THYSELF.²³²

The court noted that the text came from three parts of the Protestant Bible. Unlike the posted text in Glassroth, which only con-

²³² Id.
tained the well-known pericope from Exodus 20:2-17 and Deuteronomy 5:6-21, the instant text also included a so-called "summary" from the New Testament book of Matthew. This addition, the court acknowledged, was "not part of the Jewish Bible." As a rabbi named Leonard Gordon testified, this fact alone made the text objectionable to adherents of Judaism. The very inclusion of a "summary" portion of the plaque "implie[d] that certain commandments are more important than others," an idea at odds with the Jewish understanding of the Decalogue. In addition, like the experts in Glassroth, Rabbi Gordon recognized the distinction between "kill" and "murder" to be a contentious issue between Jewish and Christian interpretations of the Sixth (Fifth) Commandment. Finally, Rabbi Gordon testified that the plaque's omission of "the First Commandment in Jewish tradition: 'I am the Lord your God who brought you out of the land of Egypt'" sent a decidedly Christian message.

Despite these denominational conflicts, however, the court did not consider the Protestant focus of the text to cut against the defendant's case. After summarizing Rabbi Gordon's assertions in a footnote, the court pointed to contrary testimony from one of the defendants, a county commissioner. The commissioner, whose denial of the plaintiff's request to remove the plaque led to the litigation, described himself as "a practicing Reform Jew" and opined that his coreligionists would not care about or even notice the distinctions noted by Rabbi Gordon.

Concomitantly, in the main text of its opinion, the court described at length the testimony of a Father Francis X. Meehan, who declared that the posted version of the text would not be offensive to Catholics. The priest also testified, however, that there was "at least one critical difference in the Catholic interpretation of the Ten Commandments." Whereas the posted version contained the standard Protestant and Jewish injunction against the creation of any likeness or image, the standard Catholic version, as set out

233. Id. at 253.
234. Id.
235. See id. at 253 & n.1.
236. Id. at 253 n.1.
237. Id.
238. Cf. id.
239. Id.
240. Id. at 255.
241. Id. at 253 n.1.
242. Id.
243. Id. at 253.
in the New American Bible, "uses the word 'idols' in place of 'graven images.'"244

In its analysis of the message sent by the plaque, the court looked almost exclusively to the physical and historical context of the display, without considering its text. Discounting the fact that a religious organization had donated the plaque amid a religious ceremony,245 the court emphasized both the fact that a famous architect had designed the building in 1920246 and the fact that the plaque was adjacent to an entrance no longer used.247 While the court did briefly distinguish "the language of the Ten Commandments"248 from phrases like "In God We Trust," it did not fully elaborate on this distinction.249 The court therefore never made explicit its reasons for failing to consider the decidedly Protestant bent of the display.

While the court might have simply discounted the rabbi's testimony, which declared that posting the Christian version of the Commandments on the plaque sends a message of disapproval to Jews, the panel might also have implicitly accepted other reasoning. A Kentucky district court judge, for instance, based his decision to rule a Decalogue display constitutional on an aversion to even discussing which version of the Decalogue was posted.250 The chief judge offered two alternative rationales to explain his decision not to consider the source of the display on which he was ruling. First, he posited that a court was not in the position to determine which denomination's version of the Decalogue is posted, because judges ought not become involved in "theological distinctions that are not the proper business of the Court."251 Second, he asserted that conflicting versions of the Decalogue were irrelevant, given the "reasonable observer" standard posited by Justice O'Connor. While the hypothetical reasonable observer has

244. Id.
245. Id. at 251 ("Judge J. Frank E. Hause, the keynote speaker at the dedication ceremony, admonished those in attendance: Have you remembered the Sabbath Day to keep it holy? If you disobey the commandments here and escape punishment, there is yet the punishment which will surely be meted out on the day of judgment.").
246. Id. at 266 (citing Marsh v. Chambers, 463 U.S. 783 (1983), for the proposition that "history can transform the effect of a religious practice").
247. E.g., id. at 266-67.
248. Id. at 264.
249. Id. at 264-65. The court noted that the national motto, "In God We Trust," unlike the Ten Commandments, was "not taken directly from the Bible" and is "non-sectarian." Id. at 264.
251. Id. at 797.
been presumed to have the capacity to scrutinize the context of a
display on the level of an interior decorator.\footnote{252}{Am. Jewish Cong. v. Chicago, 827 F.2d 120 (7th Cir. 1987) (Easterbrook, J.,
dissenting) (asserting that current Establishment Clause strictures require "scrutiny
more commonly associated with interior decorators than with the judiciary").} Forester ruled that
such an observer would not grasp the "subtle distinction[s]" be-
tween the various versions of the Commandments.\footnote{253}{Mercer, 219 F. Supp. 2d at 797.}

\section*{B. FOE's Attempt at Ecumenism}

As noted above,\footnote{254}{See supra notes 91-106 and accompanying text.} many Ten Commandments cases involve
monuments donated to local governments by FOE.\footnote{255}{See ACLU Neb. Found. v. City of Plattsmouth, 358 F.3d 1020, 1025 (8th Cir.
2004) (noting that the monument donated to Plattsmouth bore a "very close resem-
bance to scores of other Ten Commandments monuments given by the Fraternal
Order of the Eagles to towns and cities in the 1950s and 1960s").} Like the dis-
plays of the Protestant version of the Commandments, different
FOE monument cases vary with regard to the physical setting of
the monument,\footnote{256}{Compare Van Orden v. Perry, 351 F.3d 173, 175-76 (5th Cir. 2003) (describing
a monument on Texas capitol grounds), with ACLU Neb. Found., 358 F.3d at 1025
(describing the monument as being in a park ten blocks from city hall)
.} though some facts are fairly uniform. The monu-
ments are between three and six feet high, are usually positioned
on public land and are inscribed with purported amalgamations of
the standard Jewish, Catholic, and Protestant versions of the Deca-
logue.\footnote{257}{E.g., ACLU Neb. Found., 358 F.3d at 1025; Van Orden, 351 F.3d at 176; State v.
} In addition, the face of each monument contains a combi-
nation of symbols including "two small tablets engraved with the
Ten Commandments written in a Semitic script, an eye within a
triangle, and an eagle gripping an American flag . . . two six-point
stars [and] the intertwined [Greek] symbols ‘chi’ and ‘rho.’"\footnote{258}{ACLU Neb. Found., 358 F.3d at 1025
(footnotes omitted); cf. Van Orden, 351 F.3d at 176.
} Each monument is also inscribed with a dedication to the city in
which it was donated.\footnote{259}{See, e.g., Adland v. Russ, 307 F.3d 471, 480-81 (6th Cir. 2002).
}

While some courts simply presume the text of the monument to
be religious, asking whether the external context of the monument
mutes the religious message,\footnote{260}{See, e.g., Adland v. Russ, 307 F.3d 471, 480-81 (6th Cir. 2002).
} other courts have gone into more
depth in discussing the essential nature of the text of the Ten Com-
mandments. These latter courts, which have given due attention to
ESTABLISHMENT CLAUSE

external context but also have considered the Decalogue as a self-contained document, are themselves split. On the one hand, the Eighth Circuit, discussing particular Commandments in its analysis, found that a government's display of a list of religious injunctions, as put forth in the FOE version of the Decalogue, is more constitutionally infirm than mere "acknowledgment" of a generic "God." On the other hand, the Fifth Circuit and the Supreme Court of Colorado, speaking only generally of the comprehensive Decalogue and not paying particular attention to the words therein, have taken the view that the message conveyed by the Ten Commandments can be secular. The following subsection of the Note focuses on this split.

1. The Eighth Circuit Approach

In ACLU Nebraska Foundation v. City of Plattsmouth, the Eighth Circuit decided that a five-foot monument inscribed with a hybrid version of the Ten Commandments identical to that inscribed in the Elkhart, Indiana monument, in a public park near city hall violated the Establishment Clause. In considering how to apply the Supreme Court's holding in Larson v. Valente, the court explored two distinct concepts related to the factious nature of the Ten Commandments as a religious document. First, echoing the Glassroth court, the panel noted that the "choice of Commandments," in terms of which denomination's version the government chose to post, did "indeed express religious preference." The "deep and divisive disagreement" between adherents of Protestantism, Catholicism, and Judaism over the content of the text was real, and it existed irrespective of FOE's purported "amalgam" of Protestant, Catholic, and Jewish interpretations. Second, the court found that, far from simply displaying a list of universally applicable moral axioms, the monument's text exhibited a series of

261. See ACLU Neb. Found., 358 F.3d at 1042 (“The monument does much more than acknowledge God; it is an instruction from the Judeo-Christian God on how He requires His followers to live.”).
262. See Van Orden, 351 F.3d at 182; Freedom from Religion Found., 898 P.2d at 1027.
263. 358 F.3d 1020 (8th Cir. 2004).
264. See supra notes 94-95 and accompanying text.
265. 358 F.3d at 1025.
266. 456 U.S. 228 (1982); see ACLU Neb. Found., 358 F.3d at 1032-33.
267. ACLU Neb. Found., 358 F.3d at 1032.
268. See id. (quoting several sources that discuss the contentious and violent nature of religious disagreement).
269. See id. at 1026.
sectarian "religious beliefs," every one of which was "a rejection of contrary views."\textsuperscript{270} Thus, even on its face, the monument "snub[bed] polytheistic sects, such as Hinduism, as well as non-theistic sects, such as Buddhism, and the non-religious."\textsuperscript{271}

Although the court declined to apply the strict scrutiny analysis of \textit{Larson},\textsuperscript{272} it considered the capacity of the Ten Commandments to be divisive in its discussion of the \textit{Lemon} framework.\textsuperscript{273} Applying the purpose prong of \textit{Lemon}, the court looked primarily to the text of the monument\textsuperscript{274} to show that it not only "possesse[d] a religious nature," as other courts had pointed out,\textsuperscript{275} but that it also patently advanced an argument in support of a contentious religious view. The monument's declaration of the "existence and supremacy of God,"\textsuperscript{276} for instance, as well as the prescription of "exclusively religious" behavior\textsuperscript{277} made it more likely that the government was motivated by a desire to promote particular religious beliefs.\textsuperscript{278}

Furthermore, even the arguably secular Commandments, such as the prohibition against stealing, were not unproblematic. "It is one thing for Plattsmouth to say one should not steal," the court stated.\textsuperscript{279} "[I]t is quite another for Plattsmouth to say there is a God who said, 'Thou shalt not steal.'"\textsuperscript{280} Thus, the "religious tenor" of even the "secular" Commandments gave credence to the plaintiff's argument that the government's motivation in displaying them was to promote their "putative source"—"the LORD thy God"—rather than to discourage the admittedly wrongful act.\textsuperscript{281}

The court used the same evidence to both apply the effect prong of \textit{Lemon} and to distinguish \textit{Marsh v. Chambers}, a case that side-stepped the \textit{Lemon} framework.\textsuperscript{282} After explaining that the external context of the monument did not heal its constitutional defect, the court concluded that Justice O'Connor's reasonable observer would "perceive this monument as an attempt by Plattsmouth to

\begin{itemize}
\item 270. \textit{Id.} at 1033.
\item 271. \textit{Id.} at 1032-33.
\item 272. \textit{Id.} at 1033-34.
\item 273. \textit{Id.} at 1034-36.
\item 274. \textit{Id.} at 1036 ("We begin with the words and symbols on the monument.").
\item 275. \textit{Books v. City of Elkhart}, 235 F.3d 292, 302 (7th Cir. 2000).
\item 276. \textit{ACLU Neb. Found.}, 358 F.3d at 1036.
\item 277. \textit{Id.}
\item 278. \textit{See id.}
\item 279. \textit{Id.}
\item 280. \textit{Id.}
\item 281. \textit{Id.}
\item 282. 463 U.S. 783 (1983); \textit{see ACLU Neb. Found.}, 358 F.3d at 1042.
\end{itemize}
steer its citizens in the direction of mainstream Judeo-Christian religion.\textsuperscript{283} Likewise, the court found "fatal fault" in the defendant's attempt to describe the monument as "merely an acknowledgment of God."\textsuperscript{284} Seeking to show that the monument was no different than the nonsectarian benediction upheld in \textit{Marsh}, the defendants failed to realize that the monument's text "is an instruction from the Judeo-Christian God on how He requires His followers to live."\textsuperscript{285} To reduce the Ten Commandments to a bland recognition of faith would "diminish[ ] their sanctity to believers and bel[ie] the words themselves."\textsuperscript{286} While a dissenting opinion disagreed on most of these points,\textsuperscript{287} a concurring opinion emphatically "join[ed] and applaud[ed] most of the Court's excellent opinion,"\textsuperscript{288} urging that the court should also have applied \textit{Larson} strict scrutiny.\textsuperscript{289} Quoting the majority's rejection of the "mere acknowledgment" argument, the concurrence underscored the court's finding that "[t]he words on the monument clearly prefer Christianity and Judaism."\textsuperscript{290}

2. \textit{The Approach of the Fifth Circuit and the Colorado Supreme Court}

Both the Fifth Circuit and the Supreme Court of Colorado took a different tack than the Eighth Circuit in deciding on the validity of FOE monuments on government property.\textsuperscript{291} Although each court gave its own theory on the essential nature of the Ten Commandments, both spent little or no time considering the text of the Commandments as had the Eighth Circuit. While the Fifth Circuit, in \textit{Van Orden v. Perry},\textsuperscript{292} did not even transcribe the text of the monument it was analyzing, the Colorado Supreme Court did so in \textit{State v. Freedom from Religion Foundation}.\textsuperscript{293}

\begin{quote}
I AM the LORD thy God
I. Thou shalt have no other gods before me.
\end{quote}

\textsuperscript{283} ACLU Neb. Found., 358 F.3d at 1042.
\textsuperscript{284} Id.
\textsuperscript{285} Id.
\textsuperscript{286} Id.
\textsuperscript{287} See \textit{id.} at 1043-50 (Bowman, J., dissenting).
\textsuperscript{288} \textit{Id.} at 1042 (Arnold, J., concurring).
\textsuperscript{289} See \textit{id.} at 1043 (Arnold, J., concurring).
\textsuperscript{290} \textit{Id.} (Arnold, J., concurring).
\textsuperscript{291} \textit{Van Orden v. Perry}, 351 F.3d 173, 182 (5th Cir. 2003); \textit{State v. Freedom from Religion Found.}, 898 P.2d 1013, 1027 (Colo. 1995).
\textsuperscript{292} 351 F.3d 173 (5th Cir. 2003).
\textsuperscript{293} 898 P.2d at 1016.
II. Thou shalt not take the name of the Lord thy God in Vain.

III. Remember the Sabbath day to keep it holy.

IV. Honor thy father and thy mother that thy days may be long upon the land which the Lord thy God giveth thee.

V. Thou shalt not kill.

VI. Thou shalt not commit adultery.

VII. Thou shalt not steal.

VIII. Thou shalt not bear false witness against thy neighbor.

IX. Thou shalt not covet thy neighbor's house.

X. Thou shalt not covet thy neighbor's wife, nor his maidservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's.294

Asserting that this "unique version"295 of the Decalogue did "not reproduce exactly the Ten Commandments as accepted by any particular sect," the court failed to discuss the monument's striking resemblance to the Catholic version of the Decalogue. Though the text of the monolith excluded the prohibition of "graven images"—the Second Commandment according to the Jewish and Protestant versions of the text296—for instance, the court summarily concluded that it reflected "reconciliation and diversity more than any sentiment of intolerance."297 Rather than taking note of the monument's two separate Commandments against coveting—also at odds with the Jewish and Protestant versions of the biblical passage298—the Court looked to the monument's Jewish and Christian icons299 as more evidence of harmony.

Aside from the ecumenism issue, however, there was another argument regarding the nature of the Ten Commandments as a whole which could be found in both the Colorado Supreme Court's opinion and the Fifth Circuit opinion. The Colorado court suggested that the Commandments were essentially "expressions of universal standards of behavior common to all western societies."300 Without acknowledging the injunctions against other forms of religious worship found throughout the Decalogue, the court held that it could not concede to disestablishmentarian argu-

294. Id.
295. Id. at 1023.
296. See supra notes 45-67 and accompanying text.
298. See supra notes 85-90 and accompanying text.
299. Freedom from Religion Found., 898 P.2d at 1023 (describing "the juxtaposition of the Christian Chi and Rho [symbolizing Jesus Christ] with the Jewish Star of David").
300. Id. at 1024.
ments that would only be “exaggerat[ing] the effect of benign religious messages . . . ”301

Similarly, the Fifth Circuit emphasized that “the Commandments have a secular dimension as well as a religious meaning.”302 Seemingly taking the position that the only “religious” aspect of the Commandments was their purported source, the panel, like the Colorado Supreme Court, failed to discuss the patently religious duties noted by the Supreme Court in Stone.303 The Fifth Circuit did, however, harken back to Justice Rehnquist’s dissent in Stone, asserting that the Decalogue’s “influence upon the civil and criminal laws of this country” was axiomatic.304 The court further suggested that “even those” that did not accept the biblical narrative “cannot deny” this;305 to do so would be to seek a “constitutional right to be free of government endorsement of its own laws.”306

PART IV. TAKING TEXT SERIOUSLY: RECOGNIZING THE DISPLAY OF THEOLOGICAL OBLIGATIONS AND PARTICULARIST RENDERINGS OF BIBLICAL PASSAGES ON GOVERNMENT PROPERTY AS AN IMPERMISSIBLE ENDORSEMENT OF RELIGION AND A VIOLATION OF THE “CLEAREST COMMAND” OF THE ESTABLISHMENT CLAUSE

Because raw emotion pervades the atmosphere in the debate over the legal ramifications of displaying the Ten Commandments in public, it is crucial that judges and commentators focus on the text of the Decalogue itself in analyzing this issue. Thus, this part of the Note reaches its conclusion—that the Ten Commandments cannot be publicly displayed—through an analysis of the words of the biblical pericope. Section A concentrates on the theological nature of the Commandments and argues that their public posting conveys a sense of government endorsement of religion to a reasonable observer, violating the second prong of the Lemon test. Returning to the first prong of Lemon, section B contends that in most cases, the act of posting the Decalogue on government property betrays an impermissible religious purpose. Section C then concludes that because there is no standard version of the Deca-

301. Id. at 1026.
302. Van Orden v. Perry, 351 F.3d 173, 179 (5th Cir. 2003).
303. See id. at 181 (“Even those who would see the decalogue as wise counsel born of man’s experience rather than as divinely inspired religious teaching cannot deny its influence upon the civil and criminal laws of this country.”).
304. Id.
305. Id.
306. Id. at 182.
logue to which all religions conform, the government violates Lemon's third prong by entangling itself in religious affairs whenever it chooses to post one of the many extant versions of the document.

A. Religious Duties in Black and White: Impermissible Government Endorsement of Religion

In ACLU v. McCreary County, one of the cases for which the Supreme Court granted certiorari, the Sixth Circuit correctly noted that the Decalogue, unlike a crèche or other "passive symbol[s]" of religion, is an "active symbol" containing "blatantly religious content." Quoting the Supreme Court in Stone, the McCreary court explained that the Commandments from God were "religious duties of believers." Nothing could be clearer from reading the text itself.

The most striking religious identifier of the Ten Commandments is that the first several obligations are express requirements enjoining religious worship and belief in the most fundamental theological issues. For instance, "I am the LORD your God," the First Commandment in the Jewish text and the introduction included in most Christian versions, requires the belief in a particular God. Likewise, the next verse in the pericope included in each version, "You shall have no other gods beside me," prohibits, perhaps even more directly, all polytheistic belief. If reasonable observers of a monument bearing these words would attribute them to the government, they would naturally assume a governmental instruction, or at the very least a suggestion by the government, to obey these precepts.

As Allegheny and Justice O'Connor's concurrence in Lynch teach, such an overture violates the Establishment Clause. By encouraging monotheistic worship, the government "communicat[es] a message of government endorsement . . . of religion," setting the government's imprimatur on the theological principle at the core of

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307. 354 F.3d 438 (6th Cir. 2003).
308. Id. at 455.
309. Id. (quoting Stone, 449 U.S. at 42).
310. See supra text accompanying notes 27-35.
311. See supra text accompanying notes 36-41.
312. A reasonable person could easily assume this, considering the fact that the words are enshrined on government property and that there is often much pomp and circumstance associated with Ten Commandment dedication ceremonies. See supra note 91 and accompanying text; see also Books v. City of Elkhart, 235 F.3d 292, 295 (7th Cir. 2000).
Western religion. The nearly two million Americans who consider themselves atheists and agnostics are thus effectively dubbed "outsiders, not full members of the political community," unless they abandon their own ideologies regarding the question of a deity. Another subset of Americans greater than two million in number likewise have their beliefs marginalized as a result of the nontheistic and polytheistic theological religions to which they subscribe, making "adherence to [their] religion relevant . . . [to their] standing in the political community." The "accompanying message" of the text to adherents of these theological duties, treating them as "insiders, favored members of the political community," is equally impermissible and seals the fate of the posting as a violation of the modified effect prong of the Lemon test.

Other Commandments, of course, enjoin behavior also proscribed by civilizations other than those dominated by monotheistic religion. While some argue that even these Commandments are not entirely secular in nature, this notion misses the point. The public veneration of a document which plainly compares the desire to practice dissenting religious beliefs with the failure to observe basic moral imperatives is, to say the least, religious discrimination against all citizens practicing such dissenting beliefs. Whatever the value of the Decalogue within a religious tradition, a government in the United States may not officially compare murder or killing (Sixth Commandment according to Protestant tradition), stealing (Eighth Commandment according to Protestant tradition), and lying under oath (Ninth Commandment according to Protestant tradition) with the practice of religious worship that differs from that practiced by the majority. Indeed, even to compare those that follow their own religious ideologies with those who dishonor their parents (Fifth Commandment according to Protestant tradition) and commit adultery (Seventh Commandment according to Protestant tradition)—two nearly universal ethical transgressions—"sends a message to nonadherents that they are outsiders, not full

314. See id.; Adherents.com, supra note 18.
317. See, e.g., Stone v. Graham, 449 U.S. 39, 41-42 (1980) (stating that "honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness" are "arguably secular matters") (emphasis added).
members of the political community." As Allegheny tells us, this the government may not do.

B. Seeking to Post the Commandments: An Impermissibly Religious Purpose

The above reasoning should hold irrespective of the font size used for each Commandment. Even if a government chose to post a text of the Decalogue that enlarged the Commandments that do not regard worship, such as those against stealing and lying, a reasonable observer would still read government endorsement of a religion into the text. So long as the Commandments requiring monotheistic worship, the sanctification of God's name and the observance of the Sabbath are legible, their literal message—an instruction to the reader to follow the imperatives—is religious. If, however, a government were to follow the lead of the Alabama Supreme Court and surround the document with other lawgiving texts, such as the Magna Carta and the Bill of Rights, the result would not be so clear according to the reasonable person test.

There would be a substantial likelihood, however, that such an action would be invalidated based on an impermissibly religious governmental purpose, the first prong of the Lemon test. For instance, in the case of the display created in the Alabama Supreme Court six months after the deposed Chief Justice's display was removed, a religious motivation is particularly likely. Although acting Chief Justice Gorman Houston claimed at the time that the Alabama justices ordered the construction of the display to educate citizens on the foundations of Alabama and United States law, such an "avowed secular purpose" is unlikely. It is doubtful that the Alabama justices would be so motivated by a sudden interest in legal history that they would construct a display including the Ten Commandments so soon after Moore's Decalogue was removed. The more likely explanation for this governmental action is that the Court wished to maintain some semblance of the Decalogue monument built by former Chief Justice Moore, "The Ten Commandments Judge," an act of unambiguously religious

319. Id.
320. See supra note 15.
321. See supra notes 124-27 and accompanying text.
322. See supra notes 1-15 and accompanying text.
323. See National Public Radio, supra note 115.
motivation.325 Despite the justices’ desire to moderate the raw offensiveness of Moore’s display by placing other documents around the Decalogue, their actions belie a desire to replicate Moore’s work out of a similarly religious—albeit tempered—motivation or a desire to appeal to Moore’s religious constituency.326 While the United States Supreme Court has not often parsed the meaning of the phrase “religious purpose,”327 it would seem that even the latter motivation should be deemed improper. After all, a government official acting as a surrogate of a religious organization determined to execute an act with a decidedly religious motivation would be no different than a government actor expressing and acting on that motivation itself.

C. Not Just Any Ten: “The Clearest Command” and The Decalogue

1. Background

In light of the strictures of Lemon’s purpose prong, it seems difficult to believe that any amount of “context,” short of an in-depth critical study of the text, could save a government display which was clearly designed to showcase the Decalogue. Yet some who urge judicial recognition of “the foundational role of the Ten Commandments in secular, legal matters,”328 remain unconvinced. While the debate over the historical role of the Commandments in the development of American law is alive and well,329 it should be noted that at least one admirer of the Decalogue agreed that the lack of an agreed-upon version of the document was a “sensible

325. Glassroth v. Moore, 335 F.3d 1282, 1296 (11th Cir. 2003) (“Chief Justice Moore testified candidly that his purpose in placing the monument in the Judicial Building was to acknowledge the law and sovereignty of the God of the Holy Scriptures, and that it was intended to acknowledge ‘God’s overruling power over the affairs of men.’”).

326. Id. at 1286 (noting that Moore was supported by groups like the “Coral Ridge Ministries, an evangelical Christian media outreach organization...[which] used its exclusive footage of the installation [of the monument] to raise funds for its own purpose and for Chief Justice Moore’s legal defense, which it [underwrote]”).

327. Indeed, the court has eschewed descending any deeper than necessary into the term “religious” in any context. See Freeman, supra note 187, at 1524-25.


329. See generally Green, supra note 91, at 531 (examining “the historical basis for claims that the Ten Commandments is the fundamental legal code of Western Civilization and the Common Law of the United States.”).
enough" reason to prohibit its public posting.330 Bernard Meislin, who wrote a still-authoritative book on the influence of Jewish law on its American counterpart,331 also wrote extensively on the particular influence of the Ten Commandments.332 In an article on the latter subject, he noted that differences between the distinct versions of the text "have grown with the passage of time."333 Indeed, because "the trend of major religions has been away from De- calogue harmony," all efforts to create a truly ecumenical version of the text in the modern period were necessarily flawed.334

Any attempt at Decalogue reconciliation prescribed by state officials would be anathema to church and constitutionally abhorrent to the state. It has been tried and rejected. Display of a version of the Ten Commandments drawn by state officials from the three major faiths but conforming to the authorized version of none was forbidden by the New York State Education Commissioner. As early as 1803, the Chief Justice of New Hampshire's highest court wrote, "It has not pleased God to enlighten by his grace any government with the gift of understanding the scriptures."335

Such vaticinations proved prescient. Efforts of governments to post particular version of the Ten Commandments are almost always constitutionally infirm. Public Decalogue displays fail "the test of neutrality,"336 as set out by the Court in Kiryas Joel, because the different versions of the text are in irresolvable conflict; regardless of which version the polity chooses, it necessarily accepts the view of one denomination while rejecting that of another. Moreover, even if it were possible to find a perfectly neutral version of the Commandments, a government would have to violate "the entanglement test,"337 as applied in the kosher fraud law cases, to create it. Polities would have to establish committees of rabbis, priests, and ministers to sort out the complicated distinctions between the Commandments of each sect and to decide which should be displayed, an anathema to the third prong of Lemon.

330. See Meislin, Role of the Ten Commandments, supra note 26, at 190.
331. MEISLIN, JEWISH LAW, supra note 91.
332. See generally Meislin, Role of the Ten Commandments, supra note 26 passim. He was in the process of writing a book on the subject before his death in 1988.
333. Meislin, Role of the Ten Commandments, supra note 26, at 190.
334. Id.
335. Id. (citations omitted).
2. The Use of Icons in Religious Observance: Catholics vs. Protestants

The most apparent illustration of this twin-prong argument regards the Commandment against "graven images," which is included prominently in the Jewish and Protestant versions as the Second Commandment, but is either excised or embedded in the Catholic version.\(^{338}\) Whether the government posts a Decalogue which prominently displays this Commandment, as the city of Elkhart did, or it displays a monument that omits this Commandment, as the city of Denver did, the polity entangles itself in a theological debate that is centuries old.\(^{339}\) For instance, if the government includes the Commandment in the display, it implicitly demonstrates a hostility to religious icons.\(^{340}\) This position is at odds with Catholicism and favors the Protestant view, a blatant failure to maintain neutrality between religious denominations as Larson and Kiryas Joel command. Likewise, a posting that does not include the Commandment takes the Catholic view on the issue—that religious icons may and should be venerated—and is equally damning.\(^{341}\)

Additionally, even if a government were to attempt to resolve this dispute amicably, it would likely have to create an advisory board made up of clergy from each side of the debate to sort through the history and theology underpinning the conflict. Because a secular commission composed largely of clergy would have to apply Christian and Protestant theology to decide the issue, the board would constitute the application "by religious personnel of a sectarian or religious law," an impermissible entanglement akin to the advisory board of rabbis in the kosher fraud cases.\(^{342}\)

3. Deliverance from Exile and the Commandment Regarding Homicide: Judaism vs. Christianity

Just as Catholics and Protestants have incentives to insist on a particular version of the Decalogue, should one be publicly displayed, so too does the Jewish community. As the Eleventh Circuit noted in Glassroth, Judge Moore’s Commandments included the phrase "I AM the LORD thy God," but did not include the continuation of the biblical verse acknowledging the Exodus story ("who

\(^{338}\) See supra notes 45-67 and accompanying text.  
\(^{339}\) See supra notes 91-100 and accompanying text.  
\(^{340}\) See supra notes 45-67 and accompanying text.  
\(^{341}\) See supra notes 45-67 and accompanying text.  
\(^{342}\) See Ran-Dav’s, 129 N.J. at 158.
brought you out of the land of Egypt, the house of bondage”).\textsuperscript{343} This is a story cherished by the Jewish people, as it is what inexorably links the Commandments themselves to the people’s mythic deliverance by God, the very fact that suffuses the document with its essential meaning in Jewish tradition.

Likewise, the Commandment regarding homicide is an issue that at least some Jews regard as a staunch difference between their faith and Christianity.\textsuperscript{344} A literal translation of the Hebrew text yields a Commandment forbidding only “murder” and not all killing, as most Christian versions of the text would have it. Again, a government that publicly displays a Decalogue that flouts Jewish versions of these Commandments effectively prefers the Christian view of the text and Christian thought on these matters to the Jewish view. To even get involved in such matters, like the attempts by several governments to regulate the definition of Jewish dietary laws, is a violation of the entanglement prong of \textit{Lemon}.\textsuperscript{345} This is true not only because it will lead to official preference of Judaism or Christianity over the other, but because these are the types of “varying doctrinal interpretations” which the entanglement test simply forbids the government to resolve.\textsuperscript{346}

\textbf{Conclusion}

One of the strangest features of judicial opinions and legal commentary regarding the public displays of the Ten Commandments is how little time is spent reading the very text inscribed on the monument, the fate of which is being commented on or decided. Peculiar Establishment Clause arguments to the contrary notwithstanding,\textsuperscript{347} it seems odd that a judge would not discuss the text of a document the fate of which he or she will decide. As I have argued, a close reading of the document shows that it contains what clearly may not be posted on government property—unequivocal endorsement of particular religious duties. That there are also undeniable universal truths within the Ten Commandments makes the document not less abhorrent, but more, when displayed in the

\textsuperscript{343} \textit{Exodus} 20:2; see \textit{The Torah: A Modern Commentary}, \textit{supra} note 27, at 534 (enumerating Commandments according to the “prevailing Jewish division” and noting that this division of the Commandments differs from “the Greek Church Fathers, and most Protestant churches” as well as some Jewish sources). Some translations begin, “I, the Lord, am your God.” See \textit{Etz Hayim}, \textit{supra} note 23, at 442.

\textsuperscript{344} See \textit{supra} notes 78-84 and accompanying text.

\textsuperscript{345} See \textit{supra} notes 177-86.

\textsuperscript{346} \textit{Ran-Dav’s}, 129 N.J. at 159.

\textsuperscript{347} See \textit{supra} notes 245-49 and accompanying text.
public square. In equating the practices of religious and nonreligious minorities—who worship other deities or no god at all, create graven images in their worship, and observe the Sabbath differently or not at all—with those that lie, steal, and murder, the government explicitly disapproves of those minorities. A reasonable person viewing this would rightly feel that the government has established a de facto religious ideology that discriminates against all nonadherents. Additionally, courts should not remain blissfully ignorant of the fact that different versions of the Decalogue exist and that they conflict with one another in ways that are not meaningless and often contentious. The politicization of religion in America is already regretfully apparent. To add fuel to the fire by allowing Catholics, Jews, and Protestants to fight amongst themselves as to whose version of the Decalogue should be publicly displayed in a particular polity is, to borrow a phrase, “as senseless in policy as it is unsupported in law.”

ARE TALEBEARERS REALLY AS BAD AS TALEMAKERS?: RETHINKING REPUBLISHER LIABILITY IN AN INFORMATION AGE

Jennifer L. Del Medico*

INTRODUCTION

It was a spectacle that "produced without question some of the most bizarre testimony," a district court judge commented in hindsight.1 The 1982 Pulitzer divorce trial featured tales of sex, drugs, and séances that were splashed throughout magazines and newspapers across the country.2 Many of the scandalous details involved Janice Nelson, the woman who served as Mrs. Pulitzer’s marriage counselor and psychic.3 Nelson testified on behalf of Mr. Pulitzer because she felt that Mrs. Pulitzer should not have custody of the couple's children.4

While the high-profile Pulitzer divorce produced juicy fodder for news reports, the media's real gain from the case came five years after the divorce trial when Nelson sued several media organizations for defamation.5 During the divorce trial, the Associated Press erroneously reported that Nelson conducted séances in the Pulitzer home where ten to fifteen people surrounded Roxanne Pulitzer, who was in bed with a trumpet and a black cape.6 Both

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1. The statement of Judge J. Spellman, author of the opinion in Nelson v. Associated Press, Inc., 667 F. Supp. 1468, 1471 (S.D. Fla. 1987). Later in the opinion, Judge Spellman writes that the Pulitzer trial "elicited some of the most preposterous testimony imaginable during the 18 days it lasted." Id. at 1482.

2. Id. at 1471. Trial testimony was filled with stories of adultery, lesbian trysts, incest, and drug use. Id. at 1473. Testimony indicated that Roxanne Pulitzer slept with a Palm Beach real estate salesman, a French baker, a Belgian race-car driver, and the wife of Kleenex heir James Kimberly. Paradise Lost, TIME, Jan. 10, 1983, at 24.

3. See Nelson, 667 F. Supp. at 1471. Nelson, who operated an astrology business, voluntarily left Palm Beach to avoid attention because of her association with Roxanne Pulitzer. Id.

4. Id.

5. See id. at 1471.

6. Id. at 1473-74.
The Miami Herald\textsuperscript{7} and The New York Post republished this erroneous dispatch.\textsuperscript{8} Knight-Ridder wire service sent out a similar story over its news wire that The Washington Post republished.\textsuperscript{9} Newsweek reported the same story based on information from various newspaper and wire service reports.\textsuperscript{10} After the publications of these statements, the Associated Press issued a retraction which stated that “[i]n a Pulitzer deposition made available Thursday, [Mr. Pulitzer] describes séances—unrelated to Ms. Nelson—that Mrs. Pulitzer conducted in their home.”\textsuperscript{11}

The court granted summary judgment in favor of the republishers\textsuperscript{12} based on a “powerful, but often neglected libel defense” called the “wire service defense.”\textsuperscript{13} This defense allows the media to republish news without liability for defamation if the information passed over a news wire and the subsequent publisher did not know or have reason to know that the material was defamatory.\textsuperscript{14} In certain circumstances, this privilege exempts the media from the strict common law rule that imputes independent liability to third parties who republish libelous statements.\textsuperscript{15} Whether the defamed individual is a public or private figure is not a factor in determining whether the wire service defense is applicable.\textsuperscript{16} Therefore, the

7. Id. at 1478-79.
8. Id. at 1482-84.
9. Id. at 1481.
10. Id. at 1475-78.
11. Id. at 1473.
12. Id. The court granted summary judgment to the Associated Press because Nelson failed to provide notice of the suit as required under Florida law. See infra note 53 and accompanying text.
13. See generally Kyu Ho Youm, The “Wire Service” Libel Defense, 70 Journalism Q. 682 (1993) (tracing the history and use of the wire service defense from its 1933 inception to the date of the article’s publication).
14. See Nelson, 667 F. Supp. at 1474 (holding that the wire service defense is law in Florida); see also infra notes 54-72 and accompanying text (discussing the evolution of the wire service).
16. In New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964), the Court held that in order for a public figure to recover for defamation, the publisher must have acted with “actual malice”—that is, with knowledge that [the statement] was false or with reckless disregard of whether it was false or not.” See also Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 667 (1989). But see Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (holding that “so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual”).
media can potentially get the case dismissed on summary judgment without engaging in litigation concerning whether the defamed is a public or private figure.

Over time, spreading the news has become more of a cooperative endeavor. In 1848, the Associated Press was founded as a news cooperative for six New York papers. Today, the Associated Press serves 1700 newspapers and 5000 radio and television stations around the country. More than thirty other news wires, from institutions like United Press International to the two-year-old Women's Enews, relay news to media outlets around the country. Journalists frequently rely on these services for facts or quotes to incorporate into original stories and publications often use entire wire service stories as a replacement for self-generated copy.

The very existence—and recent proliferation and expansion—of the wire service privilege illustrates that traditional republication liability does not allow news organizations to function effectively in a society that demands rapid news dissemination. Today, twenty-one jurisdictions currently recognize the seventy-year-old defense, the majority of them electing to do so within the last twenty years. In the past decade, eight jurisdictions have approved the wire service privilege.

18. See Associated Press, supra note 17.
21. See infra notes 84-116 and accompanying text (discussing the expansion of the wire service defense).
22. See Youm, supra note 13, at 688 (citing thirteen jurisdictions that rely on the wire service defense as of 1993).
The acceptance of the defense suggests that the strict common law rule burdening republishers with potential liability should be abolished if there is no showing of actual knowledge that the material was defamatory. Thus, the "actual malice" standard articulated in *New York Times v. Sullivan*, which applies to public figures, should apply to all individuals in cases involving republishers.\(^{24}\) The *Sullivan* Court defined acting with "actual malice" as publishing material "with knowledge that it was false or with reckless disregard of whether it was false or not."\(^{25}\) This Comment argues that the standard established by *Sullivan* is the proper standard to impose on republishers who publish material noting that it originates from another source, regardless of whether the plaintiff is a public or private figure.

Whether republishers can escape liability for defamation should not turn on the technology involved. In its traditional form, the defense is only applicable when a wire service is involved in the news distribution.\(^{26}\) Without the wire service privilege, a news organization can face liability for defamation if it reports verbatim what has appeared in another publication, even if the item is attributed.\(^{27}\) It is time to re-evaluate the old adage in libel law that "[t]alebearers are as bad as talemakers."\(^{28}\)

Part I of this comment chronicles the history and expansion of the wire service defense since it first appeared in a 1933 decision.\(^{29}\) Additionally, Part I posits that the early development of the wire service defense was likely a tool to protect technological developments that improved news distribution over the wire.\(^{30}\) Part I also discusses the reverse wire service defense, which developed more than sixty years after the first articulation of the defense.\(^{31}\)

Part II will examine New York's broader approach to evaluating whether a republisher should be held liable, which displaces the

\(^{24}\) 376 U.S. 254, 279-80 (1964).

\(^{25}\) Id. at 280.

\(^{26}\) See Layne v. Tribune Co., 146 So. 234, 239 (Fla. 1933) (holding that papers that act as a "local screen" and reprint news dispatches from wire service are protected from libel claims via the wire service defense).

\(^{27}\) See RESTATEMENT (SECOND) OF TORTS § 578(b) (1977).

\(^{28}\) Houston Chronicle Publ'g Co. v. Wegner, 182 S.W. 45, 48 (Tex. Civ. App. 1915) (holding that a newspaper can be held liable for defamation when it reported with attribution that another newspaper published a story accusing the local police chief of illegally putting his son on the city payroll).

\(^{29}\) See infra notes 54-72 and accompanying text.

\(^{30}\) See infra notes 73-83 and accompanying text.

\(^{31}\) See infra notes 104-16 and accompanying text.
need for a privilege like the wire service defense.\textsuperscript{32} Under New York law, in matters involving public figures and matters of public concern involving private figures, republishers must act in a grossly irresponsible manner in order to be held liable.\textsuperscript{33} Under this standard, the court must determine whether the initial publisher was a reliable source and whether the republisher acted as would a prudent journalist.\textsuperscript{34}

Finally, Part III concludes that the common law rule holding republishers liable for defamation should be replaced with a presumption in favor of republication.\textsuperscript{35} This presumption would allow republication of news without liability when a republisher meets certain criteria, regardless of the type of medium involved, unless the republisher acted with actual malice.\textsuperscript{36} This Part also points out problems with both the traditional wire service defense and New York's broader approach.\textsuperscript{37} Part III also discusses how Congress has limited traditional republication liability for Internet service providers, which illustrates that republisher liability is unsuitable in modern times.\textsuperscript{38} This change supports the important goal of ensuring that speech is not chilled, a core First Amendment value, and that news is not kept from the public.\textsuperscript{39} In addition, this Part will suggest that the traditional rule barring the original publisher from being held liable for third party publication of the original publisher's statements should be altered to account for truly harmed plaintiffs.\textsuperscript{40}

\textsuperscript{32} See infra notes 147-75 and accompanying text.
\textsuperscript{33} See infra notes 151-52 and accompanying text.
\textsuperscript{34} See infra notes 163-68 and accompanying text.
\textsuperscript{35} See infra notes 221-25 and accompanying text.
\textsuperscript{36} See Tzougrakis v. Cyveillance Inc., 145 F. Supp. 2d 325, 329-30 (S.D.N.Y. 2001). The qualified privilege is granted to republishers in New York who have no reason to question the accuracy of the article or the good faith of the reporter. Another factor to be considered when evaluating the republisher's behavior is whether the republisher followed "sound journalistic practices" in republishing the material and whether it adhered to "normal procedures, including editorial review of the copy." \textit{Id.}
\textsuperscript{37} See infra notes 191-212 and accompanying text.
\textsuperscript{38} See infra notes 213-20 and accompanying text.
\textsuperscript{39} See, e.g., Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market . . . .").
\textsuperscript{40} See infra notes 226-29 and accompanying text.
I. THE DEVELOPMENT OF THE WIRE SERVICE DEFENSE

Part I examines Layne v. Tribune Co., the first case to articulate the wire service defense, and the policy reasons for departing from the strict common law rule that republishers are liable for defamation regardless of whether they attributed the source of the material. This Part also hypothesizes that the court's holding was partly in response to changing technology that made wire services more efficient. In addition, this Part discusses how courts have expanded the defense, applying it to news organizations that go beyond acting like Layne's "local screen." For an understanding of why the media would benefit from the defense, it is necessary to examine the elements of defamation and republisher liability.

A. The Elements of Defamation

The elements of the defamation tort vary from case to case depending on several factors: the identities of the parties, the character of the alleged defamatory statement, and the law of the jurisdiction applied to the action. The general elements are, however: "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting to at least negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." The wire service privilege is a powerful tool for the media in battling some defamation lawsuits because of the continued existence of the rule that secondary publishers are subject to the same liability as the original publisher. The common law of libel has long held that a publisher adopts the defamatory comment as its own through republication. This rule, which aims to protect repu-
REPLIER LIABILITY
49. See, e.g., Times Publ'g Co. v. Carlisle Journal Co., 94 F. 762, 766 (8th Cir. 1899).
51. Id. at § 578, comment b; see also Times Publ'g Co., 94 F. at 767 (“[I]t is no justification for the publication of such a libel that another had spoken or written the false charge, and that the libeler simply repeated his statement, and that he gave the name of his informant.”).
52. The wire service defense does not apply differently to public or private figures, making it a tool that allows media defendants to get an early motion for summary judgment since the private/public question, which is often heavily litigated, is not an issue. See Youm, supra note 13, at 688 (reminding media defendants not to overlook a summary judgment motion based on the wire service defense if appropriate).
53. See Nelson v. Associated Press, Inc., 667 F. Supp. 1468, 1484-85 (S.D. Fla. 1987). Nelson could not sue the original publisher, the Associated Press, because she did not give proper notice under Florida statute. Fla. Stat. Ann. § 770.01 (West 1986) required plaintiffs in a civil action brought against the media for libel or slander to notify the defendant specifying the article and the statements that are allegedly defamatory. Nelson, 667 F. Supp. at 1473. Nelson notified the Associated Press that she was filing a defamation suit, but failed to point to the specific defamatory statements in specific press dispatches. Id. The court said that Nelson had that information available, since she sued two other newspapers the following day that reproduced copies of the offending Associated Press story. Id. The Florida statute requires the best notice possible. Id. at 1474. In addition, the wire service defense barred Nelson from recovering from Newsweek, The Miami Herald, and The New York Post. Id. at 1484–85. The court noted that this outcome is “ironic” and recognized that “[t]here is no question but that Plaintiff feels victimized by the nature of these proceedings and this result.” Id. at 1485. “The irony does not ‘smack’ of injustice in the federal courts . . . . The First Amendment, unfortunately [sic] as it may be, does not otherwise protect Plaintiff’s subjective feelings.” Id. “Regardless, the court is adamant that First Amendment protection justifies—and demands—this result.” Id. The decision “must be understood as a price we pay for upholding a Bill of Rights which believes that the truth is best arrived at from ‘uninhibited, robust and wide-open’ comment.” Id.
54. 146 So. 234, 237-38 (Fla. 1933).
55. Id. at 238. But see Okla. Publ’g Co. v. Givens, 67 F.2d 62, 63 (10th Cir. 1933) (affirming a jury award for a woman libeled by an article stating that she was jailed on
FORDHAM URBAN LAW JOURNAL [Vol. XXXI

Tampa Morning Tribune after the paper published two wire stories that said he was indicted for possession of alcohol. The court held that when a newspaper republishes a wire story from a "generally recognized reliable source of daily news," there is no cause of action for defamation unless there is evidence that the publisher "acted in a negligent, reckless, or careless manner in reproducing it." The court likened the republisher to a "local 'screen'" lacking authorship. Later courts ruled that republishers do not have to use the wire service byline, nor are they confined to acting as a local screen, to be afforded the privilege.

While the Layne court recognized that the wire service defense was at odds with the majority common law view of republisher liability, the court justified its decision by relying on policy reasons and the ancient common law "to the effect that one who hears a slander has a legal right to repeat it," in the same words and with attribution. It appears, however, that the Layne court erroneously interpreted the ancient common law. The court extended forgery charges; the court rejected defendant's defense that they should not be liable because they based their article on an Associated Press dispatch.

56. Layne, 146 So. at 235-36. Both stories had a Washington dateline. Id. at 238.
57. Id. at 239.
58. See Nelson v. Associated Press, Inc., 667 F. Supp. 1468, 1482 (S.D. Fla. 1987) (stating that a newspaper does not lose the wire service defense if the article in question does not explicitly carry the wire service byline). In addition, headlines the republisher created that are based on the wire story are only actionable if information is added or subtracted, which would make the headline itself libelous. MacGregor v. Miami Herald Publ'g Co., 119 So. 2d 85, 88 (Fla. Dist. Ct. App. 1960).
59. Layne, 146 So. at 237 (approving of the modern rule that in cases of libel and slander, one who republishes the statement "must be held liable for the publication of a libel or defamatory words in regard to another, even though he is but repeating what he has heard, and names his authority, and although the repetition is made without any design to extend circulation . . ." (citing World Publ'g Co. v. Mullen, 61 N.W. 108, 109 (Neb. 1894)), because one "who repeats a slander or libel is presumed by his reiteration of it, to indorse it and make it his own" (citing Evans v. Smith, 21 Ky. 363, 363 (1827)).
60. Layne, 146 So. at 237-39 (citing Waters v. Jones, 3 Port. 442 (Ala. 1836); Johnson v. St. Louis Dispatch Co., 65 Mo. 539 (1877)). Johnson suggested, without holding, that one who repeated a slander was not liable for slander for repeating the statement if he said it in the same words and attributed the source. 65 Mo. at 541 ("That one heard another make the charge which he repeats, will not screen him unless at the time of repeating the words, he affords the plaintiff a cause of action against the original author."); see also Nelson, 667 F. Supp at 1476 (discussing the ancient common law and allowing slander to be repeated without liability, and concluding that "modern newspapers could not exist without a similar privilege").
61. Id. at 237-39 (citing Waters v. Jones, 3 Port. 442 (Ala. 1836); Johnson v. St. Louis Dispatch Co., 65 Mo. 539 (1877)). Johnson suggested, without holding, that one who repeated a slander was not liable for slander for repeating the statement if he said it in the same words and attributed the source. 65 Mo. at 541 ("That one heard another make the charge which he repeats, will not screen him unless at the time of repeating the words, he affords the plaintiff a cause of action against the original author."); see also Nelson, 667 F. Supp at 1476 (discussing the ancient common law and allowing slander to be repeated without liability, and concluding that "modern newspapers could not exist without a similar privilege").
this erroneous rationale to news organizations, recognizing that "[t]he modern daily newspaper is an institution of news dissemination that was unknown to the early common law," and that judicial notice allowed the court to adjust common law principles to better serve society.63

The Layne court reasoned that adopting a wire service defense would give papers access to news from around the country and the world that would be of interest to their readers.64 Without such a privilege, a newspaper would be forced to verify every news item it published, while "at the same time keep up the prompt daily service expected of present day newspapers."65 Later courts recognizing the defense explained that an obligation of independent verification "would leave only large, wealthy newspapers capable of covering multiple stories and regions."66

Since Layne, courts have added several requirements which a news organization must fulfill to raise the defense:67 the republisher must read the release to make sure there are no inconsistencies;68 the article must not be republished if there are unexplained inconsistencies or if the news organization republishing the article knows the article is false;69 and if a reasonable jury could disagree as to whether something in the article should put the newspaper on notice of a possible inaccuracy, the defense is not available and summary judgment is not appropriate.70

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63. Layne, 146 So. at 238. Courts are not "wholly powerless to remold and reapply the ancient rules so as to fit them to modern conditions, where there has arisen and become involved, new factors of life and business arising from the complexities of a mechanized era of human progress." Id. at 237.

64. See Layne, 146 So. at 237.

65. Id. at 239; see also Nelson, 667 F. Supp. at 1480 ("The wire service defense is fully consistent with the First Amendment—an amendment which tolerates occasional, non-negligent mistakes for the sake of getting out the news people want.").

66. Cole v. Star Tribune, 581 N.W.2d 364, 369 (Minn. Ct. App. 1998) (recognizing the wire service defense in Minnesota and granting summary judgment for papers that relied on a story from The Associated Press "because there is no question that the AP is a reputable news service that provides accurate information").


68. Id. at 740-41.

69. Id.

70. Id. at 742. The decisions, however, lack guidance on what type of information that would be so outrageous as to put the defendant republisher on notice that the story was potentially defamatory. Examples of information that would not put the republisher on notice can be found in Nelson v. Associated Press, Inc., 667 F. Supp. 1468, 1482 (S.D. Fla. 1987) and in O'Brien v. Williamson Daily News, 735 F. Supp.
While using the term wire service defense for consistency, some modern courts have recognized that the defense is actually a definition of the duty a newspaper has when republishing information from a wire service.71 Requiring verification of facts, these courts reason, would impose a standard of extraordinary care, not ordinary care, on the media.72 These courts focus their analysis on the standard of care, not on whether the medium involved can somehow be classified as or identified with a wire service. Whether the information came from a wire can be an element used to evaluate whether a republisher demonstrated ordinary care.

C. Defending the Media, Protecting Technology

Significantly, the Layne court’s decision recognizing the wire service defense appeared shortly after technological advances made news dispatches via the wire quicker and more efficient.73 The invention and widespread use of the teletype system changed news-gathering.74 Prior to the teletype system, the telegraph system transmitted news in the form of dots and dashes, which had to be converted into words.75 Telegraph technology improved marginally since its invention in 1844, and the human element plagued the

218, 225 (E.D. Ky. 1990). The Nelson court said that while the statement “drugs were used and sex was had” is false and arguably defamatory, it was not enough to put The New York Post on notice. Nelson, 661 F. Supp. at 1482. “This is because, admittedly, the Pulitzer trial elicited some of the most preposterous testimony imaginable during the eighteen days it lasted.” Id. In O’Brien, the court rejected the plaintiff’s argument that the paper should have been on notice as to the defamatory nature of the statements because the article contained accusations that teachers were involved in sexual misconduct. 735 F. Supp. at 225.

Allegations of wrongdoing are published nearly every day and involve people world-wide. The plaintiff has offered no authority which holds that the mention of sexual misconduct should automatically require an independent investigation by every newspaper which wishes to publish such a story as transmitted via the AP. The burden would clearly be onerous . . . .

Id.

71. See Howe, 555 N.W.2d at 740-41; see also O’Brien, 735 F. Supp. at 218, 220 (stating that “the so-called ‘defense’ is actually a definition of ordinary care in regard to the use of wire service stories”).

72. See Brown v. Courier Herald Publ’g Co., 700 F. Supp. 534, 537 (S.D. Ga. 1988). Here, the federal district court, sitting in diversity, decided that the Georgia Supreme Court would have applied the wire service defense, pointing to the logic behind the defense and the fact that neighboring states had adopted it. Id.

73. Five years before the Layne court approved the wire service defense, the Associated Press replaced the telegraph with the teletype printer. See Libby Quaid, Morse Was The Source: Telegraph Served AP for Eight Decades, at http://www.ap.org/anniversary/welcome4.html (last visited Nov. 4, 2004).

74. Id.

system's efficiency. Although the more efficient teletype system was introduced in 1914, it was not until the mid-1930's, around the time of the Layne decision, that this new technology was in widespread use for news transmission.

The teletype took the human element out of wire service transmission, thereby increasing its efficiency. Transmitting news via the wire service was "ingressed deeply into the social fabric" by the development of the teletype. Even prior to the advanced technology, the news wires were already an accepted part of society. Increased efficiency and widespread use turned the work of the wire service into a social institution, whose international stories American newspaper readers came to expect. It follows that courts would want to protect a valuable social institution like the wire services and promote their use and growth. In fact, a contrary decision in Layne could have potentially destroyed the wire service industry. Papers fearing traditional republisher liability may have forgone the use of wire news. While it is unknown if papers would have reacted this way, this potential scenario was exactly what the Layne court sought to avoid.

This rationale, however, does not...

76. Id. Although the system could transmit thirty-five words-per-minute, the words were transmitted as dots and dashes which needed to be translated by operators. Id. Errors in translation were frequent. In addition, wire service telegraphers, following the lead of Western Union telegraphers, unionized. Id. During the first fifteen years of the century, the wire service telegraphers fought with management, sometimes striking, in order to secure privileges similar to other telegraphers. Id. This movement impacted transmission efficiency. Id.

77. Id. (stating that the early models of the teletype were not reliable). The teletype "was simply a consolidation of a typewriter mechanism (in both sending and receiving stations) with a device for transmitting electrical impulses along connecting telegraph or telephone wires (or even through the atmosphere by radio)." Id.

78. Id.

79. Id. "The innovation raised transmission rates to sixty words per minute, reduced operator manpower to a single sender for each trunk or regional wire, and permitted reception of a greater volume of cleaner, more uniform, and more immediately usable news copy in the newspaper office." Id.

80. Id. at 88.

81. See generally MENAHEM BLONDHEIM, NEWS OVER THE WIRES: THE TELEGRAPH AND THE FLOW OF PUBLIC INFORMATION IN AMERICA, 1844-1897, at 6 (1994) ("For by the early 1850's at least two columns of Associated Press news appeared daily in nearly every major American newspaper.").

82. See SCHWARZLOSE, supra note 75, at 202-05, 339 (arguing that the wire services attained "the position of a social institution in the United States"). "In fact, this status increasingly appears also to accrue to them abroad by virtue of their increasing ingestion into the communication processes of foreign societies." Id. at 203.

83. See Layne v. Tribune Co., 146 So. 234, 239 (Fla. 1933) ("To hold otherwise would mean that newspapers at their peril published purported items of news, against the falsity of which no ordinary human foresight could effectually guard and at the
explain why the defense became popular in recent years, with courts opting to apply the defense more liberally.

D. Broadening the Scope of the Defense

The Layne court provided the justification for the wire service defense, but left many questions open for subsequent courts, including when the defense should apply and what the relevant standard of care should be. Courts since Layne have continued to recognize that the defense facilitates the quick dissemination of news, but many courts have rejected applying the defense only to breaking news. While the Layne court referred to the republishing newspaper as a "local" media outlet, the court did not define the term "local." Later courts expanded the notion of the republisher to include national media organizations. In addition, subsequent courts have further clarified the threshold the media has to meet in order to invoke the defense.

Courts since Layne have been clear that the application of the wire service defense does not turn on whether the republished report is breaking news, or if the republisher theoretically could have covered the story on its own without hardship. Almost fifty years after Layne, the Massachusetts Supreme Court in Appleby v. Daily Hampshire Gazette ruled that the wire service defense applied even when the news reported was breaking and did not take place in a remote location. In Appleby, a convicted felon sued various newspapers in ninety-four actions, claiming that they defamed him in reporting information related to a criminal investigation of which he was the subject. Thirty-three of the papers filed
for summary judgment were based on the wire service defense. The Appleby court ruled in favor of summary judgment using the same rationales as the Layne court, even though the papers in Appleby were Massachusetts-based and were published not far from Appleby's Massachusetts home, the setting of the stories. The Appleby court reasoned that making a distinction between local stories and remote stories "would impose the same risks of 'apprehensive self-censorship,' as would the requirement that newspapers corroborate all wire service stories before publication." In addition, the court rejected the "local screen" rationale from Layne and extended the defense to include stories that were not republished verbatim, but which instead accurately restated the substance of the wire service stories.

While the Layne court did not expressly limit the defense to newspapers, it did not specifically authorize its application to other news sources. Subsequent courts, however, have extended the defense to television networks and magazines. One court even suggested that the defense could be extended to radio broadcasts. The Nelson court allowed Newsweek, a national news-

94. Id. The lower court granted summary judgment in favor of four papers that were representative of the others and delayed ruling on the rest to save time and money until appeals were exhausted in the four test cases. Id.

95. Id. at 726. The four papers were The Medford Daily Mercury, The Boston Globe, The Daily Hampshire Gazette, and The Holyoke Transcript-Telegram. The Medford Daily Mercury republished stories verbatim from the United Press International, while the rest of the papers republished stories verbatim from The Associated Press. Id. at 723.

96. Id. at 726 (quoting Stone v. Essex County Newspapers, Inc., 330 N.E.2d 161, 169 (Mass. 1975)).

97. Id. (stating that there is no difference between reprinting verbatim and accurately restating a wire story's contents).


100. See Brown v. Courier Herald Publ'g Co., 700 F. Supp. 534, 538 n.2 (S.D. Ga. 1988) (stating that the court suspected that the radio station defendant would be granted summary judgment based on the defense should he decide to submit a motion to the Court).
weekly, to successfully assert the defense because periodicals "obviously must rely for their sources of information upon other reliable periodicals, newspapers and wire service reports."101 The court further justified the extension, adding that "[t]hese periodicals are an integral part of today's news information services."102 It should be noted, however, that there is still a question as to whether Layne should be extended to other media. While some courts have applied the wire service defense to other mediums, none have discussed whether there are limits as to what type of medium the defense could be extended to cover. Some courts have taken the reasoning of the wire service defense and applied it to protect the wire service when it disseminates member-created work, rather than that of the wire service reporters.103

E. Protecting the Wire: The Reverse Wire Service Defense

The same reasoning behind protecting republishers who rely on news wires has been used to protect "reputable news services" like The Associated Press under a "reverse wire service defense."104 A reverse wire service defense allows a wire service to escape liability for defamation if the story it distributed was the work of a reputable news source instead of the wire service's own reporter.105 In this situation, the wire service would not have the duty to independently verify the facts of the story, and could raise the defense as long as it did not know or have reason to know that the material was defamatory.106

Recently, the Massachusetts Appeals Court, in Reilly v. Associated Press,107 upheld summary judgment in favor of The Associated Press, holding that the wire service had no independent duty to verify the facts of a story before disseminating it when the story came from a reputable source and had nothing on its face to indicate that it was defamatory.108 In Reilly, the wire service distributed an allegedly defamatory story from The Boston Herald about

102. Id.
103. See infra notes 104-16 and accompanying text.
105. Reilly, 797 N.E.2d at 1217.
106. Id.
107. Id. at 1217-18.
108. Id. at 1218. But see Mehau, 658 P.2d at 322 (holding that defendant UPI could not rely on the reverse wire service defense when picking up a story from a new
a veterinarian under disciplinary investigation for negligent practice and the paper disseminated a condensed version of the story to Associated Press members.\textsuperscript{109} The court ruled that the reasoning behind the wire service defense applied to the situation here provided that the elements needed to raise the privilege were met.\textsuperscript{110}

The \textit{Reilly} court recognized that newspapers and wire services have a "symbiotic" relationship and must be able to trust each other to disseminate news effectively.\textsuperscript{111} While one of the rationales underlying \textit{Layne v. Tribune Co.} was to allow smaller, resource-poor publications to publish news outside their communities without the fear of liability,\textsuperscript{112} the court in \textit{Reilly} decided that the ability to disseminate the news, rather than the resources available to a particular news organization, justifies the reverse defense.\textsuperscript{113} It would be difficult to rely solely on \textit{Layne}'s justifications to defend applying the defense to large, well-funded news cooperatives like The Associated Press.\textsuperscript{114}

In addition, the \textit{Reilly} court, like many courts examining the standard wire service defense, refused to draw a distinction that would allow the defense to be raised in regard to "fast-breaking" national and international news, but not "local, human interest or news features, arguably concerning 'lesser' events."\textsuperscript{115} The court justified this rejection, saying that it would be an "impermissible burden" on the media and the courts to identify these "subtle distinctions."\textsuperscript{116} Further, like media asserting the traditional privilege,

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\textsuperscript{109} Reilly, 797 N.E.2d at 1209. The court reversed summary judgment in favor of The Boston Herald, finding that there were genuine issues of material fact as to whether Reilly negligently treated the animal in question. \textit{Id.} at 1218.

\textsuperscript{110} See \textit{id.} at 1217 (quoting Appleby v. Daily Hampshire Gazette, 478 N.E.2d 721, 725 (Mass. 1985)).

\textsuperscript{111} See \textit{id.}

\textsuperscript{112} 146 So. 234, 239 (Fla. 1933); \textit{see also} Mehau, 658 P.2d at 323 (pointing out that should the court not apply the wire service defense, the paper "may be reduced to an organ reporting news of Hilo and the Big Island").

\textsuperscript{113} 797 N.E.2d at 1217 (concluding that "[w]hile the AP's resources may be greater than a small local newspaper's, it cannot afford to verify every news item originating from every one of its member publications and still disseminate news promptly"); \textit{see also} Nelson v. Associated Press, Inc., 667 F. Supp. 1468, 1476-77 (S.D. Fla. 1987) (holding that Newsweek was entitled to a wire service defense regardless of the fact that it was a large, national, weekly publication.)

\textsuperscript{114} The Associated Press has 242 bureaus and a budgeted revenue of more than $500 million. \textit{See} Associated Press, Facts & Figures, \textit{at} http://www.ap.org/pages/aptoday/about/about.html (last visited Nov. 3, 2004).

\textsuperscript{115} 797 N.E.2d at 1217.

\textsuperscript{116} \textit{Id.}
wire services looking for protection under a reverse wire service defense must show that they relied on a trustworthy source.

F. Determining Who Is a Reliable Source

Papers can raise the wire service defense even if they did not rely on a wire service itself, but instead relied on other local papers that republished wire copy.\textsuperscript{117} In \textit{McKinney v. Avery Journal, Inc.},\textsuperscript{118} the defendant newspaper editor relied on information from at least five area newspapers when writing a story.\textsuperscript{119} The papers upon which the editor relied were state papers that were arguably local papers since none of them had a national circulation, and some did not even circulate throughout the state.\textsuperscript{120} In \textit{McKinney}, however, the court found that "[t]he sources relied upon . . . are known for their accuracy and are regularly relied upon by local newspapers without independent verification."\textsuperscript{121} Thus, smaller papers have the privilege of relying upon their larger counterparts.

Arguably, the court in \textit{McKinney} created a hierarchy that defined "local" in relation to the size of the party that wrote the original story and the party that relied upon it. For example, the North Carolina Press Association classifies the Avery Journal as a community newspaper, while the papers it relied upon are all classified as daily newspapers.\textsuperscript{122} Although the court did not mention this distinction, it seems that the local requirement articulated in \textit{Layne} is not uniform, but instead is evaluated based on how the republishing paper relates in size and scope to the medium upon which it relied.

Expanding the definition of a reliable source is also illustrated in \textit{Gay v. Williams},\textsuperscript{123} where the Alaska district court applied the principles of the wire service defense without explicitly mentioning

\begin{footnotes}
\footnotetext{117}{See McKinney v. Avery Journal, Inc., 393 S.E.2d 295, 297 (N.C. Ct. App. 1990). Arguably, media organizations that raise the defense do not have to be subscribers of the news wire. \textit{See id.}}
\footnotetext{118}{\textit{Id.}}
\footnotetext{120}{See N. Carolina Press Ass’n, \textit{NCPA Member Newspapers}, at http://www.ncpress.com/membersbytown.html (last visited Nov. 2, 2004).}
\footnotetext{121}{\textit{McKinney}, 393 S.E.2d at 297.}
\footnotetext{122}{See N. Carolina Press Ass’n, \textit{supra} note 120.}
\footnotetext{123}{486 F. Supp. 12 (D. Alaska 1979). While the Alaska court did not invoke the wire service defense by name, it ruled that neither the wire service nor the local newspaper could be held liable for reasonably relying on IRE’s published report. \textit{Id.} at 16-17.}
\end{footnotes}
it by name. The court granted summary judgment based on the logic of the wire service defense in favor of a local newspaper that relied upon an Associated Press story. The court also dismissed the Associated Press from the action because its story was a summary of a report from Investigative Reporters and Editors, Inc. ("IRE"). The IRE story reported allegations that Gay was involved with drug smuggling. The Associated Press reporter assigned to write stories about the IRE reports chose not to feature the story written about Gay. At the request of one of the Alaska member papers, however, the Associated Press wrote and disseminated a story that included the allegations against Gay. The court granted summary judgment in favor of The Associated Press, despite the plaintiff’s claim that IRE was not a reputable news source on which the wire should reasonably rely. IRE was only formed two years before the articles in question were published, which suggests that longevity is not a major factor in deter-

124. Id.
125. Id. The court accepted the newspaper’s argument that if they did not have the ability to rely on The Associated Press as a reliable source of news, then they would only be able to publish local news. Id.
126. Id. at 13. According to IRE’s website, the group, founded two years before the stories in Gay were written, is a grassroots nonprofit organization dedicated to improving the quality of investigative reporting. See IRE, History of IRE, at http://www.ire.org/history (last visited Nov. 3, 2004). The AP did not conduct its own investigation about the facts in the IRE stories. Gay, 486 F. Supp. at 17.
127. Gay, 486 F. Supp. at 13. Journalists from around the country participated in IRE’s Arizona Project to investigate organized crime in Arizona after the death of Don Bolles, an investigative reporter for the Arizona Republic, who was killed by a bomb in 1976 on his way to meet an informant. Id. “The stories stated that ‘published accounts of a series by a team of investigative reporters’ say that Gay, ‘a wealthy Alaskan bush pilot and owner of a small Arizona boarder town,’ was a ‘mystery man of the Arizona drug corridor,’ and that the town owned by Gay is a ‘major crossing point for drug smugglers.’” Id. at 14.
128. Id. at 17.
129. Id. The Ketchikan Daily News and Southeast Alaska Empire both published the Associated Press story in question. Id. at 16.
130. Id. at 17. The court said that the fact that many newspapers around the country refused to cover the IRE stories, especially the one about Gay, did not mean that the stories were unreliable. Id. The court also said that Gay failed to show that The AP should have questioned the IRE’s reliability. Id. In addition, the court dismissed stories from The Chicago Tribune and The Los Angeles Times that were critical of IRE’s methods, reasoning that the stories were published after the Gay story was published, and that they did not pertain to The Associated Press’s “knowledge at the time of publication.” Id.
mining reliability.\textsuperscript{131} Other courts, however, have suggested that longevity is indeed a factor in evaluating reliability.\textsuperscript{132}

\section*{G. Limits to the Wire Service Defense}

In addition to the nature of the source relied upon, other factors limit the applicability of the wire service defense. While it is not necessary for republished text to mirror the wire service text verbatim,\textsuperscript{133} adding further substantial material may bar the defense.\textsuperscript{134} In \textit{O'Brien v. Williamson Daily News},\textsuperscript{135} the wire service defense protected all but one of the newspaper defendants that republished an Associated Press story about a school meeting. Parents of high school students called the meeting in response to the expulsion of a student who fought with a teacher.\textsuperscript{136} The media organizations reported that during the meeting, parents also requested that the administration investigate allegations of teachers having affairs with students.\textsuperscript{137} The Associated Press story reported that while none of the speakers linked the fight between the expelled student and the teacher to the allegations of sexual misconduct, "most [of the parents] referred to 'allegations' and 'charges' surrounding the [fight] that could prove harmful to a teacher's career."\textsuperscript{138} The teacher involved in the fight sued for defamation because of the implication that the reason the male student attacked him was because he was having an affair with a female student.\textsuperscript{139}

The \textit{O'Brien} court ruled that the wire service defense was not applicable to the Williamson Daily News because the reporter added a paragraph at the end of the Associated Press report that raised a negligence issue.\textsuperscript{140} The lesson from cases subsequent to \textit{O'Brien} is that strict adherence to the factual essence of the wire

\textsuperscript{131} See IRE, \textit{supra} note 126.

\textsuperscript{132} See Mehau v. Gannett Pac. Corp., 658 P.2d 312, 317 (Haw. 1983) (referring to one of the media defendants as a tabloid without a "track record" for reliability).


\textsuperscript{135} \textit{Id.}

\textsuperscript{136} \textit{Id.} at 221-22, 225.

\textsuperscript{137} \textit{Id.} at 221-22.

\textsuperscript{138} \textit{Id.} at 224.

\textsuperscript{139} \textit{Id.} at 225.

\textsuperscript{140} \textit{Id.} at 224. The additional paragraph stated, "[Phelps High School principal] \textit{O'Brien} said last week that if 'something was going on, I want to stop it.'... \textit{O'Brien} confirmed that he had received a complaint against [the teacher involved in the fight] from a 17-year-old female who is a senior at the school, but that she was not accompanied by a parent." \textit{Id.} (alteration in original).
service story is necessary to benefit from the defense's liability shield.\footnote{141} In addition, to successfully assert the defense, journalists must be able to point to the exact article upon which they relied.\footnote{142} The Jewell court stated that the wire service defense was not applicable to reporters who, in their affidavits, said they relied on wire service and televised reports but who could not point to the precise reports that they used.\footnote{143} The court rejected the defendant's argument that the reason the reporters could not identify the precise wire report was because more than a year had passed between the time they relied on the reports and when their affidavits were taken.\footnote{144} The result of this candid admission was a denial of a summary judgment motion based on New York's broader republication privilege.\footnote{145} The court reasoned that since the defendants could not point precisely to the articles upon which they relied, they could not estab-
lish that they did not have substantial reason to question the accuracy of the Associated Press reports.\textsuperscript{146}

II. A DIFFERENT APPROACH TO REPUBLISHER LIABILITY

This Part discusses New York's qualified privilege for republishers as an alternative to the wire service defense.\textsuperscript{147} While the New York privilege is similar in many ways to the wire service defense, the New York privilege substantially broadens the shield for republishers.\textsuperscript{148} This approach is broader because its protection is not limited to media organizations; instead, it also allows non-traditional media entities like public relations companies to successfully invoke the privilege when they rely on clients as reliable sources when preparing press releases.\textsuperscript{149}

A. New York's Approach to Republisher Liability

New York offers a qualified privilege to all republishers, regardless of whether a wire service is involved. Republisher liability in New York does not hinge on whether or not news passes over a wire.\textsuperscript{150} Instead, in cases involving private figures and matters of public concern,\textsuperscript{151} New York plaintiffs must show that the republisher acted "in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."\textsuperscript{152} This qualified privilege is granted to republishers in New York who have no reason to question the accuracy of the article or the good faith of the reporter.\textsuperscript{153} When evaluating the republisher's behavior, New York courts also consider whether the publication fol-

\textsuperscript{146} See id.
\textsuperscript{147} See infra notes 147-71 and accompanying text.
\textsuperscript{149} See id.
\textsuperscript{151} New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964), defined the actual malice standard when dealing with public figures. To act with actual malice means one must have knowledge that a story is false or act with reckless disregard as to whether it was false or not. Id.
\textsuperscript{152} Tzougrakis, 145 F. Supp. 2d at 329 (noting that while the grossly negligent standard was initially used for media defendants, it has been applied to non-media defendants); see also Chapadeau v. Utica Observer-Dispatch, Inc., 341 N.E.2d 569, 571-72 (N.Y. 1975) (holding that getting information from two authoritative sources and having two editors check the reporter's work did not illustrate grossly negligent behavior).
\textsuperscript{153} See Zetes, 447 N.Y.S.2d at 779; see also Rinaldi v. Holt, Rinehart & Winston, Inc., 366 N.E.2d 1299, 1307 (N.Y. 1977) (holding that a book publisher could rely on
lowed "sound journalistic practices" in republishing the material, and whether it adhered to "normal procedures," including editorial review of the copy."\textsuperscript{154}

\textit{Zetes v. Richman} was the first New York case to apply this qualified privilege to a situation involving republication from a wire service story.\textsuperscript{155} There, the defendant, Tonawanda Publishing Corp., appealed from a denial of summary judgment. Tonawanda claimed it could not be held liable for defamation for republishing a United Press International story reporting that the plaintiff was selling defective souvenir pennies commemorating the 1980 Winter Olympics in Lake Placid.\textsuperscript{156} The court granted summary judgment in Tonawanda's favor because the plaintiff failed to show that Tonawanda had reason to question either the accuracy of United Press International, or the "bona fides" of the sports editor who wrote the story.\textsuperscript{157} \textit{Zetes} did not mention the possibility of the wire service defense, even though courts in other jurisdictions had already adopted the defense.\textsuperscript{158} The strict common law standard of republisher liability is only valid in cases where the elements of New York's qualified privilege are not met.

\section*{B. The Privilege Is Not Limited to Traditional Media Organizations}

Over time, New York's qualified privilege to republish developed into a more inclusive privilege than the wire service defense. In \textit{Tzougrakis v. Cyveillance Inc.},\textsuperscript{159} the plaintiff, the owner of an online designer retail site, www.offtherunway.com, sued Cyveillance, the magazine Inter@ctive, and PR Newswire after it included her business in a story about websites that sell counterfeit designer goods.\textsuperscript{160} The article was based on a press release that defendant PR Newswire transmitted to Inter@ctive\textsuperscript{161} from Cyveillance, a

\textsuperscript{154} See \textit{Tzougrakis}, 145 F. Supp. 2d at 330 (quoting Chaiken v. VV Publ'g Corp., 119 F.3d 1018, 1031 (2d Cir. 1997)).
\textsuperscript{155} See 447 N.Y.S.2d at 779.
\textsuperscript{156} Id.
\textsuperscript{157} See id.
\textsuperscript{158} See Jewell v. NYP Holdings, 23 F. Supp. 2d 348, 370 (S.D.N.Y. 1998) (noting that the defense had never before been mentioned in a New York opinion). The defense, however, had been recognized sixty-five years earlier in Florida. See \textit{Layne v. Tribune Co.}, 146 So. 234, 237 (Fla. 1933).
\textsuperscript{159} 145 F. Supp. 2d at 325.
\textsuperscript{160} Id.
\textsuperscript{161} Ziff Davis, Inc., who was named in the lawsuit, owned Inter@ctive. \textit{Id.}
company that conducts investigations of internet sites that sell counterfeit goods or real products sold without the permission of the designer.\textsuperscript{162} The court granted summary judgment for PR Newswire, reasoning that the plaintiff could not establish that PR Newswire was grossly irresponsible.\textsuperscript{163} The court held that PR Newswire could reasonably rely on information that its client, Cyveillance, provided.\textsuperscript{164} PR Newswire knew the nature of Cyveillance's business, and the press release that it received was related to that subject.\textsuperscript{165} In addition, "the source of the [press release] had previously provided accurate information and there were no facts which should have aroused the suspicions of Newswire or that would give cause for further inquiry."\textsuperscript{166} While Cyveillance was not a traditional media outlet, PR Newswire still had the privilege to rely on the company's information.

In \textit{Tzougrakis}, the court erred on the side of calling a source reputable until it proved otherwise, establishing a presumption of reliability. PR Newswire had only received two other press releases from Cyveillance prior to the one in question.\textsuperscript{167} Apparently, a minimum showing—two prior press releases that did not prompt any allegations of libel—was enough for a republisher to consider a source reliable.\textsuperscript{168} This standard allows republishers much more protection than the wire service defense, where republishers can only rely on publications with a substantial track record establishing credibility.

The \textit{Cyveillance} court also granted summary judgment in favor of Inter@ctive because the plaintiff could not prove that the magazine acted grossly irresponsible.\textsuperscript{169} The reasoning here was based heavily on the credentials and actions of the reporter involved.\textsuperscript{170}

\textsuperscript{162} \textit{Tzougrakis}, 145 F. Supp. 2d at 327.
\textsuperscript{163} \textit{Id.} at 332. Defendant PR Newswire claimed that it could not be held liable for republication because it was more like a distributor, such as a telegraph company or a printer, which would require a showing of actual knowledge of the statement's defamatory nature in order for PR Newswire to be liable. \textit{Id.} But, the court pointed out that PR Newswire had editorial control over the press release and formatted it before distribution, which would make them more than a distributor. \textit{Id.} The court did not rule on whether PR Newswire was a distributor or a publisher because neither would affect the outcome with regard to PR Newswire. \textit{Id.}
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{See id.}
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Id.}
\textsuperscript{168} \textit{Id.}
\textsuperscript{169} \textit{Id.}
\textsuperscript{170} \textit{Id.} at 328.
The court noted that the reporter had fifteen years experience\textsuperscript{171} and that she conducted "an adequate investigation of the facts received"\textsuperscript{172} in the press release.

If New York adopted the strict interpretation of the wire service defense instead of its broader republisher qualified privilege, it is likely that neither Inter@ctive nor PR Newswire would have been able to take advantage of the defense. The issue would be whether the original publishers qualified as a traditional, reputable source of daily news. Arguably, a company sending out press releases or its client would fail to meet that standard because their primary goal is to sell a product, not disseminate news.

The elements of the wire service defense and New York's qualified privilege for republication are similar, except for the former's requirement that the information relied upon come from a wire or similar source of daily news. But, even that requirement of the wire service defense has been relaxed over the years. Many cases illustrate that the trend is to make the wire service defense more inclusive, with courts applying it to magazines, television stations,\textsuperscript{173} and possibly radio.\textsuperscript{174} This suggests that there may not be any justification for restricting the privilege to republish to certain types of media. All of these modifications imply that the traditional justifications should be replaced in favor of a rule that allows republication without liability for libel in the absence of actual malice.\textsuperscript{175}

\textsuperscript{171} Id.
\textsuperscript{172} Id. at 332.

Although [the reporter] did not actually speak with offtherunway.com, the site had no direct contact information posted. [The reporter] also was unable to discover any contact information after performing a sufficiently diligent search. It is undisputed that [the reporter] attempted to use the email link provided by offtherunway.com but that the link did not work. Furthermore, absent obvious reasons to doubt the truth of the article, Ziff-Davis was entitled to rely on . . . a trusted reporter's representations without rechecking her assertions or retracing her sources.\textsuperscript{173}


\textsuperscript{174} See Brown v. Courier Herald Publ'g Co., 700 F. Supp. 534, 538 (S.D. Ga. 1988). In footnote 2, the court "suspects" that the radio station defendant would be granted summary judgment based on the defense should he decide to submit a motion to the Court. \textit{Id.} at 538 n.2.

\textsuperscript{175} See \textit{infra} notes 178-232.
III. REWORKING REPUBLISHER LIABILITY FOR LIBEL

Before arguing that libel law should immunize republication in the absence of actual malice, Part III examines problems which make both the traditional wire service defense and New York's approach inadequate. This Part concludes that while the New York qualified privilege starts to address the shortcomings of the wire service defense, the New York approach does not go far enough. Part III also discusses how Congress has limited traditional republication liability for Internet service providers, which illustrates that republisher liability is unsuitable in modern times. This Part then argues that there should be a presumption against holding republicers liable, which can be overcome only if the plaintiff shows actual malice. First, Part III.A discusses and dismisses a general critique of the negative impact republication could have on the marketplace of ideas.

A. General Critique of Immunizing Republication

Critics may argue that allowing media organizations to rely on each other could have the effect of stifling the marketplace of ideas. The court in United States v. Associated Press pointed out just how important the marketplace of ideas is to First Amendment jurisprudence. There, the court noted that the newspaper industry "serves one of the most vital of all general interests: The dissemination of news from as many different facets and colors as is possible." If a media outlet knows that it will be shielded from liability if it acts as a mere conduit of news, there is less of an incentive to find the facts on its own and construct its own story. Theoretically, one less voice on a subject creates less of a chance that the truth is reported.

The stronger argument, however, is that rather than adversely affecting the market place of ideas, changing the traditional repub-

176. See infra notes 191-208.
177. See infra notes 209-12 and accompanying text.
178. See infra notes 213-20 and accompanying text.
179. See infra notes 180-90 and accompanying text.
180. See JOHN STUART MILL, ON LIBERTY 15-52 (Hackett Publ'g ed., 1978) (1859). Mill argued that citizens must be free to espouse false speech in order for the truth to be discovered. Id.
183. See MILL, supra note 180.
lication rule will actually increase the flow of news. First, it strains credulity to believe that a substantial number of journalists will forego opportunities to report and write stories on their own and instead rely increasingly on another published report. Scooping the competition is often what personally drives journalists to produce their own stories. In addition, pressure from editors to beat the competition, or at least produce the same quality story as the competition, makes it highly unlikely that the quality of journalism would suffer should the republication rule be repealed. Using attributed work would likely only happen when resources impede a media organization's attempt to report its own story.

In addition, seventy-five percent of entry-level daily newspaper journalists in the 1990s graduated from a college program in media or mass communications, despite the fact that, unlike doctors or lawyers, there is no professional degree required to become a journalist. The high rate of journalists educated specifically in communications severely undermines an argument that many journalists would rely on published work rather than reporting a story on their own. Students of journalism who have paid thousands of dollars for their degrees and are serious about entering the profession are unlikely to envision themselves as stenographers.

B. Problems with the Wire Service Defense

Media ownership, like the degree of journalists' education, has changed tremendously in recent years. Thus, a limited republication defense like the wire service privilege makes less sense in today's society as compared with the time when the common law

186. Id. at 225 (quoting a journalist who indicated that breaking news was a factor for evaluating a journalist's best work).
187. See generally David J. Krajicek, Scooped! (1988). Krajicek recounts the pressure of having to chase a story after it appeared in a rival New York City newspaper. Id. at 1-5.
188. See Weaver & Wilhoit, supra note 185, at 32-33.
189. Id. The number of journalism departments and schools has doubled from 200 in 1972 to 413 in 1992. Id. at 30-31.
190. See June Kronholz, College Costs Play on Stump: Candidates Offer Promises to Needy Students, But No Solutions, WALL ST. J., Feb. 4, 2004 at A4. In 2004, the average cost for tuition and room and board at a public university was $10,636. Id.
republication rule was first articulated. The number of family newspapers has severely declined, as they have been absorbed into media conglomerates. For example, in 2002 Gannett Corp. owned ninety-four daily community newspapers around the country with a paid circulation of 7.6 million. Gannett also owns a wire service that allows its papers around the country to share news. Many other media conglomerates also own a wire service. Therefore, small newspapers do not enjoy the same benefit of the wire service defense.

A major problem with the wire service defense in this context is that, in terms of defamation liability, it treats the reporting of media conglomerates as a single publication, giving them a benefit similar to the single publication rule. The single publication rule states that "[a]ny one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication," and a publisher can only be held liable once. Thus, a media defendant could not be sued twice for defamation if a statement appeared in its morning and afternoon editions. In situations where the re-publishing newspaper is part of a large chain with a wire service,
the work of a single entity in the company is treated similarly to a single publication across the company when the wire service defense is applied. Smaller media companies and family-owned operations that lack a wire service do not receive a similar benefit. There is no reason to believe that news that passes over a wire is more reliable and more worthy of dissemination and protection than news that is republished without going out over a wire. Courts, however, have ignored this changing landscape and have often relied on seventy-year-old justifications of the defense.\textsuperscript{198}

In addition, courts have not hinted at why the wire service, as a conduit of news, warrants protection. Their decisions give little guidance on this point, only stating that it is important to allow the free dissemination of news so local media are not forced to report only on the events in their geographical area.\textsuperscript{199} None of the wire service decisions discuss why news transmitted over the wire deserves preferential treatment with regard to republisher liability. While protectionism may have been an impetus for creating the wire service defense,\textsuperscript{200} it does not answer the question of why more modern courts continue to apply it. Interestingly, the majority of states that recognize the defense first did so in the past twenty years,\textsuperscript{201} when the wire services were already an established social institution that arguably no longer needed protection.\textsuperscript{202} The proliferation of the defense illustrates the importance that the ability to republish information has in our society.

There is no justification for limiting republisher liability to instances where the original material passes through a news wire. While the imagery of the wire lends itself well to analogizing republishers to mere conduits\textsuperscript{203} of information, the wire is not the only credible way to relay news without taking ownership of its creation. Instead of limiting republisher liability with the wire ser-

\textsuperscript{198} See \textit{supra} note 84 and accompanying text.


\textsuperscript{200} See \textit{supra} notes 173-83 and accompanying text.


\textsuperscript{202} See \textit{supra} note 82.

vice defense, courts should eliminate the old common law liability for republication. The power of a privilege like the wire service defense is no match for the traditional republication rule when it comes to chilling speech. Although media defendants overwhelmingly win defamation lawsuits, the threat of litigation often significantly impacts publication decisions, thereby chilling speech.

In addition, the recent move of courts to recognize the reverse wire service defense illustrates the expansion of limited liability. This absolves republishers from liability for republishing material that first appeared in a newspaper, as long as that material passed through the wire. If the reverse defense were not created, the traditional common law standard of liability would apply. Courts justify the reverse wire service defense saying, "[t]he responsibility for accurate, nondefamatory reporting lies with the newspaper that published the original story, not the wire service that ‘demonstrated ordinary care in preparing and transmitting the article.'" A showing of ordinary care should also absolve from liability any publication that takes material from another publication and republishes it with attribution.

C. Why the New York Approach Is Not the Right Answer

While the New York privilege is broader in scope than the approach taken by jurisdictions using the wire service defense, New York’s qualified privilege also fails to go far enough. First, the privilege effectively allows courts to create a hierarchy of what types of publications are reliable sources. While the court in Tzougrakis was quite liberal in deciding what constituted a reliable source, they concluded that the chilling effect is "significant". 

204. See generally Boies, supra note 184, at 1297 (discussing the great impact of possible litigation on the media’s publication decisions, and concluding that the chilling effect is “significant”). “[L]itigation] is also expensive for the defamation defendant, and that discourages some in the media from undertaking stories (or undertaking approaches to stories) they know may engender litigation, whether they believe they can actually win that litigation.” Id. Boise argues that to counter the chilling effect, courts should consider applying the English fee-shifting rule to defamation cases. Id. at 1212.

205. See id.

206. See supra notes 104-16 and accompanying text.


208. Winn, 903 F. Supp. at 579. “[T]he wire service defense is available where, as here, a news organization reproduces an apparently accurate article by a reputable publisher, without substantial change and without actual knowledge of its falsity.” Id.

source, there is uncertainty as to how other judges would define the concept of reliability.

This Comment argues that it is irrelevant whether or not the court believes the initial publisher was reliable. The real question is whether or not the republisher published the work with the actual malice—knowledge that there were factual errors or acting with reckless disregard of the truth of falsity of the facts alleged. Instead of looking to courts to determine which publications are reliable, media organizations should make this determination for themselves. If a media organization is going to republish with attribution something appearing in another publication, they are subtly aligning their credibility with that of the other publication. Therefore, should the initial publisher be an unreliable source, it is unlikely that the republisher will rely on that source since the republisher will not want to tarnish its own reputation. The focus must be on the behavior of the republisher.

Another problematic issue in regard to the New York approach is the court's inquiry into whether or not sound journalistic practices were followed. There are no objective criteria that help a court make that determination. It is true that courts routinely make similar determinations with the help of expert witnesses. It is troublesome, however, to have courts involved in fashioning proper journalistic standards when one of the main functions of journalists are to keep the branches of government, including the judiciary, accountable for their actions.

D. Congressional Action Illustrates that Republisher Liability Is Incompatible with Society's Information Needs

Congressional action with respect to republishers on the Internet illustrates the fact that neither the wire service defense nor New York's "grossly negligent" standard is adequate. While courts had ruled that Internet service providers had First Amendment

210. Id.
211. Id.
212. See New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring) (arguing that the Constitution protects press so it can "bare the secrets of government and inform the people").
213. The legislature apparently did not feel that the courts were doing enough to protect Internet speech. After Stratton Oakmont v. Prodigy, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), the legislature overruled the decision by passing the Communications Decency Act of 1996, 47 U.S.C. § 230 (2004). The act says that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The act states that
it is the policy of the United States: (1) to promote the continued development of the Internet and other interactive computer services and other interactive media; (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation; (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking and harassment by means of computer.

214. In Stern v. Delphi Internet Services, 26 N.Y.S.2d 694 (1995), radio personality Howard Stern sued the electronic bulletin board owner after it advertised its service, which included a bulletin board to discuss Stern's candidacy for governor, using Stern's picture. Delphi had been in business for eleven years and had more than 100,000 subscribers. The computer network offered three types of information: hard information, such as news and stock quotes, computer games, and interactive features like bulletin boards and e-mail. Id. at 696. Here, the court was faced with the novel issue of whether an Internet service provider should be given First Amendment protection and be afforded the incidental use exception. Id. at 697. The incidental use exception was established in Humiston v. Universal Film Manufacturing, 189 App. Div. 467, 476 (N.Y. App. Div. 1919). Stern, 26 N.Y.S.2d at 697. In Humiston, the court "held that a news disseminator was entitled to display the name and photograph of a woman who was the subject of the defendant's newsreel for the purposes of attracting and selling the film." Id. at 697-98 (quoting Humiston, 189 App. Div. at 476). "Affording protection to on-line computer services when they are engaged in traditional news dissemination, such as in this case, is the desirable and required result." Stern, 626 N.Y.S.2d at 698; see also Cubby v. CompuServe, Inc., 776 F. Supp. 135, 140-41 (S.D.N.Y. 1991) (analogizing plaintiff's role as an online bulletin board host to that of a news distributor, not publisher). The court held that Delphi was an online distributor comparable to a news vender, bookstore or library, thereby allowing it to benefit from First Amendment protection. Stern, 626 N.Y.S.2d at 697. When faced with new technology the courts applied traditional defamation principles to both the wire service and the Internet in order to allow the free flow of news and avoid a chilling effect. Id.; see also Nelson v. Associated Press, 667 F. Supp. 1468, 1485 (S.D. Fla. 1987).

215. In Prodigy, 1995 WL 323710, the court held that Prodigy was liable for defamatory messages posted on its bulletin board because the service held itself out as a family-oriented online service that edited content. In addition, Prodigy sometimes edited inappropriate content, and substantially changed posted messages. Id. at *6. The court stated that it agreed with holdings in Cubby, 776 F. Supp. at 144, and Auvil v. CBS, 800 F. Supp. 928, 931 (E.D. Wash. 1992) (holding that a television affiliate is not liable for defamation if the program came from the network because it is consistent with the general rule that there is no "conduit liability" in the absence of fault). What distinguished Prodigy from these cases is "Prodigy's own policies, technology and staffing decision which have altered the scenario and mandated the finding that it is a publisher." Prodigy, 1995 WL 323710, at *5.
Congress passed the Communications Decency Act of 1996, giving Internet service providers virtual immunity from republication liability regardless of the credibility of their source. History has shown that when traditional republication rules threaten the expansion of technology with a potential for increasing news dissemination, either progressive judges or Congress will become involved.

E. Talebearers Should Not be Treated as Talemakers

This Comment argues that the proliferation of the wire service defense and Congressional action to protect Internet republishers demonstrates that the traditional rule holding republishers liable for defamation should be replaced with a new approach. Under this new approach, republishers would be entitled to republish material so long as they did not act with actual malice, knowing the material was defamatory, or acting with a reckless disregard for the truth. In addition, the republisher could not materially change the meaning of the information, and must identify the source of the material, so there is no question of the material's origin. The reliability of the origin, however, must not be a factor when evaluating whether a republisher acted impermissibly. One of the justifications for imposing republisher liability was that the repetition

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217. It is not surprising that Congress got involved with protecting the Internet since the U.S. government had funded the Internet's development beginning in the early 1970s. See Robert E. Kahn, The Role of Government in the Evolution of the Internet, Revolution in the US Information Infrastructure (1994), available at http://www.nap.edu/readingroom/books/newpath. The same kind of government backing, however, was not present when Samuel Morse invented the telegraph in the early 1800s.

Before the press took an interest in telegraphic technology, Morse experienced immense difficulty in diffusing the invention. Only after years of lecturing, lobbying, and negotiating was a bill to appropriate funds for an experimental telegraph line brought before Congress, in 1843. In the course of debate, the bill was encumbered by a proposed rider, appropriating funds for experiments in mesmerism. This was perhaps less surprising than the fact that the legislators were discriminating enough to vote down the rider and uphold the original bill.

Blondheim, supra note 81, at 32.


220. See supra note 213.
221. See supra notes 166-82 and accompanying text.

lends credibility to statement, and confirms it if there is no statement of disbelief. This is simply untrue. This comment argues that it is paternalistic and unrealistic to conclude that people are not intelligent enough to digest information and for themselves decide if it is worthy of belief. If American Online can republish the Drudge Report under the Communications Decency Act without liability, there is no good reason why USA Today should be barred from republishing with attribution material from a tabloid, should USA Today deem that information newsworthy.

**F. Heightening Initial Publishers' Potential Liability**

Should a presumption immunizing republication exist, there still must be a chance for a worthy plaintiff to recover for damages to his reputation. Thus, the original publisher is rightly held liable for actual damages for third party publication. The traditional rule is that original publishers are not liable for republication, either as a separate cause of action or to enhance damages, unless the subsequent publication was a natural and probable consequence. The statute of limitations begins to run from the date of the original publication, not the subsequent publication. This rule would require adaptation to allow plaintiffs to fully recover for their damages should republisher liability be abolished in the absence of actual malice.

A bright-line rule that third parties are privileged to republish would put original publishers on notice that they may be held liable for more than just their own publication. This would give injured plaintiffs the opportunity to fully recover for their actual damages. It is likely that the heightened liability potential will induce original publishers to carefully source their stories before publication.


225. Blumenthal v. Drudge, 992 F. Supp. 44, 53 (D.D.C. 1998) (holding that American Online, as a service provider under the Communications Decency Act, could not be liable for providing a gossip report to AOL subscribers). "Section 230 [of the Communications Decency Act] was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum." *Id.* at 50 (citing Zeran v. Am. Online, Inc., 129 F.3d 327, 330-31 (4th Cir. 1997)).

226. *See Clifford v. Cochrane, 10 Ill. App. 570, 577 (App. Ct. 1882)* (holding that the original newspaper publisher was not liable for republication in subsequent newspapers).

227. *See Foretich v. Glamour, 753 F. Supp. 955, 960 (D.D.C. 1990)* ("[S]tatute of limitations runs from the date on which a publication was first made available to the general public.").
It is unlikely that saddling the original publisher with increased potential for liability will chill speech. In the case of private individuals, it will often be difficult to prove actual damage to reputation outside of the plaintiff's community. Further, it is likely that the original publisher will be a publication based in the same community. The original publisher, however, is not likely to be liable for papers outside of the community because the defamed plaintiff will not have suffered actual damage to his reputation as a result of an out-of-town publication of the offending story. In the rare case that it does actually harm the plaintiff, the injured party will have recourse for all damages suffered from the original publisher.

CONCLUSION

While the wire service defense is an important tool to protect republishers from defamation suits, it does not go far enough to serve society's need for news. Third parties should be free to republish material so long as they specifically state their source, do not deviate from the facts of the original source, and do not act with actual malice. The courts and the legislature have already taken steps that have weakened republisher liability. Courts across the country have affirmed the use of the wire service defense, and Congress has passed the Communication Decency Act of 1996, which virtually immunizes Internet service providers from republisher liability.

The next logical step is to extend this privilege to all publications, rather than limiting it only to wire services and Internet service providers. Thus, a presumption in favor of republication would be created that could be defeated by a showing of actual malice. Under this proposed approach, the prevailing plaintiffs

228. New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (holding that public figures must prove actual malice to recover for libel). Because public figures already have the high burden of proving the original publisher acted with actual malice, it is therefore unlikely that they could successfully sue republishers unless a republisher knew or should have known that the original material was libelous. See id.


230. See supra notes 191-208 and accompanying text.
231. See supra notes 221-29 and accompanying text.
232. See supra notes 54-72, 84-132, 147-75, and 213-20 and accompanying text.
233. See supra notes 54-132 and accompanying text.
234. See supra notes 213-20 and accompanying text.
would be able to hold the original publisher liable for subsequent publications if the plaintiff could prove damages resulting from the third party publication. In a technologically advanced society that demands current news instantly, this approach best balances a plaintiff’s right to recover for defamation with the media’s ability to inform the public.
SHOULD PUBLIC RELATIONS EXPERTS EVER BE PRIVILEGED PERSONS?¹

Deniza Gertsberg*

INTRODUCTION

Over the past decade, the media fixation with pursuing crime stories has made it increasingly difficult for persons accused of a crime to enjoy a fair judicial process.² The media's concentration on trials to increase ratings and profits delivers what the voyeuristic public wants to see: raw human emotion discharged through greed, sex, and murder.³ It is no longer true that any publicity is good publicity.⁴ Witness the trials of O.J. Simpson and Martha Stewart.⁵ Their celebrity status granted them the misfortune of having to face two trials—the legal trial and the trial by the court of public opinion.⁶ Even defendants with no prior celebrity status often become infamous overnight when accused of a crime.⁷ Me-

¹ J.D. candidate, Fordham University School of Law, 2005; B.A. Fordham University, 2002. I am especially greatful to my husband, mother, and father for their love, understanding, support, and tolerance. I wish to dedicate this Comment to my mother, Svetlana, who as always been an inspiration to me.

2. Elisabeth Semel & Charles M. Sevilla, Talk to the Media About Your Client? Think Again, 21 CHAMPION 10, 11 (1997).

3. Id. at 10; see Carol Ann Kell, Putting Your Client Out Front, N.J. L.J., June 16, 1997, at 31 (“[T]he reality is that what is communicated in the media is often perceived by the public as gospel.”).

4. See, e.g., Vanessa Blum, Waging War in the Court of Public Opinion, LEGAL TIMES, Nov. 1, 1999, at 15.

5. See Robert W. Tracinski, Martha and the Tall Poppies, CNSNEWS.COM, Jan. 12, 2004, at http://www.cnsnews.com/ViewCommentary.asp?Page=Commentary\archive\200401\COM20040112a.html (last visited Nov. 2, 2004) (“As the Martha Stewart case finally goes to trial, it is clear that Ms. Stewart has already been convicted in the court of public opinion.”).


7. See Mawiyah Hooker & Elizabeth Lange, Limiting Extrajudicial Speech in High-Profile Cases: The Duty of the Prosecutor and Defense Attorney in Their Pre-Trial Communications with the Media, 16 GEO. J. LEGAL ETHICS 655, 666-67 (2003) (“The characterization [of Steven J. Hatfill, the suspected anthrax mailer] as a ‘person
dia has "enormous power" to influence the course of legal proceedings. The result for clients whose lawyers are not trained in public relations could be devastating.

This phenomenon broadens an attorney's role. Not only is a lawyer obligated to pursue lawful strategies in the court of law, but a lawyer must also ensure that the client's right to a fair trial is not undermined by negative media campaigns that ignite public outrage, induces prosecutors to bring more severe charges, and possibly influence the jury pool. Yet, lawyers are taught how to litigate, negotiate, and practice law according to precedent. They are not taught how to "spin." Untrained and unskilled in ad-

9. See Tracinski, supra note 5.
10. The media feeding frenzy is a “phenomenon” only in the sense that the availability of sources that deliver the “news” has increased exponentially. See Christine Brennan, Hubbub Surrounding Bryant Case Hits Ridiculous Heights, USA TODAY, Aug. 7, 2003, at C9; available at http://www.usatoday.com/sports/columnist/brennan/2003-08-06-brennan_x.htm ("There are hundreds of cable outlets, thousands of radio shows, hundreds of thousands of Web sites and chat rooms—and they all have oodles of airtime and space to fill."); see generally David Harris, The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System, 35 ARIZ. L. REV. 785 (1993) (arguing that although most people get their information about the criminal justice system through the media, the information is often misleading and frequently wrong).
11. The negative influence of publicity on the outcome of litigation is not a new phenomenon in American history. See Newton N. Minow & Fred H. Cate, Who is an Impartial Juror in an Age of Mass Media?, 40 AM. U. L. REV. 631, 635-36 (1991) ("Not a Term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts") (quoting Irwin v. Dowd, 366 U.S. 717, 730 (1961) (Frankfurter, J., concurring)); Jonathan M. Moses, Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion, 95 COLUM. L. REV. 1811, 1816 (1995) (discussing Aaron Burr’s highly publicized trial and his ability to get a fair trial where newspapers had published affidavits of two prosecution witnesses). Minow and Cate also discuss the increased number of cable channels dedicated to dissecting high-profile cases. Minow & Cate, supra, at 635.
13. The term “spin control” originated in the halls of politics to describe how politicians and their spokespeople coordinate and manipulate commentary for purposes of controlling public opinion. See JOHN A. MALTESE, SPIN CONTROL: THE WHITE HOUSE OFFICE OF COMMUNICATIONS AND THE MANAGEMENT OF PRESIDENTIAL NEWS 23 (2d ed. rev. 1994); see also David Levy et al., Have a Media Plan Before
dressing the media, many lawyers require “outside help” from public relations firms when representing clients who endure highly publicized trials. A public relations consultant or firm can help attorneys understand the effects of publicity on the judicial proceeding. The attorney can thus respond with an appropriate legal strategy that attempts to minimize the negative effects of publicity.

Lawyers cannot be sure that confidential information and communications exchanged with a public relations firm will be protected by the attorney-client privilege. This uncertainty injures clients because they are less likely to be frank with attorneys if attorney-client privilege applies only some of the time. A lawyer who does not know the full facts cannot represent her client using her fullest efforts.

Traditionally, disclosure of confidential information to a third party was viewed as a waiver of the attorney-client privilege.

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Crisis Strikes, Nat’l. L. J., Aug. 19, 2002, at C13 (“There are only two guys in every media saga—a good guy and a bad guy. . . . Without the proper insight and training, the lawyer loses control.”).

14. See Semel & Sevilla, supra note 2, at 64 (stating that “because attorneys are trained for the courtroom, not the press conference, mistakes are likely even if one is prepared”); see also Harris, supra note 10, at 785 (describing that while “[t]elevision ensures that jurors are empanelled with ridiculous expectations,” the lawyers are “blind to anything but the intricacies of procedure”). The term “outside help” is from United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961).

15. See Haggerty, supra note 8, at 6-7.

16. Id.


19. See id.

20. See Goddard v. Gardner, 28 Conn. 172, 175 (1859) (finding that when a third party is present at communication between attorney and client, the communication is not covered by the privilege); Springer v. Byram, 36 N.E. 361, 363 (Ind. 1894) (“It is settled law that if parties sustaining confidential relations to each other hold their conversation in the presence and hearing of third persons, whether they be necessarily present as officers, or indifferent bystanders, such third persons are not prohibited from testifying to what they heard.”); Bacon v. Frisbie, 80 N.Y. 394, 401 (1880) (“It may be that if a client chooses to speak his mind to his counsel, in the presence and hearing of persons unrelated to him in the matter, that what is said is not privileged.”).
There is an exception, however, for third parties who have a necessary role in assisting the lawyer as a consulting expert or an agent. This Comment addresses the issue of whether, and under what circumstances, a lawyer's communications with a public relations expert, whose advice and assistance is only valuable to the extent that it is communicated fully and freely with the attorney, will be protected by privilege. This Comment focuses on the role of public relations firms in the criminal law context, where constitutional concerns often arise.

Part I of the Comment explores the boundaries of the attorney-client privilege and explores how the privilege developed through the years. Part II examines the traditionally limited view of a lawyer's role and indicates how the advent of mass media has forced the defense lawyer to do more than litigate in the court of law. Part III examines cases involving public relations firms and the attorney-client privilege. The section explores such issues as whether a public relations firm may be considered a privileged person because it plays a significant enough role in assisting the attorney in representing her client. Resolving these issues involves determining (1) what courts consider legitimate legal services, as opposed to business services, and (2) whether the public relations expert, as a third party, gives sufficiently important assistance to the lawyer in rendering legal services, as opposed to (a) not giving assistance that is really needed; (b) assisting the lawyer in non-legal services; or (c) giving assistance to the client and not the lawyer.

Part IV scrutinizes the cases discussed in Part III and suggests that the decision reached by the Stewart court is more rational and consistent with modern legal practice. The Comment also argues that in cases where the public relations firm acts as a consulting expert to an attorney representing a highly publicized criminal defendant, the firm should be considered a privileged person for the purposes of the attorney-client privilege. Finally, this Comment


22. See infra notes 30-113 and accompanying text.

23. See infra notes 114-68 and accompanying text.

24. See infra notes 169-225 and accompanying text.

25. See infra notes 170-94 and accompanying text.

26. See infra notes 169-225 and accompanying text.

27. See infra notes 226-30 and accompanying text.

28. See infra notes 226-30 and accompanying text.
concludes that in order to maintain fairness in the judicial process for those accused of a crime, our system of adjudication must recognize that, in certain circumstances, the assistance of public relations firms will be required, and the attorney-client privilege must not be denied. 29

I. BACKGROUND

A. Attorney-Client Privilege

Attorney-client privilege is the oldest rule of privilege known to common law. 30 It evolved from a tradition of the English courts where the privilege belonged to the lawyer and was grounded on humanistic considerations, enabling the attorney to "comply with his code of honor and professional ethics." 31 The code of a gentleman thus shielded attorneys from being compelled to testify in court what they had been told by their clients. 32 Today the privilege rests with the client, and it is the client who determines whether to assert or waive it. 33

Whether embodied in the common law, state law, or federal law 34 the broad outlines of the attorney-client privilege attaches: "(1) where legal advice of any kind is sought (2) from a profes-

29. See infra notes 231-51 and accompanying text.
33. Id. In circumstances where the client is unable to personally assert the privilege, the attorney can assert it on the client's behalf. See In re Grand Jury Subpoena Duces Tecum, 391 F. Supp. 1029, 1034 (S.D.N.Y. 1975) (stating that the defendant need not be present to assert the privilege).
34. FED. R. EVID. 501:
Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, per-
sional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.”\(^{35}\) “The privilege must also be invoked before any disclosure of the communication sought to be protected has occurred.”\(^{36}\)

The Restatement (Third) of the Law Governing Lawyers defines the attorney-client privilege broader than did Judge Kearse in the above definition.\(^{37}\) It expands the privilege to “privileged persons,” not just clients and their attorneys.\(^{38}\) While it is the communication that is privileged, and not the underlying facts,\(^{39}\) the privilege extends to writings as well. For example, the production of a privileged paper in possession of a person within privileged relations cannot be compelled.\(^{40}\) Furthermore, there is a rebuttable presumption that all communications between an attorney and

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The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of the law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client . . .


38. The Restatement states that the attorney-client privilege may be invoked with respect to “(1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.” \(^{Id.}\) It further defines communications in section 69 as “any expression through which a privileged person, as defined in § 70, undertakes to convey information to another privileged person and any document or other record revealing such an expression.” \(^{Id.}', \) § 69. Section 70 defines “privileged person” as “the client (including a prospective client), the client’s lawyer, agents of either who facilitate communications between them, and agents of the lawyer who facilitate the representation.” \(^{Id.}', \) § 70.

39. In re Grand Jury Subpoena Duces Tecum, 731 F.2d at 1037 (stating that the “attorney-client privilege protects communications rather than information”).

40. J.P. Ludington, Annotation, **Persons Other Than Client or Attorney Affected By, or Included Within, Attorney-Client Privilege**, 96 A.L.R. 2d 125, 127 (2004).
client are privileged, with the burden of showing that an attorney-
client relationship exists, as well as the confidential character of
communication, resting on the party objecting to the introduction
of the evidence. 41

1. General Constraints on the Application of the
Attorney-Client Privilege

The attorney-client privilege is a limited doctrine 42 that only be-
comes "absolute" after the privilege attaches. 43 First, as already
mentioned, the privilege only applies to communications not the
underlying facts. 44 In addition, a conversation is not privileged au-
tomatically just because it is between a client and her attorney. 45
Second, most courts agree that when an attorney functions as a
business or economic advisor, the attorney-client privilege does not

41. See, e.g., United States v. Aramony, 88 F.3d 1369, 1389 (4th Cir. 1996) (stating
that "the party claiming the privilege carries the burden of demonstrating that: (1) the
attorney-client privilege applies; (2) the communications were protected by the privi-
lege; and (3) the privilege was not waived"); accord United States v. Zolin, 809 F.2d
1411, 1415 (9th Cir. 1987) (stating that "[i]n order to establish the applicability of the
attorney-client privilege to a given communication, the party asserting the privilege
must affirmatively demonstrate a non-waiver"), aff'd in part and vacated in part on
other grounds, 491 U.S. 554 (1989); United States v. Jones, 696 F.2d 1069, 1072 (4th
Cir. 1982) (holding that "the proponent must establish not only that an attorney-client
relationship existed, but also that the particular communications at issue are privile-
eged and that the privilege was not waived").

42. See Rice, Eroding Concept, supra note 21, at 861 n.19 (stating that "[m]ost
courts have accepted Professor Wigmore's pronouncement that because the 'benefits
of the privilege' are all indirect and speculative [and] its obstruction is plain and
concrete ... [the privilege] ought to be strictly confined within the narrowest possible
limits consistent with the logic of its principle.'").

43. See id. at 856 n.6 ("Under federal law and the law of most states, once the
attorney-client privilege has attached to confidential communications between the
attorney and client, the privilege is absolute.").

44. See Alliance Constr. Solutions, Inc., v. Dep't of Corrs., 54 P.3d 861, 865 (Colo.
2002) ("[I]t is important to note that the privilege only protects against disclosure of
communications and does not protect the underlying facts on which the communica-
tion is based. In other words, 'the client may not refuse to disclose any relevant fact
within his knowledge merely because he incorporated a statement of such fact into his
communication to his attorney.'") (quoting Nat'l Farmers Union Prop. & Cas. Co. v.
Dist. Court of Denver, 718 P.2d 1044, 1049 (Colo. 1986)).

LEXIS 15510, at *6 (W.D. Wis. July 16, 2002) (stating that "simply transmitting infor-
mation to an attorney does not cloak it in the privilege: 'a communication is not privi-
egled simply because it is made by or to a person who happens to be a lawyer'"
)(quoting United States v. Evans, 113 F.3d 1457, 1463 (7th Cir. 1997)); Energy Capital
Corp. v. United States, 45 Fed. Cl. 481, 485 (2000) ("Thus, information does not be-
come privileged simply because it came from counsel, and when documents or con-
versations are created pursuant to business matters, they must be disclosed.") (citing
attach. Third, the presence of third parties not privileged to the communications that occur between a lawyer and a client waives the attorney-client privilege. Lastly, confidentiality is regarded as a fundamental aspect of the attorney-client privilege.

2. Attorney-Client Privilege and "Privileged Parties"

The Restatement's broader definition more accurately captures the scope of the modern day attorney-client privilege when it defines it as communications made between "privileged persons," in confidence, for the purpose of obtaining or providing legal assistance for the client. A "client" also includes individuals who had preliminary communications with regard to retention of counsel but eventually decided to hire a different attorney. It is "universally accepted that agents of both of the attorney and the client, who were vital to the legal assistance sought, could be brought within the circle of confidentiality." The privilege thus covers secretaries, paralegals, and law clerks. It also extends to experts

46. See Energy Capital Corp., 45 Fed. Cl. at 485 (holding that the attorney-client privilege does not protect either factual information or business advice); see also In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1037 (1984) ("the privilege is triggered only by a client's request for legal, as contrasted with business, advice.") (citing In re John Doe Corp., 675 F.2d 482, 488 (2d Cir. 1982)); Dep't of Econ. Dev. v. Arthur Andersen & Co., 139 F.R.D. 295, 300 (S.D.N.Y. 1991) (stating that "when a lawyer acts as a business or economic advisor, there is no special relationship to give rise to a privilege to protect his advice from disclosure") (citing Standard Chartered Bank PLC v. Ayala Int'l Holdings (U.S.) Inc., 111 F.R.D. 76, 80 (S.D.N.Y. 1986)).

47. Evans, 113 F.3d at 1462.

48. See Rice, Eroding Concept, supra note 21, at 859 n.12. Rice mentions that Professor Wigmore believes that confidentiality is one of four fundamental conditions necessary to the establishment of a privilege. Id.

The four fundamental conditions delineated by Wigmore are:

1) The communications must originate in confidence that they will not be disclosed.
2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Id.


51. See Rice, supra note 21, at 874.

52. See United States ex rel. Edney v. Smith, 425 F. Supp. 1038, 1046 (E.D.N.Y. 1976) (stating that "[g]iven the complexities of modern existence few, if any, lawyers
hired to assist with the investigation,\textsuperscript{53} or provide scientific or technical assistance in preparation for trial.\textsuperscript{54}

Despite the misgivings of some courts,\textsuperscript{55} the circle of privileged persons has widened.\textsuperscript{56} The attorney-client privilege includes a client's outside consultants hired to perform business and later retained by the attorneys to assist in litigation because of their knowledge and experience.\textsuperscript{57} It also covers consultants who are essential to lawyers in performing tasks that go beyond advising a client to the law.\textsuperscript{58} This includes non-testifying expert witnesses, psychiatrists,\textsuperscript{59} accident reconstruction experts,\textsuperscript{60} consultants that gauge the state of public opinion for venue change purposes, and jury consultants.\textsuperscript{61}

\textsuperscript{53} NLRB v. Harvey, 349 F.2d 900, 906-07 (4th Cir. 1965) ("Circumstances may exist where a lawyer finds it necessary to employ a detective to enable him adequately to furnish legal services to his client. In such a situation the client's communication, including those relating to the hiring of the detective, would be privileged because the legal services are indistinguishable from the non-legal.").

\textsuperscript{54} See Commonwealth v. Noll, 662 A.2d 1123 (Pa. 1995) (holding that where a third party (accident reconstruction expert) is retained by an attorney to assist the attorney in giving legal advice to the client, information which the attorney or the client furnishes this third party is protected by the attorney-client privilege); Rice, \textit{supra} note 21, at 875 (describing how attorney-client privilege came to include those "investigating or providing scientific or technical assistance in preparation for litigation").

\textsuperscript{55} See In re Grand Jury Subpoenas Dated January 20, 1998, 995 F. Supp. 332, 334 (E.D.N.Y. 1998) (citing United States v. Bryan, 339 U.S. 323, 323 (1950)) ("The primary assumption [is] that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule."); see also United States v. Nixon, 418 U.S. 683, 710 (1974) (stating that the privilege is neither "lightly created nor expansively construed"); Grand Jury Proceedings Under Seal, 947 F.2d 1188, 1190 (4th Cir. 1991) ("This court has consistently stated that the privilege must be strictly construed.").

\textsuperscript{56} See In re Hill, 786 F.2d 3, 6 n.4 (1st Cir. 1986) (paralegal); United States v. Pipkins, 528 F.2d 559, 563 (5th Cir. 1976) (handwriting analyst).

\textsuperscript{57} See Rice, \textit{Eroding Concept}, \textit{supra} note 21, at 875 n.61 (noting cases in the early 1990s where communications between outside consultants and attorneys were held protected by the attorney-client privilege).

\textsuperscript{58} In re Grand Jury Subpoenas Dated March 24, 2003, 265 F. Supp. 2d 321, 326 (S.D.N.Y. 2003) (holding that jury consultants can be covered by the privilege).


\textsuperscript{61} In re Grand Jury Subpoenas, 265 F. Supp. 2d at 326.
3. Justification for the Attorney-Client Privilege

The growing body of regulatory law which adds to the complexity and specificity of legal obligations often requires that persons untrained in the law seek professional legal assistance. In order for attorneys to represent their clients competently they need to know all the information. Attorney-client privilege encourages “full and frank communication” between attorneys and clients. Clients will not fear that statements made in confidence to their attorneys will be subsequently subject to disclosure by an adversary. Such full disclosure by the client allows attorneys to render the best possible legal advice. Only when a client has informed the lawyer of all the facts can a lawyer encourage “compliance with the ever growing and increasingly complex body of public law,” thus “facilitating the administration of justice.” Additionally,

63. United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989) (“Without the attorney–client privilege, that right and many other rights belonging to those accused of crime would in large part be rendered meaningless.”).
64. UpJohn Co. v. United States, 449 U.S. 383, 389 (1981) (“The purpose of the privilege [is to] ‘encourage clients to make full disclosure to their attorneys.’”) (quoting Fisher v. United States, 425 U.S. 391, 403 (1976)); see Hunt v. Blackmun, 128 U.S. 464, 470 (1888) (stating that the privilege is “founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.”).
66. Schwimmer, 892 F.2d at 243 (“It also recognizes that a lawyer’s ‘assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.’”) (quoting Hunt, 128 U.S. at 470); see Trammel v. United States, 445 U.S. 40, 51 (1980) (“These privileges are rooted in the imperative need for confidence and trust . . . The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out.”).
67. Fisher v. United States, 425 U.S. 391, 403 (1976); see Alliance Constr. Solutions, Inc. v. Dep’t of Corr., 54 P.3d 861, 864 (Colo. 2002) (“In order to provide effective legal advice, an attorney must have a full understanding of the facts underlying the representation.”) (citing Gordon v. Boyles, 9 P.3d 1106, 1123 (Colo. 2000) and Nat’l Farmers Union Prop. & Cas. Co. v. Dist. Court, 718 P.2d 1044, 1047 (Colo. 1986)).
68. Note, Attorney-Client and Work Product Protection in a Utilitarian World: An Argument for Recomparison, 108 Harv. L. Rev. 1697, 1699 (1995); see Schwimmer, 892 F.2d at 243 (noting that the “rule of confidentiality recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client”) (quoting Upjohn, 449 U.S. at 389).
69. Natta v. Hogan, 392 F.2d 686, 691 (10th Cir. 1968) (quoting Radiant Burners, Inc. v. Am. Gas Ass’n, 320 F.2d 314, 322 (7th Cir. 1963)).
some commentators believe the attorney-client privilege may also discourage frivolous lawsuits in cases where the attorney finds, after full disclosure, that his client's case is too weak to pursue.\textsuperscript{70}

Attorney-client privilege serves an important societal interest of effective representation to clients who disclose all the relevant information.\textsuperscript{71} The privilege also encourages an attorney to use her fullest efforts to develop her client's case when she knows all the facts and is confident that she will not be subsequently compelled by her adversary to disclose her communications.\textsuperscript{72} Thus, the privilege is central to our adversarial system of justice since it assures a client's right to a fair judicial process.\textsuperscript{73} The Supreme Court, for example, has held that "[a] lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system."\textsuperscript{74}

In criminal cases particularly, the privilege protects a defendant who faces the broad power of government.\textsuperscript{75} "[T]he right of parties within our justice system to consult professional legal experts is rendered meaningless unless communications between attorney and client are ordinarily protected from later disclosure without client consent."\textsuperscript{76} If candid communications between an attorney and

\textsuperscript{70} Michael Sweeney, Lecture at Fordham Law School (Oct. 23, 2003); see also \textit{Upjohn}, 449 U.S. at 390-91 ("The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.").

\textsuperscript{71} People v. Gionis, 892 P.2d 1199, 1204-05 (Cal. 1995).

The attorney-client privilege is based on grounds of public policy and is in furtherance of the proper and orderly functioning of our judicial system, which necessarily depends on the confidential relationship between the attorney and the client. Without the ability to make full disclosure of the facts to the attorney, the client risks inadequate representation . . . by encouraging complete disclosures, the attorney-client privilege enables the attorney to provide suitable legal representation.

\textit{Id.}


\textsuperscript{75} In re Grand Jury Proceeding Dated March 24, 2003, 265 F. Supp. 2d 321, 330 (S.D.N.Y. 2003) ("Target, like any investigatory target or criminal defendant, is confronted with the broad power of the government."); see Cole, \textit{supra} note 73, at 471 (arguing that "it is fair to question some of the tactics that law enforcement officials have been employing as they combat crime").

\textsuperscript{76} Alliance Constr. Solutions v. Dep't of Corr., 54 P.3d 861, 865 (Colo. 2002) (citing \textit{Wesp v. Everson}, 33 P.3d 191, 196 (Colo. 2001)); see also Cole, \textit{supra} note 73, at 587 (arguing that the attorney-client privilege "may well be the pivotal element of the modern American lawyer's professional functions").
her client are not protected, then the two parties to a controversy are on unequal footing. In criminal cases, if clients are discouraged or unwilling to frankly confide in their attorney because of uncertainty over whether their communications are protected, then our legal system moves away from its goal of administrating justice.

4. Countervailing Principles

Despite being recognized as the oldest privilege in the common law tradition and serving a useful purpose in maintaining the integrity of our legal system, the attorney-client privilege has to be balanced against other important societal interests. Judges often have to weigh a client's right to effective, competent representation and the public's right to evidence, the interests of society in solving crime, and the vindication of victims' rights. The balancing becomes even more difficult in a criminal proceeding because of the defendant's constitutional rights. The Second Circuit, for example, has "severely restricted" the scope of discovery in criminal proceedings.

Nevertheless, many courts adhere strongly to the "fundamental maxim . . . recognized for more than three centuries . . . that the public . . . has a right to every man's evidence." According to this view, the attorney-client privilege is "in derogation of the search
for the truth." Holding the public's right to evidence on a higher plane, some judges rule that the privilege "should be narrowly construed." Typically, the decisions reflect a view that the privilege is seen as a barrier to learning the truth. Judges that subscribe to such a view often protect only those communications that are between a client and her lawyer.

Another reason for a strict interpretation of the attorney-client privilege is a fear that extending the privilege will invite abuse. The fear is grounded in concrete examples that recently shocked the country, from tobacco litigation to Enron, where, at least in the tobacco case, the attorney-client privilege was used for fraudulent purposes. For example, the tobacco companies had potentially damaging studies and scientific experiments conducted through legal counsel so they could be suppressed if they ultimately proved unfavorable to the companies' interests. Compounding the problem was the companies' public avowal that the products were safe and that all such studies and experiments were conducted by impartial scientists and would be fully disclosed, regardless of the outcome.

Retrospectively, there is no doubt that the attorney-client privilege was abused when attorneys were used to cover up damaging studies. Determining whether an abuse of the privilege has taken

87. See John Doe Co. v. United States, 350 F.3d 299, 302 (2d Cir. 2003) (holding that the attorney-client privilege does not apply to documents between the attorney and the investigator because at the time they were created they were not intended by the parties to be confidential); United States v. Bein, 728 F.2d 107, 113 (2d Cir. 1984) (finding no attorney-client privilege when no attorney was present when the conversation took place between the client and the client's accountant).
89. Id. Rice notes how Philip Morris "went a step further. They had their lawyers request and supervise these communications (reports, studies, etc.) thereby using the credibility of the attorneys to make it appear as though each communication were an instrumental part of the legal assistance being rendered." Id.
place is particularly difficult during the trial, however, since the information requested by challenging attorneys relates in some ways to legal assistance. While a crime/fraud exception exists to pierce the attorney-client privilege, the fact that the privilege was used for illegal purposes reinforces the idea shared by an increasing number of legal professionals, including those in the Department of Justice and the SEC, that the attorney-client privilege should be limited.

5. Kovol and Its Progeny

The seminal case for extending attorney-client privilege to third-party consultants was United States v. Kovol, decided by the Second Circuit in 1961. In Kovol, a former IRS agent with accounting skills who was employed by a law firm specializing in tax law, claimed attorney-client privilege for the work he performed in connection with one of the firm's clients.

In Kovol, the court used a two-step process to decide that the attorney-client privilege should be extended. First, the Kovol court recognized that the privilege would apply in situations where a non-English speaking client provided his confidential information to an interpreter employed by the attorney to translate for the attorney. Second, the court concluded that since accounting con-

91. See Rice, Tobacco Industry, supra note 88, at 27.
92. Id. (explaining that "[t]he crime/fraud exception is based on the recognition that when the client seeks the lawyer's assistance to commit a crime or fraud, whether or not the lawyer is or becomes aware of the client's unlawful aim, the privilege serves no useful purpose and its protection should be withdrawn").
93. See Cole, supra, note 73, at 548-49. The Justice Department's Bureau of Prisons Amendments (in effect since October 31, 2001), give the Attorney General the power, "in cases where 'reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism,' to order monitoring of communications between that inmate and his attorney or attorney's agents." Id.
94. 296 F.2d 918 (2d Cir. 1961).
95. Id. at 919.
96. Id. at 921. The court held that there are actually four instances to which the attorney-client privilege would apply when an attorney is dealing with a client speaking a foreign language:
(1) where attorney sends a client speaking a foreign language to an interpreter to make a literal translation of the client's story;
(2) where the attorney employs the help of non-lawyer employee in the room to help out;
(3) where the client brings a translator;
(4) where the attorney sends the client to a non-lawyer proficient in foreign language, with instructions to interview the client on the attorney's behalf and then render his own summary of the situation so that the attorney can give the client proper legal advice.
cepts could be as incomprehensible as a foreign language, "the presence of an accountant . . . ought not destroy the privilege."97 The Kovel court stressed, however, that not all accountants are included within the protection of the privilege, noting that "[w]hat is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer."98

The court's decision laid the groundwork for broadening the category of privileged persons because it recognized that during the course of representation, attorneys may need the assistance of consultants when dealing with matters they are unskilled and untrained to perform.99 Yet, the Kovel decision suggested that courts should apply a high standard before a third party will be considered "privileged" for the purposes of the attorney-client privilege.100 Indeed, the third party has to be "necessary, or at least highly useful" to the attorney's representation of a client before the party may be brought within the "circle of confidence."101

The Kovel court recognized two categories of third parties who could be brought into the circle of confidence.102 The first category includes those who are essential to the attorney, without whom representation would be extremely difficult or impossible, as the interpreter analogy illustrates.103 Today this category encompasses third-parties such as translators, investigators, scientific experts, and accountants.104 The second category holds agents of the attorney, whose work is sufficiently important that it deserves protection, such as law clerks, assistants, and "aides of other sorts."105 This second category includes persons who may not be translating documents for the attorney, but because of the "complexities of

97. Id. at 922.
98. Id. The presence of the accountant has to be "necessary, or at least highly useful, for the effective consultation between the client and the lawyer . . . ." Id.
99. Id.
100. Id.
101. Id. "Circle of confidentiality" is a term used by Professor Rice. See Rice, Eroding Concept, supra note 21, at 874.
102. Kovel, 296 F.2d at 921-22.
103. Id. at 922.
104. See Rice, Eroding Concept, supra note 21, at 874-75 n.57-58.
105. Kovel, 296 F.2d at 921; see also United States ex rel. Edney v. Smith, 425 F. Supp. 1038, 1046 (S.D.N.Y. 1976) ("Given the complexities of modern existence few, if any, lawyers could as a practical matter represent the interests of their clients without the assistance of a variety of trained legal associates not yet admitted to the bar, clerks, typists, messengers, and similar aides.").
modern existence,” they are often indispensable to the attorney’s ability to represent a client. The Kovel decision and its progeny established a framework with several overarching principles that courts use to measure the boundaries of the privilege. First, in addition to the requirement of confidentiality, the advice that is sought must be “legal,” not business advice. Business advice would include “attorney’s work in drafting ‘by-laws, promissory notes, security agreements, incorporation documents, partnership documents and tax information.’” Therefore, third parties who provide business advice are not considered privileged because the information is not considered “legal advice.”

Second, the Kovel decision suggests that parties who are agents of the client could be “privileged persons” if their presence “further[s] the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted.” Furthermore, the concept of the “agent” was broadened to include outside consultants retained to perform business services and whose knowledge and experience from that service was important to the legal assistance later sought. Despite the expansion of the privilege in the corporate context, recent abuses of the attorney-client privilege suggest that the attorney-client claims of corporations will be subject to heavier scrutiny.

106. Kovel, 296 F.2d at 921.
107. Id.
110. Kovel, 296 F.2d at 922 (holding that “if the [accounting] advice sought is the accountant’s rather than the lawyer’s no privilege exists”).
112. See In re Bieter, 16 F.3d 929, 937 (8th Cir. 1994) (holding that communications between an independent consultant hired by the client and the client’s lawyer were protected by the attorney-client privilege where the purpose of communications were to seek legal advice); Viacom Inc. v. Sumitomo Corp., 200 F.R.D. 213, 220 (S.D.N.Y. 2001) (extending the attorney-client privilege to a public relations firm hired by the firm at the inception of litigation because the firm was considered a functional equivalent of the company’s employee).
113. See United States v. Adlman, 68 F.3d 1495, 1500 (2d Cir. 1995) (finding that the attorney-client privilege does not apply because the required elements of the attorney-client privilege were not met); see also United States v. Ackert, 169 F.3d 136, 138 (2d Cir. 1999) (holding that attorney-client privilege is not extended to an invest-
II. THE CHANGING ROLE OF A LAWYER

Justice Holmes once wrote that "[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." As Justice Holmes' observation indicates, the potential effect of negative press coverage of the judicial process has long been a concern of the judicial system. One way the judicial system dealt with the negative publicity was to restrict the lawyer's interaction with the press.

The American Bar Association, when it promulgated 30 Canons of Legal Ethics in 1908, dealt with publicity about pending or anticipated litigation in Canon 20. This Canon broadly denounced lawyers who trafficked in litigation information by talking about their cases in the news media. It provided: "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally, they are to be condemned." Such strong views against extrajudicial speech reflect the profession's general position that the traditional role of an attorney is in the courtroom.

Despite the American Bar Association's efforts to control lawyers' communication with the press, the promulgation of Canon 20 did not stem the aggressive press coverage. History records the highly publicized trials of Sacco and Vanzetti, the Lindbergh kid-
napper,\textsuperscript{122} and Dr. Sheppard.\textsuperscript{123} To this day speculations about the guilt or innocence of Sacco and Vanzetti and the defendant in the Lindbergh case persist.\textsuperscript{124} The sensational Sheppard case, other cases,\textsuperscript{125} and the Warren Commission's Report,\textsuperscript{126} encouraged the ABA to establish its own committee to "take steps to bring about a fair balance between the right of the public to be informed and the right of the individual to a fair and impartial trial."\textsuperscript{127}

The resulting Reardon Commission proposed Rule 1.1, which was adopted in part by the ABA in its Model Code of Professional Responsibility, DR 7-107.\textsuperscript{128} Even though six decades elapsed after the Canons were published by the ABA, the Reardon Commis-

\textsuperscript{122} Id. at 1817-18. The Lindbergh kidnapping case generated tremendous publicity. A well-known journalist called for the conviction and electrocution of the defendant Bruno Hauptman well before the trial began. Id.

\textsuperscript{123} See Sheppard v. Maxwell, 384 U.S. 333 (1966). Dr. Sheppard, accused of murdering his wife, petitioned the court claiming that he was denied a fair trial because the court failed to protect him from the massive, pervasive, and prejudicial publicity of his prosecution. Id. The Supreme Court reversed Dr. Sheppard's murder conviction upon finding that the trial court failed to protect Sheppard from "inherently prejudicial publicity which saturated the community" and prejudiced the jury. Id. at 363.

\textsuperscript{124} See Moses, supra note 11, at 1818 n.31 (citing William Young & David E. Kaiser, Postmortem: New Evidence in the Case of Sacco and Vanzetti 3-9 (1985) for the position that the passionate controversy over whether one or both of defendants were framed persists); see also Bob Groves, The Case Against Lindbergh: What if There Was No Kidnapping, RECORD (Hackensack, NJ), Apr. 18, 1993, at L1.

\textsuperscript{125} See Moses, supra note 11, at 1818. "Not a term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts." Irvin v. Dowd, 366 U.S. 717, 730 (1961) (Frankfurter, J., concurring) (overturning a murder conviction in a small town based on pretrial publicity that made it impossible for the defendant to receive a fair trial).


\textsuperscript{127} See Moses, supra note 11, at 1819 (citing ABA Standards Relating to Fair Trial and Free Press 77 (1966)).

\textsuperscript{128} Model Code of Prof'l Responsibility DR 7-107 (1983). The Rule, divided into three parts, controls extrajudicial speech of lawyers, by prohibiting statements that a lawyer knows or reasonably should know would have a substantial likelihood of materially prejudicing an adjudicative process. Id. It gives examples of what constitutes "likely to prejudice materially," as well as examples of permitted statements that a lawyer may make. Id.
sion still concentrated its efforts on attorney extrajudicial speech. It failed to recognize that a lawyer, not trained in the art of public relations, is often incapable of mitigating the negative publicity that often adversely affects the course of a client’s legal proceedings.

The Commission saw lawyers as a big part of the problem and sought to restrict lawyers’ communications with the media. The Commission believed that because “lawyers have special access to information, including confidential statements from clients and information obtained through pretrial discovery or plea negotiations . . . lawyers’ statements are likely to be received as especially authoritative.”131 Although challenges to the Rule resulted in a somewhat more flexible Model Rule 3.6, the Rule was once again modified after the Court’s decision in United States v. Gentile.135

While sensational media was limited in the past to print and television, today its reach potential has grown exponentially. The public is flooded with images and photographs from numerous sources that deliver the information at incredible speeds. Not only has traditional print media become more abundant, but television networks and the Internet have expanded its reach.

129. See Moses, supra note 11, at 1820-21.
130. Id. at 1822.
133. The Rule is more flexible because it has made a special provision permitting an attorney to make extrajudicial statements. It states:
   Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

   MODEL RULES OF PROF'L CONDUCT R. 3.6(c) (1995).
135. See Watson, supra, note 117, at 97 (“Comments in the Annotated Model Rules of Professional Conduct . . . reported that Model Rule 3.6 was ‘substantially amended’ in August 10, 1994, to meet the concerns expressed in Gentile.”).
136. See Minow & Cate, supra note 11, at 632, 635.
137. Id. at 633.
138. See Harris, supra note 10, at 786.
The prosecutors and the media are intertwined where each influences the other. Objective information, such as details of a crime, photographs of a victim or of the defendant, or even discussions about the net worth of a celebrity figure under regulator scrutiny, is framed to inflame the community. Intense public reactions may influence prosecutors to bring initial or heavier charges. A public saturated with every facet of the case, analyzed by legal TV experts, may prejudice the jury pool.

The relationship between media, prosecutors, and the public opinion is complex. Prosecutors influence public opinion with information they release about the crime and the defendant. Public opinion also influences prosecutors, and the prosecutors' responses are reflected in the charges. Such "media-prosecutor alliances" usually result in the dissemination of unbalanced information. In fact, prosecutors have lied on numerous occasions to advance the interests of their case. Those accused of crime are often not met with the fundamental presumption of innocence; instead, there is a "presumption of guilt" because the Justice Department and law enforcement slowly gnaw away at this bedrock principle. A defense lawyer thus "gets started with the playing field tilted negatively, with the presumption of innocence buried under official pronouncements of guilt or castigation by the victim and his or her family."
While the rules of Professional Responsibility caution lawyers from contacting the media, many practitioners have begun to recognize that if they do not step into the spotlight and attempt to explain the situation, their client will experience difficulty obtaining a fair trial and may self-incriminate by responding to media attacks. A New York jurist has noted that “[l]awyers now feel that it is the essence of their function to try their case in the public media.”

In fact, the American Bar Association has begun to recognize that the modern practice of law involves communicating with the media. In August of 1994, American Bar Association amended Model Rule 3.6. The Rule allows an attorney to “make a necessary response to protect a client from undue prejudicial effect of recent publicity . . .”

The ABA revisions reflect a general recognition among practitioners and theorists that the adversarial relationship that serves as a key element of the American judicial system is being expanded to outside the courtroom. The amended rule implicitly signals that the outside forum is a proper arena where the attorney’s duty to zealously represent her clients remains paramount.

Some commentators suggest that in criminal cases a lawyer’s attempts to balance the inaccuracies of the media may gain constitutional importance because the defendant’s Sixth Amendment rights are implicated. One commentator argues that a defendant has a right to a “public defense” when a defendant’s constitutional right to a fair trial is endangered by negative press coverage.

149. See Watson, supra note 117, at 84. Avoiding the media or answering with a “no comment” could backfire on the client creating an implication of guilt. Id. at 88.
150. Id. at 84.
151. Id. at 97.
152. See Watson, supra note 117, at 97.
153. Id.
154. Id. at 98.
155. Id.
156. See Grafman, supra note 148 (claiming that “[b]randing a person a criminal by . . . public exposure is Constitutionally offensive, a modern-day scarlet letter that besmirches our judicial process”); Semel & Sevilla, supra note 2, at 64 (discussing Professor Garcia’s study which indicated that the Supreme Court has failed to 1) acknowledge “the connection between freedom of expression and the ideal of a fair trial,” 2) refused to place restraints on press access or reporting of courtroom proceedings in criminal cases, and 3) “not compensated for this freedom by according more leeway to a defendant who has been the subject of pretrial publicity”).
157. See Watson, supra note 117, at 83 (quoting Max D. Stern’s idea that a “defendant has a right to a public defense to balance the negative consequences the defen-
since a defendant has a First Amendment right to respond to the charges in the news media, the defendant’s attorney should be able to exercise this right on the defendant’s behalf.\textsuperscript{158}

The Supreme Court addressed a similar issue in \textit{Gentile v. State Bar}.\textsuperscript{159} In \textit{Gentile}, the defense attorney believed that the pre-indictment press coverage prejudiced the potential jury pool and thus the outcome of the eventual trial.\textsuperscript{160} The attorney attempted to mitigate the circumstances by holding a news conference on behalf of his client.\textsuperscript{161} The State Bar brought disciplinary charges against the defense attorney for violating a Nevada Supreme Court Rule prohibiting extrajudicial speech.\textsuperscript{162} A plurality of the Court held that an attorney has a limited First Amendment right to speak to the media to mitigate the effects of adverse publicity.\textsuperscript{163} The Court overturned Gentile’s disciplinary conviction and held that to be prohibited, an attorney’s extrajudicial speech must pose a “substantial likelihood of material prejudice.”\textsuperscript{164} The court decided not to apply the “clear and present danger” test normally applied in First Amendment cases.\textsuperscript{165}

The legacy that the \textit{Gentile} decision leaves behind is the plurality opinion, written by Justice Kennedy, which looks into the future.\textsuperscript{166} Justice Kennedy recognized that an attorney’s role is much broader than litigating inside a courtroom.\textsuperscript{167} Justice Kennedy wrote:

\begin{quote}
An attorney’s duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client’s reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper mo-
\end{quote}

\begin{footnotes}
\item 158. Id.
\item 159. 501 U.S. 1030 (1991). Doctrinally, the Supreme Court considered whether, in order to be prohibited, extrajudicial speech by attorneys must pose a “clear and present danger” to a judicial proceeding, a test usually applied to First Amendment issues, or whether some lesser standard could apply. \textit{Id.} at 1031.
\item 160. \textit{Id.} at 1042.
\item 161. \textit{Id.}
\item 162. \textit{Id.} at 1033.
\item 163. \textit{Id.} at 1033-35, 1043.
\item 164. \textit{Id.} at 1063, 1074-75.
\item 165. \textit{Id.} at 1074-75.
\item 166. \textit{Id.} at 1043.
\item 167. \textit{Id.}
\end{footnotes}
tives. A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.  

### III. Analysis of the Case Law

The Second Circuit recently addressed the issue of applicability of the attorney-client privilege to public relations firms in three cases. Although all three cases had vastly different factual conditions, each of them addressed whether the attorney-client privilege should extend to public relations firms. The courts' reasoning in each case were all somewhat different. The following section will discuss the facts and the courts' holdings.

#### A. In re Grand Jury Subpoenas Dated March 24, 2003

Before being formally charged, Martha Stewart was investigated for a year and half by the Securities and Exchange Commission in connection with her sale of ImClone stock the day before the Food and Drug Administration announced that it would not approve the cancer drug. Stewart's attorneys hired a public relation firm to balance "[the] often inaccurate press reports . . . [that] created a clear risk that the prosecutors and regulators . . . would feel public pressure to bring some kind of charge against her."

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168. Id.


171. See McMenamin, supra note 170. The author argues that Stewart was unfairly singled out. Id. He calculates that Stewart saved a "mere" $45,000, compared to others, such as CEO Sam Waksal's friends who made $600,000 and $30 million on the sale of ImClone stock on December 27 and 28. Id. The ImClone colorectal drug, Erbitux, later received approval from the Swiss government and the FDA. See Erbitux (TM) (Cetuximab) Receives FDA Approval to Treat Irinotecan Refractory or Intolerant Metastatic Colorectal Cancer, GLOBEINVESTOR, Feb. 12, 2004, at http://globeinvestor.com (last visited Nov. 2, 2004).

During the grand jury investigation the United States Attorney's office subpoenaed the communications and documents from the public relations firm.\textsuperscript{173} It is worth noting that although the court's entire decision supports the expansion of the attorney-client privilege to public relations firms in certain circumstances, the court did not find that in the particular case those circumstances existed.\textsuperscript{174} Nevertheless, the court's decision takes a step into broadening the boundaries of the \textit{Kovel} doctrine.\textsuperscript{175}

The court's precedent is groundbreaking in several respects. First, the court acknowledges that the job of an attorney has broadened as a result of the constant barrage of mass media surrounding high profile clients.\textsuperscript{176} The court also accepts that part of a lawyer's legitimate legal services can include defending a person in the court of public opinion because "in some circumstances, the advocacy of a client's case in the public forum will be important to the client's ability to achieve a fair and just result in pending or threatened litigation."\textsuperscript{177} Adopting Justice Kennedy's position in \textit{Gentile}, the court endorsed the view that "[a]n attorney's duties do not begin inside the courtroom door."\textsuperscript{178}

Second, the court recognized that the complex relationship that exists between prosecutors and the media can affect the fairness of the judicial process.\textsuperscript{179} The court acknowledged that prosecutors are influenced by public opinion in deciding whether to bring charges, declining to prosecute or leaving matters to civil enforcement proceedings, or in deciding which particular offenses to charge (a decision which has important consequences during the sentencing phase of the trial).\textsuperscript{180} The court also noted that prosecutors, through the media, often engage in activities that "color public opinion" not only to the detriment of the person's general reputation but to her ability to obtain a fair trial.\textsuperscript{181}

\begin{itemize}
\item \textsuperscript{173} \textit{Id.} at 322-23.
\item \textsuperscript{174} \textit{Id.} at 331-32 (stating, after \textit{in camera} review, that conversations held between the public relations consultant and Martha Stewart were not made for the purposes of obtaining legal advice).
\item \textsuperscript{175} \textit{Id.} at 331.
\item \textsuperscript{176} \textit{Id.} at 330 ("[D]ealing with the media in a high profile case probably is not a matter for amateurs. Target and her lawyers cannot be faulted for concluding that professional public relations advice was needed."); see also \textit{id.} at 326-27 ("[T]here has been a strong tendency to view the lawyer's role more broadly.").
\item \textsuperscript{177} \textit{Id.} at 330.
\item \textsuperscript{178} \textit{Id.} at 327 (citing \textit{Gentile} v. State Bar, 501 U.S. 1030, 1043 (1991)).
\item \textsuperscript{179} \textit{Id.} at 330.
\item \textsuperscript{180} \textit{Id.}
\item \textsuperscript{181} \textit{Id.} The court mentions that while prosecutors, media, and law enforcement personnel influence public opinion, public opinion also influences prosecutors in their
The *Stewart* court also recognized that many lawyers are "amateurs" when dealing with high profile cases and may require the assistance of public relations "consultants." In fact, the court went so far as to recognize that a lawyer’s ability to perform some of her most “fundamental client functions,” such as client advising, seeking to avoid charges, and zealously seeking acquittal or vindication, would be “undermined seriously” if lawyers could not engage in a frank discussion of “facts and strategies” with the lawyers’ public relation firms.

The *Stewart* court treated public relations firms as consultants and compares their role to that of non-testifying experts or jury consultants. This brings the public relations firm closer to Kovel’s “essential category” in which the experts advise and assist the attorney in client representation. Such characterization carves out a niche where public relations firms could be considered privileged persons. The non-testifying experts and jury consultants remain in the background, helping the attorney formulate legal advice and strategies. In adopting the comparison, the court invoked a similar image of a public relations firm—a consultant, assisting the attorney in an area in which she is not trained, in order to formulate a legal strategy for her client.

decision making process. *Id.* This is perhaps the most accurate reflection on the state of things since it is not yet clear whether it is the hungry public that drives the media to meet the demand, or whether the media feeds public opinion with what it wants to deliver. *See* Semel & Sevilla, *supra* note 2, at 10 (“[O]ne question remains whether the media is giving the public what the public truly wants or dictating to the public what the media wants to sell. Perhaps there exists a more complex supply-and-demand relationship.”).

182. *In re Grand Jury Subpoenas*, 265 F. Supp. 2d at 330-31. The court specifies that lawyers may need skilled advice as to:

> [W]hether and how possible statements to the press—ranging from “no comment” to detailed factual presentations—likely would be reported in order to advise a client as to whether the making of particular statements would be in the client’s legal interest. And there simply is no practical way for such discussions to occur with the public relations consultants if the lawyers were not able to inform the consultants of at least some non-public facts, as well as the lawyers’ defense strategies and tactics, free of the fear that the consultants could be forced to disclose those discussions.

*Id.*

183. *Id.* at 330-31.

184. *See id.* at 331.

185. *Id.* at 326 (explaining that such experts advise the attorneys “[o]n matters such as whether the state of public opinion in a community makes a change of venue desirable, whether jurors from particular backgrounds are likely to be disposed favorably to the client, [and] how a client should behave while testifying in order to impress jurors favorably”).
In expanding the Kovel doctrine, by including one more possible category of privileged persons, the Stewart court emphasized several requirements. First, the communications must be "confidential." The Restatement defines confidential information as information that the communicating person believes "no one will learn the contents of... except a privileged person." The Stewart court adopted this definition of confidentiality.

Second, the information sought from the third party must be for the purpose of giving or receiving legal advice, as opposed to "saving" a public image for a client's business purposes.

The Stewart court's third requirement emphasized that it is the lawyer who must hire the public relations firm. Had Stewart hired the public relations firm herself, even if she had done it to "affect her legal situation," no attorney-client privilege would have been recognized. The last requirement is somewhat at odds with the Kovel decision. In Kovel, the court recognized that an agent or an expert of a client could be considered a privileged person—so long as the communication was made in confidence for the purpose of obtaining legal advice. One likely explanation for this adaptation of the Kovel doctrine is that the Stewart court is attempting to demarcate boundaries of where "legal advice" ends and "business purposes" begin with respect to public relations consultant.

The Stewart court also did not require that an attorney be present when communications between a client and the third party occur, subject to the provision that the communications be directed by an attorney for the purposes of giving or obtaining legal advice.

B. Calvin Klein Litigation—December 4, 2000

The attorneys for the plaintiff, Calvin Klein ("CK"), hired a public relations firm in anticipation of a high profile civil suit filed

186. Id. at 331.
188. In re Grand Jury Subpoenas, 265 F. Supp. 2d at 324.
189. Id. at 331.
190. Id.
191. Id.
193. In re Grand Jury Subpoenas, 265 F. Supp. 2d at 331. But see United States v. Bein, 728 F.2d 107, 112 (2d Cir. 1983) (holding that a private meeting between a client and an accountant following the rendering of legal advice by the client's attorney was not subject to the protection of the privilege).
against a licensee and its chief executive.\textsuperscript{195} CK's lawyers argued that the purpose of hiring the public relations consultant was defensive.\textsuperscript{196} The public relations firm was primarily retained to help the attorneys provide legal advice as well as to "assure that the media crisis that would ensue—including responses to requests by the media about the law suit . . . would be handled responsibly."\textsuperscript{197} When the defendants sought documents from the public relations firm, CK's attorneys invoked the attorney-client privilege to block communication and document production.\textsuperscript{198}

The court rejected all of plaintiff's arguments that recognized the public relations firm as a privileged person.\textsuperscript{199} Not swayed by the plaintiff's "vague and largely rhetorical contentions," the court rejected the arguments on three grounds.\textsuperscript{200} First, the court found that "few, if any, of the documents at issue appear to contain or reveal confidential communications from the . . . client."\textsuperscript{201} Second, the court found that the public relations firm was not assisting the attorneys in developing legal strategies or rendering advice.\textsuperscript{202} One possible explanation for this conclusion is that the court was unconvinced that a public relations firm with a preexisting relationship with the client was hired to do anything else than help to maintain a good public image for the client's business.\textsuperscript{203} Third, the court held that the privilege must be narrowly construed\textsuperscript{204} and not be expanded to public relations firms whose activities may "also" have been helpful to the client's attorneys.\textsuperscript{205}

There are several possible interpretations of the case. One view is that the facts in the case did not support the extension of the attorney-client privilege. The plaintiff's pre-existing relationship with the public relations firm makes it difficult to determine

\textsuperscript{196} Id.
\textsuperscript{197} Id.
\textsuperscript{198} Id.
\textsuperscript{199} Id. at 54-55.
\textsuperscript{200} Id.
\textsuperscript{201} Id. at 54.
\textsuperscript{202} Id. at 54-55 (noting that the public relations firm gave "ordinary public relations advice").
\textsuperscript{203} See id. at 54.
\textsuperscript{204} Id.
\textsuperscript{205} Id. Note that the court's use of the word "also" strongly suggests that it viewed the role of the public relations firm predominantly to improve/save the client's business reputation, thereby failing to qualify for attorney-client privilege protection. Id. The court found that "the privilege protects communications between a client and an attorney, not communications that prove important to an attorney's legal advice to a client." Id. (quoting United States v. Ackert, 169 F.3d 136, 139 (2d Cir. 1999)).
whether the public relations firm was indeed assisting the attorneys in the rendition of legal services or whether the public relations firm functioned primarily for the client’s business purposes. For example, the CK court was skeptical of the role that the public relations firm played in the litigation.

The facts suggest that the court may never view a public relations firm as a privileged person. The CK court applied Kovel’s "translator" analogy, but found that the public relations firm did not "translate" any document. Furthermore, the court found that nothing in the policy of the privilege suggests that attorneys, simply by placing accountants, scientists, or investigators [or, here, a public relations firm] on their payrolls . . . should be able to invest all communications by clients to such persons with a privilege the law has not seen fit to extend when the [third party is] operating under their own steam.

The court thus concluded that the public relations firm provided "ordinary public relations advice." This view suggests that the court does not recognize the possibility that a public relations firm could assist an attorney in the representation of a client. The CK court, therefore, declined to extend the protection of attorney-client privilege to public relations firms.


In Schroder, an employment age discrimination case, the plaintiff's attorney hired a public relations consultant in a suit against the employer alleging unlawful age discrimination. The defendants sought certain communications and documents, including fifteen e-mails exchanged between the consultant and the client, as

206. Id. at 54.
207. Id. at 54-55. The court concluded that the public relations firm's activities, such as "reviewing press coverage, making calls to various media to comment on developments in the litigation and even "finding friendly reporters,"" cannot be considered sufficiently important to be brought within the circle of confidence. Id.
208. Id. at 54.
209. Id.
210. Id. (quoting United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961)) (alteration in original).
211. Id.
212. Id.
214. Id. at *1.
well as the a sixteenth e-mail, which was communicated between
the consultant and the client's attorney.\textsuperscript{215} The plaintiff asserted
attorney-client privilege, claiming that the public relations consult-
ant provided advice and assistance that enabled the attorney to
render legal services.\textsuperscript{216}

The \textit{Schroder} court did not find that the consultant performed
anything other than "standard" public relations services for the
plaintiff, and thus declined to extend the attorney-client privi-
lege.\textsuperscript{217} The court also claimed to have followed the principle
enunciated in \textit{Calvin Klein}. The court's analysis, however, reveals
that it relied more on the reasoning and analysis of Judge Kaplan's
decision in the \textit{Martha Stewart} case, than on the \textit{Calvin Klein}
decision.\textsuperscript{218}

The \textit{Schroder} court specifically stated that it did not decline to
follow the \textit{Martha Stewart} decision, noting that there was no need
to determine whether \textit{In re Grand Jury Subpoenas} was decided
correctly.\textsuperscript{219} Second, the court expressly stated that the case before
it was decided on its facts—suggesting that under different circum-
stances the outcome may have been different.\textsuperscript{220}

Third, the \textit{Schroder} court relied on Judge Kaplan's terminology
in \textit{In re Grand Jury Subpoena}\textsuperscript{221} to find that the plaintiff did not
show any "nexus" between the consultant's work and the attor-
ney's role in preparing the plaintiff's complaint or the plaintiff's
case.\textsuperscript{222} Fourth, factually the \textit{Schroeder} case is closer to Martha
Stewart's grand jury case than to the \textit{CK} case. Just as in Martha
Stewart's grand jury case, the \textit{Schroder} case involved communica-
tions that were predominantly transmitted between the plaintiff
and the public relations consultant. Likewise, just as Judge Kaplan
found that there was no showing that established the nexus suffi-
ciently close to the provision or receipt of legal advice,\textsuperscript{223} Judge

\begin{itemize}
  \item \textsuperscript{215} \textit{Id.}
  \item \textsuperscript{216} \textit{Id.}
  \item \textsuperscript{217} \textit{Id.} at *8.
  \item \textsuperscript{218} \textit{Id.}
  \item \textsuperscript{219} \textit{Id.} at *9.
  \item \textsuperscript{220} \textit{Id.} at *1 ("The asserted attorney-client privilege cannot extend to a public
relations consultant on the facts of this case.") (emphasis added).
  \item \textsuperscript{221} \textit{Id.} at *9; see also \textit{In re Grand Jury Subpoena} Dated Mar. 24, 2003, 265 F.
Supp. 2d 321, 332 (S.D.N.Y. 2003) ("[T]here has been no showing that [communications
between the public relations consultant and Martha Stewart] has a nexus suffi-
ciently close to the provision or receipt of legal advice.") (emphasis added).
  \item \textsuperscript{222} \textit{Schroder}, 2003 U.S. Dist. LEXIS 14586, at *9.
  \item \textsuperscript{223} \textit{In re Grand Jury Subpoena}, 265 F. Supp. 2d at 332.
\end{itemize}
Cote found that "no requests for legal advice" were made in the requested e-mails.\textsuperscript{224}

The court in \textit{Schroder} also relied on the \textit{Calvin Klein} decision to hold that the plaintiff has not shown that the public relations consultant was "performing functions materially different from those that any ordinary public relations advisor would perform."\textsuperscript{225} While the holding has several interpretations, it is clear that plaintiffs would have to articulate specifically when and how the public relations consultant aided the lawyer in the rendition of legal services to make the communications privileged.

\textbf{IV. \textit{PUBLIC RELATIONS EXPERT: A PRIVILEGED PERSON IN CERTAIN CIRCUMSTANCES}}

The cases addressed in the previous section raise significant questions with respect to the scope of the attorney-client privilege and how it applies to public relations experts. When, if ever, is communicating with the media a legal service as opposed to a business service? As the previous section indicated, not everything that a lawyer does is a legal service for the purpose of the attorney-client privilege. Although lawyers are constitutionally allowed to communicate with the media on behalf of their clients within the scope of the ethical rule, that does not necessarily mean that a lawyer's communications with the media are always or perhaps ever a legal service. It is conceivable that bolstering a client's reputation, as in \textit{Gentile}, does not advance the litigation but serves an auxiliary purpose. If the lawyer is lobbying for the client, is that a legal service? Perhaps communication with the media is more legitimately viewed in certain kinds of cases, for example, in high profile criminal cases. The cases discussed in the previous sections lead to the conclusion that, at least in those circumstances, talking to the media could be an aspect of the legal representation for the purposes of attorney-client privilege.

Assuming that talking to the media constitutes legitimate legal services, what legitimate, important roles might the public relations expert play in assisting the lawyer, and what confidential communications are necessary to enable the expert to perform those roles? The public relations expert's role can be seen from two perspectives. First, the public relations expert might give advice to the lawyer about how the lawyer should communicate with the media.

\textsuperscript{225} \textit{Id.} at *8 (quoting Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 55 (S.D.N.Y. 2000)).
In carrying out this function, the issue is whether the public relations expert needs to talk to the client or learn otherwise privileged information, or can the public relations expert give the advice in the abstract?

A second view of the public relations expert's role is that of the lawyer's "mouthpiece"—an agent who engages with the media on the lawyer's behalf. This also raises the question of whether such a function is important enough. Why can the lawyer not communicate directly with the media? Furthermore, the "mouthpiece role" creates ambiguities. When is the public relations expert acting as the lawyer's mouthpiece, which, under Kovel, may be legitimate, and when is the public relations expert acting as a client's "mouthpiece," which presumably is not proper for the purposes of attorney-client privilege? The following discussion addresses these questions, and offers recommendations to attorneys so they can ensure that their communications with the public relations expert are privileged.

A. When is Lawyer Communication with the Media a Legitimate Legal Service?

Several of the cases discussed in Part III suggest that in certain circumstances, and especially in criminal cases, a lawyer's interaction with the media constitutes a legitimate legal service. Our society views criminal charges with greater seriousness than civil offenses, and thus imposes greater punishments. Although in both civil and criminal contexts the client's reputation can become sullied, it is only in the criminal context that one stands the chance of a prison sentence and the creation of a criminal record. The Sixth Amendment speaks to the gravity of a criminal charge by guaranteeing the right to a fair trial to a criminal defendant. Yet, as the media delivers sensational news reports and as public outrage grows about a particular case, the prosecutors may be influenced to indict or bring more severe charges since they carefully consider public opinion polls in making charging decisions.226 In fact, prosecutorial discretion has been called a lawless area and ultimately a political choice.227

226. See In re Grand Jury Subpoena, 265 F. Supp. 2d at 330; Cohen & Gershman, supra note 140, at 22.
227. See generally Morrison v. Olson, 487 U.S. 654, 727-31 (1998) (Scalia, J., dissenting) (explaining that a prosecutor has vast power and immense discretion with respect to criminal investigations, and that the primary check against abuse of this prosecutorial discretion is political).
It is these situations where the lawyer would be carrying out her fundamental duties to her client by interacting with the media to keep a prosecutor from indicting or from overreacting to public opinion by bringing excessive charges. Under these conditions, as the *Martha Stewart* court suggests, if a lawyer interacts with the media to strategically aim a message at those officials whose charges are of great consequences to the type of punishment a client could receive and whose actions often determine a client's freedom, it should be considered a legitimate legal service. In fact, it is the lawyer's duty to seek to avoid or narrow charges, zealously seek acquittal or vindication, and advise the client of the legal risks of speaking publicly. The plurality in the Supreme Court's decision in *Gentile* recognized and indirectly encouraged lawyers to pursue "lawful strategies to obtain dismissal of an indictment or . . . of charges." Thus, under circumstances where heavy negative news coverage threatens to taint the judicial process by adversely influencing the prosecutors, a lawyer's communication with the media is less likely to be a business service. Since prosecutors are responsive to public opinion, lawyers should have the opportunity to balance out the news coverage. Clients should not have to endure higher charges simply because the prosecutors want the public to know that they are tough on crime.

Although prosecutors are influenced by public opinion, they too play a role in setting the public discourse with the information that they reveal to the public via the media. In this complex prosecutor-media interaction, even legitimate information linked to a client can project guilt. Such coverage has the possibility of tainting the jury pool. It is unlikely, however, that a lawyer's actions to influence the jury pool will be ethical under the current rules of professional responsibility. The Justices in *Gentile* explicitly reiterated this view when they noted that even if the lawyer has constitutional rights to freedom of speech, she still has ethical obligations that she swore to uphold. Those obligations include following the precepts of Model Rule 3.6, which, even with its "fair reply" provision, is still highly restrictive of attorney interaction with the media.

Influencing the jury pool has never been an acceptable goal, and that is, in fact, the reason why lawyers were historically highly restricted from interacting with the media. The *Gentile* Court em-

229. See id. at 1072-73 (stating that the speech of those participating before a court can be restricted).
phasized that the outcome of a criminal trial is to be decided by impartial jurors based on the evidence presented at trial, and thus any extra judicial statements by lawyers supplying their version of the facts is seen as a threat to the fair process. It is worth noting that in none of the three cases evaluated in the previous section did the parties claiming protection of the privilege express their motive for hiring a public relations expert as to aid them in influencing the jury pool. While influencing the jury pool may not be ethical conduct, a lawyer should nonetheless be allowed to communicate with the media when she reasonably believes that prejudicial publicity will encourage prosecutors to indict or bring excessive charges.

B. Are Public Relations Experts Important Enough?

As the above discussion indicates, communicating with the media to counteract damaging news coverage that threatens to undermine a client’s right to a fair process could be an essential part of a lawyer’s legal services. Yet, many attorneys are not public relations experts since they are taught how to litigate and negotiate in a legal setting, not how to advocate on a client’s behalf in a public forum. There have been many reported instances where a lawyer, inexperienced in dealing with the media but feeling that she must respond to the harmful coverage, injured her client’s case by speaking out. Therefore, many attorneys, as the court in the Martha Stewart grand jury trial acknowledged, may need to turn to a public relations expert because they realize that the experts are more than mere conveniences, they are an integral part of the legal effort.

i) Public Relations Experts as Advisors

Public relations experts help the lawyer deal with the morass of public relations engagement. They provide skilled advice regarding possible statements to the various forms of media ranging from “no comment” to detailed factual presentations, and how such statements may be reported. They advise the attorney on whether the client should speak to the media at all, and if so,

230. Id. at 1070.
231. See generally Moses, supra note 11 (explaining that there are clients who have won in the courtroom, but have nevertheless been beaten in the media).
232. See Semel & Sevilla, supra note 2, at 64.
whether to do it personally or through representatives.\footnote{235} Public relations experts also advise the attorney as to how best to aim her message at prosecutors and law enforcement agencies, whether to respond to specific allegations, and advise the attorney on when is the most appropriate time to communicate with the media.

The advice of a public relations expert is significant when an attorney is attempting to avoid charges or avoid excessive charges being brought against her client. If the lawyer is not sufficiently skilled and knowledgeable in the field of media relations, then it is her duty to seek the assistance of an expert that can help her get acquainted with the subject area and be able to navigate through it for her client’s legal benefit. After all, while communicating with the media may seem simple, in reality the field is far more complex. Most attorneys do not deal with the media on a daily basis, and when a case calls for public engagement, they need the assistance of public relations experts to advise them on how to interact so that words are not taken out of context. The \textit{Kovel} decision envisions that a lawyer may seek outside help when she needs assistance in a subject area in which she is not an expert in order to advance her client’s case. Lawyers should be able to retain public relations experts to help deal with important aspects of the litigation, knowing that communications with the expert are protected. There is simply no practical way for meaningful discussions to occur if the lawyer is unable to inform the public relations expert of nonpublic facts, as well as the lawyer’s defense strategies and tactics.\footnote{236}

\begin{itemize}
\item[ii)] \textit{Public Relations Experts Talking to the Client}
\end{itemize}

While the \textit{Kovel} court found protectable situations where the client spoke directly to the translator without the attorney’s presence, whether the translator was provided by the attorney or by the client, there may be a difference as to a public relations expert. As previously noted, public relations experts, unlike engineers and forensic experts, always run the risk of appearing to have provided business services for the client because their job could be useful to the client outside the legal representation. Also, intuitively, communicating with the media is not nearly as complicated or arcane as organic chemistry or fingerprint analysis. Indeed, the \textit{Calvin Klein} court indicated that public relations experts do not provide

\footnotesize
\begin{itemize}
\item[235.] \textit{Id.}
\item[236.] \textit{Id.}
\end{itemize}
the "translator" function served by the accountant in Kovel.\textsuperscript{237} Likewise, the court in Schroder concluded that the public relations expert provided standard public relations services, via Schroder's attorney.\textsuperscript{238} Therefore, unless steps are taken to lessen the appearance that a public relations expert is being hired for the client's business purposes, it is difficult for judges to determine whether there was a legitimate legal purpose in the relationship. It is not hard to see how an attorney can serve as a conduit for a client's business purposes—the client asks the lawyer to hire a public relations expert and, just as in the tobacco cases, the presence of the lawyer is supposed to immunize the communications from an adversary's attack.

The cases discussed in Part III demonstrate that courts are not in agreement as to whether the attorney-client privilege would extend if a client interacted directly with the public relations expert. The court in Martha Stewart's grand jury trial, for example, did not see it as problematic if the client talked directly to the public relations consultants, without the presence of attorneys, as long as the communications were aimed at giving or obtaining legal advice.\textsuperscript{239} Yet, given the tone of the Calvin Klein and the Schroder decisions, and the explicitly narrow view of the privilege adopted by both courts, it is reasonable to infer that they are likely to see client-public relations expert communication as evidence of business service.

iii) \textit{Public Relations Expert as the Lawyer's Mouthpiece}

A second possible role of a public relations expert is to be the attorney's agent and in this capacity talk to the media on the lawyer's behalf. The Kovel decision envisions the possibility that lawyers may need agents to perform various tasks.\textsuperscript{240} One of the reasons why a lawyer may decide to have the public relations expert speak on her behalf is if, for example, she decides to hold a press conference and take questions from reporters, she may feel that a public relations expert may be better able to handle the questions. On the other hand, the decision may simply be one of delegation of duties, with the paralegals and law school associates doing the research, while the public relations expert handles the

\textsuperscript{239} In re Grand Jury Subpoena, 265 F. Supp. 2d at 331.
\textsuperscript{240} United States v. Kovel, 296 F.2d at 921 (2nd Cir. 1961).
media. But, having the public relations expert talk to the media creates ambiguities that are difficult to defend to a scrutinizing court.

The concern is the same—whether the public relations consultant is the lawyer's or the client’s “mouthpiece,” and how to tell the difference. The suspicion that the public relations expert is providing business services for the client is heightened in circumstances where the public relations expert speaks on a lawyer's behalf. Furthermore, a naïve court may be unconvinced that a lawyer needs a public relations expert to communicate with the media because public speaking appears to be so facile. As the court in Calvin Klein pointed out, when a public relations expert interacts with the media they are “simply providing ordinary public relations advice,”241 which does not qualify for the protection under the privilege doctrine.

C. Lawyers and Public Relations Experts—Maintaining the Privilege

In representing high profile clients whose chances of obtaining a fair trial could be adversely influenced by heavy negative media coverage, an attorney requiring the aid of a public relations expert should not be dissuaded from relying on their knowledge and skills simply because there is disagreement among courts as to whether and under what circumstances the privilege attaches. After all, none of the courts discussed have categorically stated that the privilege may never attach—they just have not been convinced given the facts in particular cases. When communications between a public relations expert and an attorney are challenged, the defending party will have to demonstrate to the judge the steps taken to ensure that the communications were privileged and that the attorney required the assistance and advice of a public relations expert for the purposes of the representation. The judge will probably conduct an in camera review and likely evaluate and determine whether the privilege attaches based on the “totality of the circumstances,” i.e., whether on the whole there was sufficient legal reason to justify extending the attorney-client privilege to include a public relations expert. In determining the issue, the judge will have to evaluate whether talking to the media was a legitimate legal service in the given circumstances. She will also have to judge whether the public relations expert was a necessary agent in ad-

vancing the litigation forward or was instead providing business services to the client.

The following factors are conclusions inferred from the cases previously discussed that may help attorneys ensure that their communications are privileged. The factors are not meant to be applied mechanically but demonstrating most, if not all of the facts, make the decision to rely on a public relations expert easier to defend and may lessen the likelihood that the public relations expert will be viewed as an outside third-party who destroys the privilege.

First, in order to demonstrate that the media engagement was a necessary legal service the lawyer must make a showing that heavy negative publicity had the possibility of undermining her client's chances of obtaining a fair trial by influencing the prosecutor to indict or bring heavier charges. This can be done with pre-indictment evidence from various media outlets which the attorney reasonably believes tends to incite public outrage and therefore is likely to effect the prosecutor's indictment decision. Demonstrating this is the necessary first step because it removes the specter of doubt that the party claiming the protection of the privilege initiated the engagement with the media prior to any negative publicity about the client, which could create doubt as to whether such engagement was indeed a legal service necessary for the representation. As the Calvin Klein court concluded, such preemptive engagement will not be protected by the privilege.242

Second, the attorney must hire the public relations expert.243 Hiring by itself, however, as the Calvin Klein and the Schroder cases indicated, will not privilege the information since it does not entirely remove the possibility that the public relations expert is performing a business service for the client via the attorney.244 It is also not the conclusion entirely based on Kovel because that decision envisioned that a client could bring his own translator.245 Fur-

242. Id. at 55.
243. In re Grand Jury Subpoena, 265 F. Supp. 2d at 331 ("[The] Target would not have enjoyed any privilege for her own communications with Firm if she had hired the firm directly.").
244. See Haugh v. Schroder Inv. Mgmt. N. Am., 02 Civ. 7955, 2003 U.S. Dist. LEXIS 14586, at *8 (S.D.N.Y. Aug. 25, 2003) (finding that the public relations firm merely provided standard public relations services for the plaintiff); Calvin Klein, 198 F.R.D. at 54 ("None of these vague and largely rhetorical contentions . . . is particularly helpful to assessing the purpose of the documents here in issue, many of which appear on their face to be routine suggestions from a public relations firm as to how to put the 'spin' most favorable to CKI on successive developments in the ongoing litigation.").
245. Kovel, 296 F.2d at 921.
thermore, realistically the client is still paying for the expert, whether the lawyer hires him or not because the cost will inevitably be incorporated into the client's bill. Nevertheless, the difficulty of drawing a line between legitimate legal service and business service where public relations experts are concerned drives towards the conclusion that the lawyer should do the hiring. The necessity for such seemingly arbitrary line drawing, as Judge Kaplan noted, is necessary. 246 Judge Kaplan applied Kovel's rationale to public relations firms: drawing of seemingly arbitrary lines is "the inevitable consequence of having to reconcile the absence of privilege for accountants and the effective operation of the privilege of a client and a lawyer under conditions where the lawyer needs outside help." 247

Third, although the Kovel decision suggests that a client should be able to communicate directly with an attorney's agent, with or without the attorney's presence and whether or not the attorney hired the agent, for the purposes of ensuring the attachment of the privilege, it is best that the public relations expert only interact with the attorney. 248 When only the lawyer communicates with the public relations expert, the situation is more consistent with the entire purpose for hiring the public relations expert—to assist the lawyer in advancing the representation of her client. Also, as mentioned earlier, it is difficult for judges to determine whether there was a legitimate legal purpose in the relationship or whether it was a business service for a client, discussing ways to bolster the client's reputation. If and when a client interacts directly with the public relations expert, it adds to the possibility that it was a business service because, presumably, any information that a public relations expert needs in order to conduct her job can be obtained from the attorney.

The fourth consideration that lawyers wishing to engage the expertise of a public relations expert should consider is interacting directly with the media. As with the previous point, having the public relations expert contact members of the media directly could be seen as "ordinary public relations advice," i.e., business service to the client. The Calvin Klein court was clear that such services as "reviewing press coverage, making calls to various media to comment on developments in the litigation," and "finding

247. Kovel, 296 F.2d at 921.
248. See id. at 921-22.
friendly reporters" does not constitute legal services.\textsuperscript{249} Legal services, as suggested by the court in Martha Stewart's grand jury case, is having the public relations expert advise the lawyer on which media outlets to use, when and how best to conduct the communications, and whether the client should speak directly to the media.\textsuperscript{250} The latter elements are more directly related to a lawyer's duty to avoid charges being brought or to ensure that unnecessary excessive charges are not brought.

In addition to the fundamental aspect of the attorney-client privilege— that communications be confidential—the factors mentioned above return full circle to what the \textit{Kovel} court expressed was the crucial aspect of the privilege. "What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer."\textsuperscript{251}

**Conclusion**

Advocating in the court of public opinion is the defining characteristic of some attorneys in recent times. The traditional role of an attorney focusing only on the courtroom is outdated. In this era of the Internet and twenty-four-hour cable news channels, advocating in the public forum to avoid charges brought or reduce their severity, is more and more recognized as a necessity rather than a choice. Failing to recognize this impinges upon clients' rights, hampers the advancement of the legal profession, and acts in contradiction to the explicit goals of the profession. If we embrace media and protect it with broad First Amendment protections, we must accept that lawyers need to protect their clients' right to a fair judicial process. Public relations firms are often part of the modern age response to this modern age problem. For our system of adjudication to be fair and just, if we protect the media's right to inflame the public opinion, to which prosecutors are highly attentive, then we must permit attorneys to engage the media through the assistance of public relations experts.

\textsuperscript{249} \textit{Calvin Klein}, 198 F.R.D. at 54-55.  
\textsuperscript{251} \textit{Kovel}, 296 F.2d at 922.
HUNGRY, HUNGRY HIPAA: WHEN PRIVACY REGULATIONS GO TOO FAR

Meredith Kapushion*

Privacy has many different definitions ranging from informational privacy to civil libertarian ideas of personal autonomy.1 It is difficult to define as it arises from a complex set of rules and institutions which determine the limitations and availability of information.2 As we find new ways to harness the massive amounts of available information, our lives may be subject to unwanted scrutiny and real losses stemming from privacy violations.3 While absolute privacy is unattainable, there are good reasons for pursuing policies which might prevent the erosion of its boundaries—no matter how gray or ill-defined those boundaries may be.4 In the area of personal health and medical information, the sensitive nature of the information at stake makes such losses all the more perilous and potentially injurious.5

Congress, concerned with the specter of privacy violations made possible by advances in technology and the use of electronic data storage, enacted medical privacy regulations with the Health Insur-

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5. See, e.g., Fabio A. Sciarrino, Ferguson v. City of Charleston: "The Doctor will See You Now, Be Sure to Bring Your Privacy Rights in With You!," 12 TEMP. POL. & CIV. RTS. L. REV. 197 (2002) (discussing case involving a South Carolina hospital that tested expectant mothers for drug use without disclosure and reported results to law enforcement); Spencer, supra note 1, at 887 nn.246-49 and accompanying text.
ance Portability and Accountability Act of 1996 ("HIPAA"). HIPAA imposes considerable regulatory burdens on health care organizations in the hope that strict administration and control of information will prevent both real and perceived injuries from unauthorized and unwanted scrutiny of personal health data. These concerns are by no means unfounded, but it remains to be seen whether HIPAA’s means of prevention are in fact the best cure.

Part I of this Comment traces a brief overview of the general development and regulatory requirements of HIPAA. Part II critiques HIPAA from a law and economics perspective, examining the economics of privacy, the problematic conditions in the market for health care services, whether HIPAA adequately addresses privacy concerns, and the costs and consequences of HIPAA. Part III suggests several alternatives for privacy advocates. In making policy choices, the costs should be carefully weighed against the benefits, and the outcomes should significantly solve the problems the policy was intended to address. The tradeoffs we accept in return for greater privacy protections should reflect our individual preferences to the greatest extent possible, and the solution put into place should have the flexibility to adjust to changing needs and the appropriate incentives to improve over time. Ultimately, HIPAA fails to meet these criteria, creates a number of new legal and economic problems, and adds regulatory and financial burdens to an already complex and costly health care system.

I. HIPAA’S IMPLEMENTATION

While HIPAA’s general policy goal was to protect the continuity of employee health coverage when changing jobs, the primary purpose of the privacy provisions was to address the public’s concern over employer access to sensitive employee medical informa-

9. HIPAA's preamble:
   An Act to amend the Internal Revenue Code of 1986 to improve portability and continuity of health insurance coverage in the group and individual markets, to combat waste, fraud, and abuse in health insurance and health care delivery, to promote the use of medical savings accounts, to improve access to long-term care services and coverage, to simplify the administration of health insurance, and for other purposes. HIPAA, Pub. L. No. 104-191, 110 Stat. 1936 (1996).
HIPAA'S PRIVACY RULE

10. Other goals included providing additional safeguards against third party access to "protected health information" ("PHI"), establishing procedures for information access, and giving patients notice and access rights to their medical information.

The HIPAA legislation gave Congress a self-imposed deadline of three years to enact legislation protecting the privacy of health information. Congress required the privacy regulations to address three specific areas:

1) The rights that an individual who is a subject of individually identifiable health information should have.
2) The procedures that should be established for the exercise of such rights.
3) The uses and disclosures of such information that should be authorized or required.

In lieu of Congress meeting the deadline, the Secretary of Health and Human Services ("HHS") was authorized to enact such regulations. Congress failed to act before the HIPAA deadline in 1999. The HHS Secretary then undertook the task, issuing final regulations in April of 2001, which went into effect on April 14, 2003. Small group health plans (under $5 million) were given an additional year to meet the requirements with April 16, 2004 as the

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11. Id.
12. Id.
13. Id.
15. Id. § 264(b).
16. Id. § 264(a). Some legislative watchdogs claim that the timing of HIPAA combined with the three year deadline was driven by political gamesmanship. Both political parties hedged their bets that they would control the executive branch when the deadline was expected to pass, thereby allowing them to sidestep the legislative process in pursuit of their respective political agenda. See Privacilla.org, Health Privacy in the Hands of Government: The HIPAA Privacy Regulation—Troubled Process, Troubling Results 12 (2003), available at http://www.privacilla.org/releases/HIPAA_Report.pdf; see also Charlotte Twight, Medicare's Progeny: The 1996 Health Care Legislation, 2 INDEP. REV. 373, 373-74 (1998). But see Mary Grealy, Health Privacy: The Beginning of the End or the End of the Beginning?, CATO INST. HEALTH POL'Y STUDIES CONFERENCE 79, 80 (2001) (arguing that failure to meet the deadline was "due to issues like private right of action and the rights of minors"), available at http://www.cato.org/events/transcripts/hipaa.pdf; cf. Dick Armey, Just Gotta Learn From the Wrong Things You Done, 22 CATO J. 7 (2002) ("HIPAA is a classic example of legislative panic.").
The final deadline for compliance. The HHS rules regulate only covered entities—health care providers, insurers, health plans, and clearing houses which handle individually identifiable patient information and transmit that information electronically. The privacy provisions, however, cover all information regardless of format. Electronic transmission is relevant only to determine whether an organization is a covered entity; covered entities are liable for all unauthorized disclosures of an individual's PHI, whether handled electronically or not.

The HIPAA provisions outline a number of penalties for non-compliance and wrongful disclosure of PHI. Disclosure penalties range from fines of $100 to $50,000 per violation. Criminal penalties for violations with proven intent can include fines up to $250,000 and ten years imprisonment. Citing the need for reform and improving consumer confidence in the integrity of medical records, the regulations set forth uniform national standards for patient privacy protection. The evidence of privacy abuse, however, was largely anecdotal in nature, and many of the examples given were already in breach of law or contract and could not have been remedied, regardless of the policy in place. Despite this, Congress took steps to deter potential future violations, and HIPAA marked the first time such a baseline national privacy standard had been promulgated. The rules preempt state laws only to the extent that they are less prohibitive, and do not replace them. HIPAA intentionally creates a floor, but not a ceiling, on privacy protections in an attempt to provide consistent restrictions on the disclosure of PHI.

18. Id.
19. Id. § 160.103.
20. Id. § 164.501.
21. See id. § 160.103; see also Jeffrey Lovitsky, Consents and Authorizations Under HIPAA, 76 FLA. B.J. 10, 11 (2002).
24. Id.
27. See infra notes 100-02 and accompanying text.
II. INTENT, EFFICIENCY, AND UNINTENDED CONSEQUENCES

A. The Economics of Privacy

It is difficult to treat privacy as a typical economic good. To fit the definition of an economic good, the quantity of privacy demanded must exceed the quantity supplied at a price of zero. Simply put, if privacy were free, we would all want more. But what does this mean in the everyday world? There is no “market” for privacy per se, and as a bundle of rules and institutions that limit the transferability of information, it is hard to think of privacy as a “good” the way that one thinks of apples, BMWs, or financial services as goods. Privacy is distinguished from the tangible goods which may complement it—window shades, caller I.D., trench coats, and fedoras—and from the substantive information it governs. The “bundle” is intangible, nontransferable, and possesses few, if any, of the characteristics we would traditionally ascribe to property.

Despite fitting the model loosely, privacy is nonetheless an economic good. It is scarce, that is, we generally don’t want to relinquish control over personal information unless we get something in return, and likewise, we would be willing to pay for more privacy up to the point where the marginal benefits equal the marginal costs.

As inapposite as it may initially seem, the metaphor of the market applies and it is instructive to think of privacy within the framework of supply and demand. The demand for privacy is driven by the competing consumption interests of market participants who would prefer other rules and institutions to govern the flow of information. Supply is similarly determined by the costs of ensuring more privacy. In this context, market participants who

29. DAVID JOHNSON, PUBLIC CHOICE: AN INTRODUCTION TO THE NEW POLITICAL ECONOMY 26 (1991) (“[A]n economic good is one that is scarce relative to people’s wants and, thus, commands a positive price on the market.”)
30. A market for privacy qua privacy does not presently exist, although markets clearly do exist for goods and services which may give rise to greater privacy protection. Likewise, there are markets for personal information, but not for the rules and policies that govern those markets. In other words, there is, at present, no direct means for an individual to select or bargain for the conditions of their personal information market.
33. See generally MURRAY ROTHBARD, MAN, ECONOMY AND STATE 241 (1962) (explaining marginal utility and principles of exchange).
34. Stigler, supra note 32, at 628.
value relaxed privacy protections will compete against those who favor more stringent policies.

As a brief aside, it is relevant to note that the current tone of the privacy debate leaves little wiggle room for those with competing demand interests. Fred Cate notes that

[i]t is frankly difficult to find the 'other' side of the privacy debate in large part because the benefits that result from open information flows (and may be placed at risk when privacy protections interfere with those flows) are so integral a part of our lives that they are seldom explicitly recognized or fully understood.35

To avoid demonizing those who are "anti-privacy,"36 it is useful to think of some of the positive effects of relaxed privacy standards from a broader social policy standpoint. For instance, fewer restrictions on information allow insurance markets to operate efficiently, reduce transaction costs among privacy providers, facilitate education and research, and lower overall costs for consumers.37 These and other advantages benefit society in the aggregate and should not be easily discounted. The effect of any given privacy policy is to create a tradeoff between these benefits and those gained from limiting access to information.38 Where the balance falls will depend on how we value these tradeoffs.39 The important thing is that we are informed as we make these decisions and consider that an increase in the amount of privacy may be more harmful than beneficial after a certain point.40

Privacy also presents another problem. While there may be a variety of options to choose from in buying any given privacy policy, the value of that policy is obscured until future valuations are revealed. Unlike most goods, the value of privacy is difficult to gage because damages from disclosure may be entirely unknown at the time the policy is agreed upon or "purchased," as is the likeli-

35. Cate, supra note 1, at 36.
36. Kent Walker, Where Everybody Knows Your Name: A Pragmatic Look at the Costs of Privacy and the Benefits of Information Exchange, 2000 STAN. TECH. L. REV. 4, 5 (2000). "Just as no one is 'pro-abortion' or 'anti-life,' no one can be 'anti-privacy,' yet that's the only label left by the rhetoric." Id.
37. See Stigler, supra note 32, at 628-33.
39. Id.
40. See infra Part II.E.
Most consumers do not know what their future medical condition will be at the time they subscribe to a medical plan. They are essentially buying a "black box" based on risk preferences and speculation about future conditions based on limited present information. The acceptable risk of PHI disclosure is entirely unresolved until the substance of the PHI is known. Thus, the ultimate value of privacy is not revealed until long after a policy is in place.

Despite this drawback, privacy may still be treated as an economic good and priced as such. All time-preferenced goods involve some measure of risk evaluation and speculation in pricing. Just as insurance policies reflect different risk preferences by offering an array of policies priced by actuarial estimates, so too can privacy policies reflect individual preferences by following a similar strategy. One solution is to concentrate or bundle the preferences of individual consumers. This could take the form of group policy plans, provider set standards, or some hybrid between the two.

There is a problem, however, in that catering to individual preferences can become very costly, very quickly. While it is conceivable that an individual could contract with every covered entity they come into contact with, the costs could mushroom as providers scrambled to accommodate a variety of needs, and regulatory oversight is replaced by extensive contract enforcement. This is not a foregone conclusion, however. The incentive to develop a way to meet the need for customized solutions while keeping costs minimized is as strong as the demand driving it. Entrepreneurs in


42. For example, take a patient who is diagnosed with a condition that carries a costly social stigma. The value of keeping their medical information confidential escalates in proportion to the consequences of disclosure. The patient's demand for privacy at the time of "purchase" is substantially less than at the relevant time of policy enforcement.

43. See generally Mario Rizzo, Time in Economics, in THE ELGAR COMPANION TO AUSTRIAN ECONOMICS 111 (Peter Boettke ed., 1994).

44. The mechanics may be complex, but such a system would offer a variety of choices with greater flexibility on the part of providers and insurers, while ultimately leaving the decision in the hands of the consumer. Ideally, an array of competing policies would emerge to effectively meet the demands of a wide spectrum of consumers. Market pressures to supply the best product at the lowest cost would also tend to prevent unwanted information disclosures and minimize implementation and enforcement costs.
search of potential profits will search for ways to capitalize on the potential profits and will likely find innovative solutions. 45

Critics of this type of market-oriented approach point out that this kind of price discrimination is not possible within the current system because of "pervasive market failures." 46

Although they are correct in their assessment that the conditions for a traditional competitive market do not presently exist, 47 it is not a foregone conclusion that the market has failed or cannot provide an efficient outcome. Problems such as high transaction costs, information asymmetries, and bargaining power disparities are commonplace in the real world and many (if not all) economists are well aware that the theoretical constraints and ceteris paribus clauses that delimit economic models do not hold true in actual practice. 48 Despite this, markets tend to work, even when the conditions suggest the classical economics framework will have little predictive power. 49 Further, when particular markets are treated within an experimental framework, economists often discover that these discrepancies may not be problems at all. 50 This is not to say that the market always works flawlessly or that complications are irrelevant. Without looking at the actual functions of a particular market and at how the participants behave within the rules and institutions that exist, it is simply inaccurate to conclude that the underlying conditions inevitably lead to market failure or that there are not effective measures for changing the rules of the game in order to yield optimal outcomes.

With the advent of HIPAA, a uniform standard is imposed which cannot adjust to individual preferences without risking liability for


50. See id.
covered entities. Rather than enable more refined price discrimination by offering consumers a variety of choices priced along the demand curve, a "one-size-fits-all" federal policy ensures that there is no price discrimination whatsoever.  

Scarce resources are not allocated according to their most valued uses, and the benefits of a competitive market are lost to waste. HIPAA fails to match consumer preferences to competing policies, and the end result is guaranteed inefficiency and true market failure.  

To illustrate part of the problem, consider a hypothetical hospital that caters only to patients with the lowest of privacy preferences. Even with all patients choosing to sign authorization and consent forms, the hospital would not escape the administrative and operative burdens that HIPAA imposes. The federal regulations mandate that the hospital jump through every compliance hoop, regardless of consumer preferences. The patients end up bearing the financial costs of a system that offers them little or no substantial benefit.  

In the real world, preferences are rarely so uniform. Consumers have wildly divergent preferences based on their individual needs and tempered by the costs they are willing to bear. When patients have heterogeneous preferences, HIPAA is only able to cater to one segment of the market. The costs are not borne in proportion to individual demand, and those with low privacy preferences end up subsidizing the privacy interests of those with high privacy preferences. The net effect is a wealth transfer from the former group to the latter.  

51. See Privacilla.org, supra note 16, at 1.

52. For a discussion on the difficulty of obtaining market efficiency through central or government planning, see generally Richard McKenzie, Competing Visions (1985). McKenzie notes that the "economic problem" is not simply one of scarcity, but one of information coordination. Id. at 104-05, 108-12.


54. See, e.g., Cate, supra note 1, at 38-43 (discussing the limits of notice and consent and comparing an opt-out to an opt-in rule).


56. See generally Gary M. Anderson, The Economic Theory of Regulation, in The Elgar Companion to Austrian Economics 294, 295-297 (Peter Boettke ed., 1994). In economic terms, this is a "deadweight loss," the uncaptured wealth that would otherwise be yielded in an efficient market.

57. See Cochran, supra note 46, at 5.

58. Id.
B. The Underlying Conditions of the Health Care Market

Stepping away from economic theory, it is useful to ask what led to the problems associated with medical privacy and health care providers in the first place. HIPAA was enacted to deal with the real conflict that exists between employee privacy and employer health care provision, but how did this conflict arise? What led to the emergence of employer provision of health care? How did health care shift from a simple individual “fee for services” arrangement to a complex system of health plans, insurers, administrators, and federal regulation? The answer is not a simple one, but at least part of it lies in the Internal Revenue Code and the rise of third party payers.60 Over time, policy changes and industry developments have shifted the role of purchasing and bargaining for medical services away from the consumer and towards employers, insurers, and group plan administrators.61 The tax code provides significant incentives for employers to manage and provide medical coverage as part of the package of benefits that employees receive.62 The tax burden for employer outlays is lower than if they paid the same amount to the employee directly,63 and the resulting shift toward employer provision of medical benefits has become so commonplace that it is effectively mandatory in all but the lowest compensated occupations.64

59. See generally Privacilla.org, supra note 16, at 3.
60. Id. at 2.
One of the major factors driving health care costs higher has been the increasing share of medical bills paid by third-party payers (private health insurers, employers, and government agencies) in the U.S. health care system. Most health care consumers do not pay directly for their own health care. Nearly 97 percent of hospital bills and more than 84 percent of physicians’ fees are paid by private health insurance. On average, 80 cents of every dollar used to purchase health care is paid by someone other than the consumer who receives the care. Id. at 3.
63. Butler & Gavora, supra note 62, at 3.
64. See generally Anne Maltz, Health Insurance 101, 690 PLI Lit. 523, 537-38 (2003).
While it may reduce individual transaction costs to seek jobs which bundle medical insurance with wages, this makes health services costlier overall.\(^6\) At the margin, individuals have few incentives to either engage in risk-averse behavior or to keep claim costs low by monitoring the medical services they receive.\(^6\) Depending on the particular type of health plan provided, employees may face strong incentives to consume more medical services, particularly if deductibles are low relative to individual demand and/or if individual account savings fail to roll over to successive periods. The more an individual is insulated from the costs of their choices, the more likely they are to spend.\(^6\) Thus, plans with poor incentive structures result in greater costs overall. This free rider and collective action problem is remedied in part by the employers' interests in keeping costs low, but this indirect bargaining and monitoring is considerably less efficient than its direct alternative. The tradeoff between group plan savings and losses attributable to agency problems is complicated by tax incentives and the increasing complexity of insurance and benefits plans,\(^6\) so it is unclear what the efficient market outcome would actually look like. It is almost certain, however, that if employers were given tax neutral treatment, third party payers would play a substantially smaller role.\(^6\)

As it stands, the current system places employers in the position of having to monitor the health services that are being provided to their employees. Without some sort of accountability check on the type and quality of care provided, employers have no means of keeping insurance costs down or monitoring what exactly they are paying for.\(^7\) This creates a real dilemma for both employers and employees, as the tradeoff for accountability is the diminution of medical privacy. As one policy study notes:

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65. See Butler & Gavora, supra note 62, at 4.
66. See Goodman & Musgrave, supra note 62.
67. Id.
69. See generally M. Susan Marquis & Stephen Long, To Offer or Not To Offer: The Role of Price in Employers' Health Insurance Decisions, 36 Health Services Res. 935 (2001) (study finding that employer demand for health insurance is relatively inelastic with regards to changes in rate premiums and noting prior studies that have found varying results for studies based on the stated preferences of employers), available at http://www.hospitalconnect.com/hsr/ArticleAbstracts/Marquis365.html.
70. See Butler & Gavora, supra note 62, at 4.
Congress will not be able to address the privacy issue fully until it addresses the tax treatment of employer-provided health coverage. Providing tax credits directly to individuals so that they can purchase and own their own health insurance would vastly improve confidentiality of medical records and minimize regulatory intrusion into the patient-doctor relationship.\footnote{71}

This and other reform solutions are well worth considering before turning to more government regulation. If it were not for the tax code encouraging employers to play the awkward part of middleman in health care provision, many of the privacy concerns that led to the HIPAA legislation may never have arisen at all. The incidental benefit of changing the payment system to eliminate or reduce the role of middlemen is to reduce the demand for information and thereby facilitate greater privacy protections.

C. HIPAA’s Policy Failings

Unfortunately, HIPAA does little to address the accountability tradeoff, and largely fails to meet its own policy goal of establishing employer/employee privacy safeguards. Employers can effectively sidestep HIPAA’s protections because of a number of broad consent exceptions\footnote{72} and a lack of prohibitions on employers requiring PHI disclosure authorizations as a condition of employment.\footnote{73}

\footnote{71. \textit{Id.}}


\footnote{73. HHS also recognizes this problem:

Jeffrey Blair: [B]ut if we go back to the original thinking of why we needed privacy protections, if I recall correctly, the greatest concern that the public had was that their health care information might be inappropriately accessed by their employers. And that that might jeopardize either their ability to be hired, or their ability to retain their employment. Of course, HIPAA attempted to address this as well as it could within the framework that Congress gave us.

Mark Rothstein: [H]IPAA actually does really very little, if anything to address that problem that you referred to. That is, individuals being concerned that their employers have access to their health records. And the reason for that is it is lawful for an employer to require that an individual sign an authorization as a condition of employment, after the individual has received a conditional offer.

So, as a result, the disclosure of an individual’s entire medical record to an employer is lawful under HIPAA. It’s illegal in California and Minnesota, that have specific statutes that address this issue, but in the other 48 states, it’s lawful. And so, therefore, HIPAA really doesn’t help things. HIPAA will prevent the wrongful disclosure without an authorization, but as long as there was a valid authorization signed, there would not be a problem.}
These and other exceptions may leave patients with inadequate privacy protections. Not only do the regulations open the door to the underprotection of privacy, the penalties often encourage draconian overenforcement of the regulations, in some cases, yielding too much privacy.4

Given the morass of regulations and accreditation requirements that health care providers already have to contend with, it is not surprising that when faced with uncertainty or the prospect of liability, the tendency is to err on the side of caution and overenforcement.5 When the stakes are high, uncertainly is an unappealing option, and covered entities are more likely to adopt reactionary policies that favor their interests over those of the patients they serve. A common example of this problem is often cited anecdotally: although the HIPAA rules require hospitals to allow patients to opt-out of the patient directory,6 many hospitals treat it as an opt-in rule. Unless the patient explicitly authorizes the listing, hospitals will not reveal that information—even in the extreme situation where an unconscious and dying patient’s friends and relatives are trying to locate her.7 While some providers may be unknow-

Meeting transcript, HHS, National Committee on Vital Health Statistics (June 24, 2003), available at http://www.ncvhs.hhs.gov/030624tr.htm.


Horror stories are appearing in the literature, warning of unintended consequences. For example, a recent letter to the editor in the New England Journal of Medicine describes a situation in which a patient underwent cardiac transplantation. Postoperatively, routine blood cultures on the patient revealed a bacteremia. The infectious disease specialist at the recipient’s hospital contacted the donor’s hospital to ascertain the identity of the infection so that immediate antibiotic treatment could be initiated for the (now immunosuppressed) patient. The donor’s hospital refused to release the information, citing HIPAA regulations and policies, because the (now deceased) donor had not given authorization for release of PHI.

Id.

75. Id.; see also Radly Balko, The Barriers Don’t Exist, TECH CEN. STATION, June 4, 2004 (discussing the reluctance of insurers to price according to individual risk based on the false perception that federal regulations prohibit them from doing so), available at http://www.techcentralstation.com/060404H.html.

76. 45 C.F.R. §164.510(a)(2).

77. See Laurie Tarkan, Sorry, That Information is Off Limits: A Privacy Law’s Unintended Results, N.Y. TIMES, June 3, 2002, at F5; see also Jack Rovner et al., Managing the Privacy Challenge: Compliance with the Amended HIPAA Privacy Rule, 15 HEALTH L. 18, 28-29 (2002); Yolanda Woodlee, Hospital Bill is Family’s Only Clue: Relatives Weren’t Notified of Md. Man’s Hit-and-Run Death, WASH. POST, Jan. 20, 2004, at B5.
ingly misapplying the law, many knowingly overreach for fear of the litigation and penalties that threaten to ensue.\textsuperscript{78}

In a similar vein, consent forms tend to be overbroad to avoid potential liability.\textsuperscript{79} While HIPAA takes steps to redress this by requiring plain language descriptions of the information and its means of disclosure,\textsuperscript{80} it is largely ineffective given that few patients bother to read the authorization forms at all—much less in critical detail.\textsuperscript{81} While HIPAA shifts control towards patients, this is not clearly in their favor. They have the option to sign or not to sign, but they lose the diversity of options they have to choose from and may be left with a stark choice between relinquishing their privacy via a consent form or forgoing treatment altogether.

There are also numerous exceptions to the consent requirements that are not within the patient’s control.

[T]oday patient consent is \textit{not} required for disclosures of your personal medical information by covered entities in connection with medical treatment, payment or health care operations. Although patient authorization is required in certain other situations, a laundry list of over-broad exceptions retained from the original rules largely guts the authorization requirement.\textsuperscript{82}

The gains that might initially seem to advance the interests of ardent privacy advocates are quickly swallowed by this and other problematic HIPAA rules which inadequately protect patient privacy.\textsuperscript{83}

Privacy advocates should also be concerned with HIPAA’s “transactions rule.” The rule sets forth a standardized format for medical records,\textsuperscript{84} which allows for centralized data collection on a scale not previously feasible. This move might bode well from a long-run cost-efficiency perspective, but it raises serious concerns


\textsuperscript{79} See Joseph Slobodzian, \textit{Judge Upholds Changes to Medical-Privacy Law}, PHILADELPHIA INQUIRER, Apr. 3, 2004, at A12 (“Patients may refuse to sign the HIPAA form, but patient advocates argue that option is practically meaningless. Since the rule, advocates say, most doctors or medical providers refuse to assume civil and criminal liability for wrongly disclosed patient information and require patients to sign before they provide care.”).

\textsuperscript{80} See Spencer, \textit{supra} note 1, at 870-71.

\textsuperscript{81} See Cate, \textit{supra} note 1, at 38.

\textsuperscript{82} Twight, \textit{Prying Eyes}, \textit{supra} note 72.

\textsuperscript{83} See \textit{infra} text accompanying notes 97-102.

\textsuperscript{84} 45 C.F.R. §162.
HIPAA'S PRIVACY RULE

for privacy.85 Consider, for example, the failed proposal to create a National Data Center put forth by the Johnson administration.86 What began as a proposal to consolidate agency efforts and cut back on costs turned into a behemoth database that would track individuals by consolidating nearly every piece of public information available on them in one location.87 Following negative reactions from the public and Congress, the measure was abandoned on grounds of creating a security threat if the database were compromised and for putting civil liberties at risk.88 These same concerns led to widespread opposition of Congress’ plan to create a National Health Identifier (“NHI”) as part of the original HIPAA legislation.89 These requirements were copied almost verbatim from the rejected 1993 Clinton health security bill.90 Although the NHI proposal was eventually withdrawn, similar threats to privacy remain as the security requirements of HIPAA dictate a standardized format for medical records, which includes Social Security numbers.91 In practice, if not in principle, this is essentially equivalent to the NHI proposal.92

D. HIPAA’s Costs

In addition to the structural problems outlined above, HIPAA also comes with a high price tag. There are direct and indirect costs of administration, as well as a number of hidden costs in the form of unintended consequences. Turning first to the direct costs, even the conservative HHS estimates are substantial. HHS estimated the start up costs of compliance at $3.5 billion with continued annual costs of $1.6 billion.93 These cost estimates account for such sunk costs as initial policy development and implementation, renegotiation of contracts between business associates, technology improvements, and other administrative burdens.94 Ongoing costs

86. See Spencer, supra note 1, at 868.
87. Id.
88. Id.
89. See 64 F.R. 59,918, 59,921 (1999).
90. Twight, Health and Human Services, supra note 85, at 486.
91. Id. at 490.
92. Id. at 488.
93. See COCHRAN, supra note 46, at 3-4 (comparing HHS’ estimates with independent cost estimates of $4 billion and $1.8 billion respectively, with a total long-run cost of roughly $30 billion).
94. Id. at 2.
include personnel training, amendment and correction requirements, and patient authorizations. 95 Combined, these expenditures yield long-run baseline costs between $25 and $30 billion. 96

Along with direct expenditures, HIPAA also adds to the costs and inefficiencies of the health care market in the form of indirect costs. By adding a layer of regulatory red tape, HIPAA distorts the market process by introducing costs which disproportionately affect covered entities. While the rules may be the same for everyone, the costs of implementing them are not. Large insurance and health care companies will gain stronger positions in the market as they are more able to bear the costs of compliance. In contrast, small organizations will face greater proportional costs. HHS recognized this problem and gave an additional year for small health plans (not small providers) to comply, but this stopgap, applied only to a fraction of affected parties, does not address the underlying problem. The regulations also hinder new entrants to the market who now face higher start up costs as a result of the compliance requirements. These barriers to market entry make the market less competitive overall, and as the costs of entering and remaining in the market rise, so too do the costs of health care provision. 97

Lastly, HIPAA has a number of additional hidden costs in the form of unintended consequences. Some market players will invariably profit at the expense of others when new regulatory burdens take effect: here, there are a number of winners and losers. HIPAA is an economic boon to the tech industry 98 and to legal firms and others that specialize in HIPAA compliance. 99 Some in-

95. Id. at 3.
96. Id. at 4.

A serious danger is that a system designed to protect privacy, even in the way that is most sensible, might impose costs in excess of benefits, simply because it is so hard to manage. Time and effort are scarce commodities and far from trivial concerns. But the more important problem is that a burdensome system for the protection of privacy could undermine patient care itself, not least by making it more expensive.

99. See, e.g., Jessica M. Lewis, HIPAA: Demystifying the Implications for Financial Institutions, 8 N.C. BANKING INST. 141, 156 n.133 (2004) (noting that Bank One gained a competitive edge by advertising itself as the first bank to become Claredi certified).
insurance companies are already offering protections for liabilities derived explicitly from HIPAA violations.\textsuperscript{100} While this may appear to create new jobs, it is only at the expense of scarce resources that would otherwise be put to use more efficiently elsewhere.\textsuperscript{101}

The regulations also adversely affect charities and medical research. Charitable organizations that raise money for health causes depend on many former and current patients for charitable revenues.\textsuperscript{102} With the advent of HIPAA, they can no longer access or purchase targeted lists without patient consent.\textsuperscript{103} This restraint puts charities devoted to medical illness and treatment that are dependent on individual donations at a significant disadvantage.\textsuperscript{104} Likewise, HIPAA makes it more difficult for pharmaceutical companies, medical device manufacturers, epidemiologists,\textsuperscript{105} and clinical researchers to conduct clinical trials.\textsuperscript{106} Researchers no longer have easy access to the medical information that allows them to reach the relevant test subjects.\textsuperscript{107} This hurdle will make the already lengthy and expensive delay between product invention and market availability even more encumbered.

Other industries may also face higher costs by virtue of falling with the "covered entities" category, even though they are not ostensibly part of the health care industry. Law firms,\textsuperscript{108} banks,\textsuperscript{109} and insurers (outside of health insurance), to name but a few, are

\begin{itemize}
\item \textsuperscript{101} See Henry Hazlitt, \textit{Economics in One Lesson} 17 (3rd ed. 1978) ("The art of economics consists in looking not merely at the immediate but at the longer effects of any act or policy; it consists in tracing the consequences of that policy not merely for one group but for all groups.").
\item \textsuperscript{102} See Epstein, \textit{HIPAA on Privacy}, supra note 41, at 15-16.
\item \textsuperscript{103} Tarkan, supra note 81; see also John Eggertsen et al., \textit{HIPAA Privacy Regulations: A Summary}, SH078 ALI-ABA 29, 68 (2003).
\item \textsuperscript{104} Tarkan, supra note 81.
\item \textsuperscript{106} See Lynne Glover, \textit{Conducting Clinical Trials Made More Difficult by New Privacy Regs}, PITTSBURGH BUS. TIMES, June 6, 2003; see also Epstein, \textit{HIPAA on Privacy}, supra note 41, at 18.
\item \textsuperscript{107} HHS has included certain exceptions for public health related activities. For a detailed discussion, see generally Diana M. Bontá et al., \textit{The HIPAA Privacy Rule: Reviewing the Post-Compliance Impact on Public Health Practice and Research}, 31 J.L. MED. & ETHICS 70, 70-72 (2003).
\item \textsuperscript{108} See infra notes 121-23 and accompanying text.
\item \textsuperscript{109} See Lewis, supra note 99, at 141.
\end{itemize}
among those that will face additional costs. In turn, these costs will be transferred to consumers in the form of higher costs for legal and banking services, and higher insurance premiums. This "trickle down" effect is hard to trace and is unlikely to be fully accounted for in any HIPAA cost estimate.

E. HIPAA's Legal Problems

HIPAA also raises a number of legal problems. There are tricky issues with some of the more straightforward legal questions. For instance, when is there a violation? When does a plaintiff have standing, and, what are the possible remedies and defenses? In addition to these types of standard litigation questions, HIPAA raises issues that are unique—namely, problems related to the "minimum necessary" standard and state law preemption problems. The typical litigation problems are worth exploring, but are beyond the scope of this paper. It is worthwhile, however, to spend some time looking at the "minimum necessary" standard and preemption problems as they have already generated considerable debate in the literature and litigation in the courts.

The "minimum necessary" standard requires that a covered entity make reasonable efforts to limit PHI to the minimum necessary to accomplish the purpose of the use, disclosure, or request. This attempt to further limit the misuse of PHI creates one of the greatest compliance challenges for covered entities.110 Even for routine and recurring disclosures or requests, covered entities must implement policies and procedures to meet the standard.111 Aside from the implementation burden, the main problem with the standard is that it is remarkably vague. Commentators have argued that it is "contrary to sound medical practice" and "unworkable in daily treatment situations."112 Although it has thus far survived constitutional challenges,113 this assurance offers little consolation to covered entities struggling to implement the rule.114 The inherent ambiguity of a "reasonableness" test combined with the near infinite number of facts and circumstances that factor into one's subjective judgment create a dangerous pitfall for covered entities.

112. Id. at 160.
113. Id. at 159; see also Epstein, HIPAA on Privacy, supra note 41, at 25.
115. See generally Guthrie, supra note 111, at 159-68.
In addition to the ambiguities of the "minimum necessary" requirement, HIPAA also creates state law preemption problems.116 The regulations call for federal preemption of state law except for a number of problematic exceptions. HIPAA does not preempt state law if the state law meets one of the following conditions:

1) Is necessary to prevent fraud and abuse;
2) Ensures appropriate State regulation of insurance and health plans to the extent expressly authorized by statute or regulation;
3) Allows for state reporting on health care delivery or costs;
4) Serves a compelling need related to public health, safety, or welfare, that warrants the intrusion into privacy when balanced against the need to be served;
5) Regulates the manufacture, registration, distribution, dispensing, or other control of any controlled substances, or that is deemed a controlled substance by state law;
6) Is more stringent than the HIPAA rule;
7) Provides for the reporting of disease or injury, child abuse, birth, or death, or for the conduct of public health surveillance, investigation, or intervention; or
8) Requires a health plan to report, or to provide access to, information for the purpose of management audits, financial audits, program monitoring and evaluation, or the licensure or certification of facilities or individuals.117

Although these exceptions may seem benign on the surface, they cause considerable confusion as to when state law preempts the federal rule.118 The issues are not straightforward or easily dispensed with, and states are already seeing substantial litigation as courts address the issue.119 Until these issues are more firmly settled, we can only expect more of the same.

Regardless of the wisdom behind the preemption exceptions, much of the blame for generating this litigation falls squarely on HHS. Presumably to cut back on compliance costs, changes were

118. See generally Bishop, supra note 26, at 723.
119. See, e.g., Law v. Zuckerman, 307 F. Supp. 2d 705, 709 (D. Md. 2004) (finding preclusion where HIPAA is "more stringent" than Maryland's disclosure regulation); Nat'l Abortion Fed'n v. Ashcroft, No. 04 C 55, 2004 WL 292079, at *3 (N.D. Ill. Feb. 6, 2004) (stating that Illinois law supercedes HIPAA where state law has more restrictive disclosure requirements, even with a court ordered subpoena); Lemieux v. Tandem Health Care, 862 So.2d 745, 748 n.1 (Fla. Dist. Ct. App. 2003) (noting in dicta that Florida substantive law is more stringent than HIPAA on the issue of disclosure and thus Florida law supercedes the less protective federal regulations, even though HIPAA's procedural requirements are more stringent).
made to the final rule which eliminated a state’s ability to seek out an advisory opinion on preemption.\textsuperscript{120} While this reduces the burden on HHS, it fails to clarify the legal issues and merely shifts the burden onto courts to resolve the question at the state level.

Beyond the particular legal questions engendered by HIPAA, the regulations also invite new litigation. Although HIPAA does not create any new federal private rights of action for wrongful disclosures of PHI,\textsuperscript{121} the privacy standards are now being incorporated into state common law causes of action\textsuperscript{122} and may be used to extend actions to parties previously exempt for lack of privity.\textsuperscript{123} For better or worse, this expansion of state law claims adds burdens to the court system and consumes legal resources.

There are also new legal costs outside of the claims themselves. Namely, lawyers face increased discovery costs and litigation obstacles in accessing medical records.\textsuperscript{124} Attorneys also have greater internal compliance costs in the form of procedural safeguards for protecting client PHI, creating and monitoring arrangements with covered entities with respect to PHI, and in-house staff training.\textsuperscript{125} When assessing HIPAA’s legal costs, it would be a mistake to look simply at the damages awarded to successful plaintiffs or the costs of new claim litigation generally. The costs of HIPAA are much broader and ought to be accounted for. Resolving legal issues as a matter of first impression, working through more red tape during discovery, and adding encumbrances to law firms and attorneys must be added to the sum.

### III. Alternatives

HIPAA’s high costs, questionable benefits, and numerous economic, legal, and administrative consequences make a strong case for repeal. Not only does it seem reasonable to conclude that the benefits fail to exceed the costs, it may be that the policy may not

\textsuperscript{120} See Guthrie, \textit{supra} note 111, at 155; Brian Zoeller, \textit{Health and Human Services’ Privacy Proposal: A Failed Attempt at Health Information Privacy Protection}, 40 \textit{Brandeis L.J.} 1065, 1081 nn.90-91 and accompanying text.


\textsuperscript{122} Id. at 652-58.

\textsuperscript{123} Id. at 662-65.


produce *any* net benefits, *regardless* of cost.\textsuperscript{126} As an alternative, we should consider less intrusive options that address the privacy concerns that led to HIPAA, while avoiding the many problems it has raised. A good solution meets the criteria of sound policy implementation,\textsuperscript{127} while minimizing the regulatory costs and burdens.\textsuperscript{128}

Several possible solutions have already been noted: a broad re-examination of the structure of the health care payment system, a revision of the tax code,\textsuperscript{129} and the development of a privacy insurance market.\textsuperscript{130} The advantage of these types of reform is that they address certain underlying concerns of the health care market that regulatory reform generally neglects. The agency problems, poor incentive structures, collective action difficulties, and moral hazards that plague the health care system are at the root of rising costs and frustrations with medical coverage.\textsuperscript{131} Only by changing the rules of the game can we expect any real resolution to these problems. But, given that such reforms would require radical changes to the health care market and the current political climate, more incremental change seems likely.

Another possible route is to adopt clear guidelines for better privacy policies. Fred Cate sets forth one such framework. He suggests regulators "should focus on harm, not control; use narrow, precise definitions; employ appropriate consent requirements; apply regulations consistently; and evaluate the constitutionality of rules."\textsuperscript{132} Similarly, Cass Sunstein offers a narrower framework for evaluating health privacy:

A free society should begin with a strong presumption in favor of full patient control over personal information. The presumption is rebutted when disclosure to others is necessary (1) for good patient care, as in the case of consultations and medical teams; (2) to compile information that will produce scientific or

\textsuperscript{126} See Cate, supra note 1, at 37; Mike Koetting, *The Regulation of Managed Care Organizations and the Doctor-Patient Relationship*, 30 J. LEGAL STUD. 703, 703-04, 707 (2001).

\textsuperscript{127} See supra text accompanying note 8.

\textsuperscript{128} See also Epstein, *HIPAA on Privacy*, supra note 41, at 22-24 (discussing the public choice problems of HIPAA and the difficulties of reversing bureaucratic entrenchment).

\textsuperscript{129} See supra notes 57-68 and accompanying text.

\textsuperscript{130} See supra notes 43-49 and accompanying text.

\textsuperscript{131} See supra notes 59-69 and accompanying text.

\textsuperscript{132} Cate, supra note 1, at 53.
medical progress; (3) to protect third parties from serious risks of harm; and (4) to prevent harm to patients themselves.\textsuperscript{133}

Whether Cate or Sunstein has the right approach is debatable, but given the current regulatory environment and the promise of a better alternative, it may not be a bad idea to let their ideas play out. The current approach to privacy is muddied and simply not feasible. A more consistent and principled approach holds the promise of clarifying our legal rights and the value of those rights in any given tradeoff. At least with a clear sense of what is at stake, we can begin to make rational decisions about when, where, and how information ought to be handled.

As a final alternative, we may simply want to go back to the beginning. Prior to HIPAA, choices about privacy were exercised by those closest to the situation and circumstances, namely health care practitioners and intermediaries constrained by state privacy, contract, and tort laws.\textsuperscript{134} They were also constrained by custom and common sense, norms we too often undervalue.\textsuperscript{135} Not every solution to a problem need be a legal one, and the lack of widespread or systematic privacy abuse prior to HIPAA suggests there may not be a place for one.\textsuperscript{136} Assuming, arguendo, that there is such a place, it may be best to bolster the protections that already exist for patient privacy at the state level, keeping in mind that there are significant tradeoffs to enhancing those protections.\textsuperscript{137}

Regardless of which path we take, there are good reasons for taking a more market-oriented approach. Among other things, it offers a variety of alternatives, eliminates or reduces the overall administrative burden, and removes the need for esoteric debates over what amount of privacy is the “right” amount for individual

\textsuperscript{133} Sunstein, \textit{supra} note 97, at 710.
\textsuperscript{134} See Epstein, \textit{HIPAA on Privacy, supra} note 41, at 20.
\textsuperscript{135} Sunstein suggests physician norms may be the best place to begin. See Sunstein, \textit{supra} note 97, at 710.
\textsuperscript{136} See \textit{supra} notes 25-26 and accompanying text.
\textsuperscript{137} See Epstein, \textit{HIPAA on Privacy, supra} note 41, at 14.

The former [pre-HIPAA] world should not be treated as though it were the state of nature, in which no one knew about privacy or cared about the consequences that might flow from the inopportune release of information. Quite the opposite, the tradeoffs between the control of information and the need for its dissemination into different arenas did not first surface in 1995 or 1996. Rather, it has long been at the center of the discussion for research protocols used by physicians, hospitals, and research centers. The protection of medical records was always a big deal, one that was subject to regulation as well as contract.

\textit{Id.}
Although, the "invisible hand" of Adam Smith cannot point us to the solution, it does encourage innovation, choice, and most of all competition. We have no guaranteed means of knowing in advance who will win and who will lose, but it is important to set aside any pessimism, and remember that the openness of the market is precisely what makes it work.\textsuperscript{139}

As a corollary, it is also important to consider the benefits of competing legal regimes. By allowing states to experiment with different legal solutions that balance the privacy interests of consumers with the interests of the health care industry, we are more likely to see innovation and improvement.\textsuperscript{140} State legislators can more readily change the laws when they become ineffective or excessive, and can more readily respond to the people affected. And, at least in principle, states can learn from each other and compare what does or does not make a system work and adjust accordingly. Under a uniform regime, we lose much of the incentive to create better laws at the state level. And although HHS officials may have the best of intentions, they face a much more difficult task in creating rules that best satisfy the conditions of each state's interests and existing legal framework. The agency is much less likely to finesse a solution that works for any single state, much less any particular health care market within that state.

\textbf{Conclusion}

In sum, HIPAA is not a good deal for patients, the health care industry, or any "covered entity" that has the misfortune to fall within its reach. The advantages of strengthening and simplifying the rules under a uniform standard are gained at the expense of experimentation and competition between states and among providers. The administrative burdens HIPAA imposes are, at best, a marginal benefit for a small segment of consumers. At its worst, HIPAA imposes costs directly and indirectly on nearly everyone and offers little in return. HIPAA's main agenda of resolving the employer/employee information disclosure problem remains

\textsuperscript{138} See, e.g., Jacobson, supra note 4, at 1506; cf. Sunstein, supra note 97, at 709-10.

\textsuperscript{139} See generally Friedrich Hayek, Individualism and Economic Order 77-91 (1996).

largely unresolved, and HIPAA does nothing to address the underlying agency problem. In place of a sound policy bolstering privacy protections, HHS has given us a stack of regulations that amount to a costly administrative headache with a number of wealth redistributive effects in tow. Alternatively, we should repeal HIPAA and consider less centralized, more competitive, and more effective options.
INTRODUCTION

In Gideon v. Wainwright, Justice Black commented that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth." Since Justice Black made this proclamation in 1963, most Americans intuitively accept the idea of an indigent's constitutional right to counsel in a criminal trial. While lawmakers and advocates debate over how best to deliver these services, and whether or not the right is being met adequately, they generally do not question whether the right exists. Neither the legislative nor the judicial branch, however, has recognized an analogous right to counsel in civil matters. Though government sponsored legal services, public interest law offices and organizations, and pro bono programs at private firms provide legal services to indigent clients, the legal services provided to indigents in civil cases fall far short of the number that are provided to people who are able to pay for legal help.

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2. See Kim Taylor-Thompson, The Legal Profession: Looking Backward: Tuning Up Gideon's Trumpet, 71 FORDHAM L. REV. 1461, 1462 (2003) (examining the Supreme Court's lack of guidance regarding the representation requirement); see generally Stephen B. Bright, Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake, 1997 ANN. SURV. AM. L. 783 (1997) (recognizing that while the right to counsel exists in criminal cases, indigents often receive insufficient or no counsel).

3. See infra Part I (discussing the holding of Gideon v. Wainwright and the arguments that the holding should apply to civil cases).

4. See Gary Bellow & Jeanne Kettleson, From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice, 58 B.U. L. REV. 337, 342 (1978) (noting the gap between available legal services and the level of services needed to provide representation to indigents).
Scholars and practitioners make both constitutional and ethical arguments for the expansion of legal services and for the recognition of a right to counsel for the indigent client in civil matters. The correct functioning of the adversarial process itself relies on the assumption that both sides are coming to the process with equal legal resources. Equality of resources, however, is frequently not a reality for indigent litigants. In the area of housing law and evictions, for example, advocates have argued that recognizing a right to counsel is the only way for government to minimize the effect of inequality in access to justice, and, in many cases, the only way to prevent homelessness. Others have cited both feasibility and public policy in arguments against recognizing a right to counsel in eviction proceedings.

Part I of this comment lays out some of the arguments for recognizing a right to counsel for indigents as well as some of the proposed solutions for making such a right a reality, focusing on the arguments made in favor of extending a right to counsel for indigents involved in eviction proceedings. Part II discusses some of the problematic aspects of recognizing the right to counsel for indigent tenants, including Barbara Bezdek's critique of reliance on "access to justice" strategies and Gary Bellow and Jeanne Ket-

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5. See infra Part I (outlining arguments for recognizing a right to counsel in civil cases).


7. See, e.g., Simran Bindra & Pedram Ben-Cohen, Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants, 10 GEO. J. ON POVERTY L. & POL'Y 1, 1 (2003) (noting that in some civil courts ninety percent of defendants are without counsel) (citing Engler, supra note 6, at 2047 n.263).


9. See infra Part II (discussing various arguments against recognizing a right to counsel for indigents in eviction hearings).

10. See infra Part I (outlining arguments in favor of a right to counsel for indigents in eviction proceedings).

bleson's arguments against using the wholesale expansion of legal services as a strategy for ameliorating inequality in the civil justice system. Part III argues that despite these important criticisms, a strong doctrinal basis as well as a deep need—especially in the case of eviction proceedings—to recognize a right to counsel for indigents still exists.

I. IN FAVOR OF THE RIGHT TO COUNSEL FOR INDIGENTS IN EVICTION PROCEEDINGS

In 1963, the Supreme Court held in *Gideon v. Wainwright* that the Constitution guarantees every person charged with a felony the right to an attorney even if he or she cannot afford one. Since the Supreme Court recognized the Constitutional right to counsel in criminal cases, advocates have argued for a civil version of *Gideon*. Proponents of this right argue that in many civil cases the stakes are as high as those in criminal cases, and consequently the concept of equitable access to justice is empty without a recognized right to counsel in these cases.

A. Equal Protection Argument

Advocates for the right to counsel for indigent litigants have argued that indigents have a right to counsel in civil cases under the Equal Protection Clause. Generally, if a law "neither burdens a fundamental right nor targets a suspect class, [a court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end." This rational basis test is relatively easy for

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13. See *infra* Part III.
15. *Id.* at 339 (overruling *Betts v. Brady*, 316 U.S. 455 (1942), which held that denying a request for court-appointed counsel by an indigent defendant facing a state felony charge was not necessarily a violation of the Due Process clause of the Fourteenth Amendment).
16. See *infra* notes 17-108 and accompanying text.
18. See Bindra & Ben-Cohen, *supra* note 7, at 12 (asserting that "equality before the law" cannot exist unless both litigants in a case have access to the court system on equal terms).
a government actor to satisfy.\textsuperscript{20} If the court determines that legislation burdens a fundamental right or discriminates based on a suspect classification, however, it will apply a "more searching judicial inquiry."\textsuperscript{21} In order to persuade a court to apply the much tougher "strict scrutiny" analysis to determine whether a right to counsel exists in civil proceedings, one would have to prove either that the assistance of counsel is a fundamental right, or that discrimination based on wealth should be considered a suspect category.\textsuperscript{22}

Leonard Schroeter argues that the right to counsel should be considered a fundamental right.\textsuperscript{23} This right, he argues, is a product of natural law, and can be seen in American jurisprudential tradition most clearly in the Declaration of Independence.\textsuperscript{24} Schroeter notes that most scholars see the Declaration of Independence as asserting the "self-evident truths of individual dignity, the right to be treated equally, and rights that cannot be taken from us which are classified as life, liberty and the pursuit of happiness."\textsuperscript{25} And, Schroeter argues, the most essential of these fundamental rights is access to justice, a right that cannot be recognized without the courts also recognizing a right to counsel.\textsuperscript{26} Proving that a right is "fundamental," however, is an extremely tough hurdle in almost any context.\textsuperscript{27} For a right to be considered fundamental, the court considers whether the right is explicitly or implicitly guaranteed by the Constitution.\textsuperscript{28} It is unlikely that the right to counsel in civil cases would be considered fundamental.\textsuperscript{29}

A court could also apply a strict scrutiny test if it considered those living in poverty a suspect class.\textsuperscript{30} Although the Court gener-

\begin{thebibliography}{99}
\bibitem{20} See Bindra & Ben-Cohen, \textit{supra} note 7, at 19 (observing that under a rational basis standard, the judiciary generally gives deference to the legislature).
\bibitem{21} United States v. Carolene Prods., 304 U.S. 144, 153-54 n.4 (1938); see also Shapiro v. Thompson, 394 U.S. 618, 658 (1969) (Harlan, J., dissenting) (detailing the strict scrutiny test) (citations omitted).
\bibitem{22} See Bindra & Ben-Cohen, \textit{supra} note 7, at 19-31.
\bibitem{23} Schroeter, \textit{supra} note 17, at 62.
\bibitem{24} \textit{Id.} at 62-63.
\bibitem{25} \textit{Id.} at 64.
\bibitem{26} \textit{Id.}
\bibitem{27} \textit{Id.} at 20 (explaining that a right is not fundamental unless it is "explicitly or implicitly guaranteed by the Constitution") (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973) (finding that education has never been considered a fundamental right)).
\bibitem{28} \textit{Id.}
\bibitem{29} See \textit{infra} note 27 and accompanying text.
\bibitem{30} See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (race, alienage, and national origin are suspect classes); see also Lewis v. Casey, 518 U.S. 343 (1996) (finding that claiming discrimination based on poverty will not merit a strict scrutiny analysis unless a group could show absolute deprivation).
\end{thebibliography}
ally reserves this category for discrimination based on race,\(^3\) in *Griffin v. Illinois*,\(^2\) a case regarding the provision of free trial transcripts to indigent defendants, the Supreme Court held that unequal treatment based on economic need is as impermissible as discrimination based on “religion, race, or color.”\(^3\) In a later case addressing the right to counsel for indigents in criminal appeals, however, Justice Clark wrote in the dissent that the Equal Protection Clause

> does not impose on the States an affirmative duty to lift the handicaps flowing from differences in economic circumstances. To so construe it would be to read into the Constitution a philosophy of leveling that would be foreign to many of our basic concepts of the proper relations between government and society. The State may have a moral obligation to eliminate the evils of poverty, but it is not required by the Equal Protection Clause to give to some whatever others can afford.\(^3\)

In 1973, the Court appeared to embrace Justice Clark’s view when it held in *San Antonio v. Rodriguez* that the poor were not a suspect class triggering strict scrutiny.\(^3\) In its holding, the Court reasoned that, “at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.”\(^3\) Thus, though cases like *Griffin* provide some hope, an argument for a right to counsel based on an Equal Protection argument is unlikely to prevail since it would necessitate a court recognizing a new fundamental right or suspect class, which the Supreme Court has been reluctant to do.\(^3\)

**B. Due Process**

In his article arguing for the recognition of a constitutional right to counsel for indigents in eviction proceedings, Andrew Scherer employs a procedural Due Process argument rather than an Equal Protection one to argue that poor people have a legal right to counsel when threatened by landlords with eviction from their

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31. See, e.g., *City of Cleburne*, 473 U.S. at 440.
33. Id. at 17.
35. 411 U.S. 1, 28 (1973) (finding that Texas’s school financing system based on property taxes did not violate the Constitution).
36. Id. at 24.
His article also argues that the promises of *Gideon*, with respect to fair and equitable access to justice, have fallen short in terms of the real lives of those living in poverty.39

In *Mathews v. Eldridge*,40 the Supreme Court created the test for determining what constitutional due process is required when someone is facing the loss of property.41 The framework requires the balancing of three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.42

Scherer applies the *Mathews* balancing test to the hypothetical of a poor tenant faced with the loss of her home.43 He identifies the interest at stake for indigent tenants in the case of eviction as both a property interest and a liberty interest.44 He argues that a tenant has a property interest in her home.45 A person or family that loses in an eviction proceeding is faced with the loss of the place where they live, and possibly the loss of possessions within the home.46

Scherer probes deeper to identify the liberty interest involved in eviction proceedings. Quoting *Allgeyer v. Louisiana*,47 he defines liberty as “the right of the citizen . . . to use [his faculties] in all lawful ways, to live and work where he will; to earn his livelihood by any lawful calling; to pursue any lawful trade or vocation.”48

38. Scherer, *supra* note 8, at 557.
39. *Id.* at 562.
41. *Id.* at 349 (holding, in part, that “an evidentiary hearing is not required prior to the termination of [Social Security] disability benefits and that the present administrative procedures fully comport with due process”).
42. *Id.* at 335.
43. Scherer, *supra* note 8, at 562-79 (concluding that applying the three-factor *Mathews* balancing test to the case of an indigent person faced with eviction supports guaranteeing appointment of counsel).
44. *Id.* at 564-69.
45. *Id.* at 564 (“The right of the tenant to continued occupancy of his home is a traditionally recognized property right.”).
46. *See id.* at 564-66 (discussing the possibility that the tenant might lose his or her home and become homeless); Evi Schueller, *Unconscionable Due Process for Public Housing Tenants*, 37 U.C. DAVIS. L. REV. 1175, 1183-85 (2004) (discussing the constitutionality of civil asset forfeiture).
47. 165 U.S. 578 (1897).
He thus identifies any procedure or policy that infringes on "the fundamental rights of liberty" as a restraint on the individual's liberty interest.\textsuperscript{49}

According to Scherer, the liberty interest in the case of eviction proceedings "is one which falls within the rubric enunciated by the Supreme Court in \textit{Lassiter v. Department of Social Services}."\textsuperscript{50} In \textit{Lassiter}, the Court refused to recognize a right to counsel for people faced with termination of their parental rights.\textsuperscript{51} In his decision for the majority, Justice Stewart derives from precedent "the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."\textsuperscript{52}

Since the risk of eviction for the indigent tenant also carries with it the risk of homelessness, Scherer argues that the liberty interest involved in a poor person losing their home rises to the level of a deprivation of physical liberty as required by \textit{Lassiter}.\textsuperscript{53} As Scherer points out, those who live on the street or in shelter systems are at risk for incarceration and institutionalization.\textsuperscript{54} And, even when they are free from prisons and other institutions, they are subject to severe restraints on their liberty.\textsuperscript{55}

Scherer's argument that eviction proceedings implicate physical liberty is demonstrated in the case of \textit{United States v. Leasehold Interest in 121 Nostrand Avenue},\textsuperscript{56} an action to enforce a forfeiture statute against public housing tenants. In this case, the court discussed the damaging effects of homelessness and poverty in New York City.\textsuperscript{57} Speaking of what would happen to the Smiths, the family involved in the case if it were to lose its housing, the court said that, despite the overcrowding in the family's apartment, the family would be better off in its home "than they would be as atomized individuals in the streets, foster homes or shelters of New York. Exclusion from their apartment risks driving the eighteen Smith family residents far below a minimum standard for civilized living."\textsuperscript{58}

\begin{itemize}
\item \textsuperscript{49.} \textit{Id.} at 567 (defining this individual liberty interest as fundamental under the Constitution).
\item \textsuperscript{50.} \textit{Id.} at 568.
\item \textsuperscript{51.} 452 U.S. 18, 19 (1981).
\item \textsuperscript{52.} \textit{Id.} at 26-27.
\item \textsuperscript{53.} Scherer, \textit{supra} note 8, at 568.
\item \textsuperscript{54.} \textit{Id.}
\item \textsuperscript{55.} \textit{Id.} (noting that the homeless are at a greater risk of developing various diseases and physical problems).
\item \textsuperscript{56.} 760 F. Supp. 1015 (E.D.N.Y. 1991).
\item \textsuperscript{57.} \textit{Id.} at 1023.
\item \textsuperscript{58.} \textit{Id.}
\end{itemize}
Scherer also points to a number of the devastating effects of homelessness to illustrate the loss of personal freedom that those without permanent shelter experience. Homeless individuals are more likely to suffer from chronic medical issues. Without access to a healthy diet or the means to take care of personal hygiene, homeless people with health problems such as epilepsy and diabetes may have an extremely difficult time keeping these conditions under control. The risk of contracting other illnesses is also high for this population.

Homelessness also has severe social consequences. Those who lose their homes can also lose their connection to their communities, and the social and economic support that comes along with community and kinship ties. Without a permanent address it is also difficult for homeless people to vote or to find and keep a job. Homeless children are subject to additional consequences, including gaps in school attendance and removal from their parents and siblings if placed in foster care.

According to Scherer, the repercussions of homelessness make up the liberty interest that is at stake for indigent families and individuals who are faced with the threat of eviction from their homes. Viewed in this light, the potential loss to tenants can be compared to the liberty interest at stake in criminal prosecutions where the defendant risks incarceration.

The second part of the Mathews test requires an analysis of the risk of error in eviction proceedings, as well as the role that declaring a right to counsel might have in alleviating this risk. The possibility of error in lopsided eviction hearings is large. While most landlords are represented by counsel, most tenants facing eviction are poor, and therefore unable to afford attorneys. Though there

59. Scherer, supra note 8, at 568 (citation omitted).
60. Id. (citation omitted).
61. Id. at 568 n.45 and accompanying text ("For example, a high incidence of severe malnutrition, anemia, lice infestation and tooth decay have been documented among homeless youth.").
62. Id. at 569 (arguing that these relationships are crucial to "one's sense of identity and well-being").
63. See id. at 569 (claiming homelessness at any age hampers a person's ability to function as a productive member of society).
64. See id. (discussing the effects of community separation on children).
65. See id. at 563 (comparing the "equally devastating effects" of losses in criminal courts, family courts, and housing courts).
67. See Scherer, supra note 8, at 571-73 ("[T]he unrepresented indigent tenant [is] severely disadvantaged in her ability to defend an eviction case.").
68. See id.
are a limited number of legal services available to indigent tenants, most go through eviction proceedings pro se.\(^69\)

The modern legal relationship between landlord and tenant is an extremely complex one.\(^70\) Each party involved in an eviction proceeding has to deal with an intricate body of law, including housing codes to protect the tenant, and legislation that limits landlords' grounds for eviction.\(^71\) Mastery of these laws and regulations is generally a prerequisite for either side to obtain a winning outcome.\(^72\) It is not difficult to imagine a case in which an indigent tenant is not aware of, or, for some other reason, is unable to present in court valid legal defenses which could change the outcome of a decision.\(^73\)

Additionally, eviction hearings are adversarial proceedings that require a specific knowledge of the rules of procedure and evidence.\(^74\) The unrepresented, indigent litigant often does not have any access to this knowledge or the time in which to educate herself about these rules.\(^75\) Again, there is a high risk that a tenant's absence of legal knowledge could lead to an incorrect outcome in a case that will cost the litigant her home.\(^76\) Thus, the risk of error in these proceedings is high.

Given the complex law involved in these proceedings, there is no question that the side represented by experienced legal counsel has a distinct advantage over the pro se litigant.\(^77\) A Supreme Court case, \textit{Lassiter v. Department of Social Services} held that there was no right to counsel in cases involving the termination of parental rights, in part because the Court could not find a determinative difference in outcomes resulting from having counsel for these proceedings.\(^78\) In contrast, in their 2001 study on the impact of counsel for poor tenants in New York City's housing court, Carroll Seron, Gregg Van Ryzin, Martin Frankel, and Jean Kovath discovered

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69. See id. at 572 n.59 (noting that only 20.8\% of all tenants in New York City's Housing Courts were represented) (citation omitted).
70. Id. at 569.
71. See id. at 570 (discussing various efforts of state and federal legislatures aimed at aiding tenants).
72. See id. at 570.
73. See, e.g., id. at 557-58 (relaying a story of indigent South Bronx tenant who probably would have avoided eviction if she had been represented by counsel).
74. See id. at 572 (discussing the "technical and complex nature" of eviction proceedings).
75. Id.
76. See supra notes 67-68 and accompanying text.
77. See supra notes 74-75 and accompanying text.
that the existence of legal representation had a large impact on the outcome of eviction cases. Their research provided evidence that the presence of legal representation for indigent tenants contributes to case resolutions that include fewer evictions and more rent abatements and apartment repairs. Similarly, in his examination of a study regarding eviction proceedings in New Haven, Connecticut, Steven Gunn concluded that "legal services attorneys were able to prevent or delay [tenant] evictions, helping the tenants either to remain in their homes or to secure alternate housing without suffering sudden dislocation or homelessness."

Though Scherer's Due Process analysis describes conditions existing more than twenty years ago, his article predicts that the presence of counsel would have a positive impact on the outcome of eviction cases. His article identifies the heavy caseloads of housing courts as one factor that increases the disadvantage to the pro se defendant. Heavy caseloads can lead courts to do less than thorough examination of evidence and to implement time saving devices that could violate the tenant's right to a fair hearing. High dockets can contribute to judicial failure to determine whether unarticulated defenses exist. Scherer further argues that the time pressures of court appearances and filings can intimidate the inexperienced litigant (sometimes so much so that the litigant agrees to an inequitable settlement). Attorneys can mitigate the effects of these time pressures and the risk of error in eviction proceedings by bringing forward legal defenses and counterclaims.

Evaluating the third prong of the Mathews test, Scherer further argues that no countervailing government interest outweighs the liberty interest at stake, the risk of error, and the advantages of having counsel in eviction proceedings. In fact, according to Scherer, the government's primary interests should be to avoid

79. See Carroll Seron et al., The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment, 35 LAW & SOC'Y REV. 419, 419 (2001) (noting that only twenty-two percent of represented tenants had final judgments against them, while fifty-one percent of tenants without legal representation had final judgments against them).
80. See id.
82. See Scherer, supra note 8, at 573-76.
83. See id. at 573.
84. See id.
85. See id.
86. Id. at 573-74.
87. See id. at 575-76.
88. Id. at 576-79.
wrongful evictions, to prevent the negative effects of homelessness, and to ensure the quality of life of its citizens.\textsuperscript{89} There are costs associated with promoting these interests and the problem of limited resources must be addressed.\textsuperscript{90} Despite these costs, Scherer argues that the government savings resulting from the prevention of homelessness and the provision of social services to fewer people could offset the cost of providing counsel to indigents.\textsuperscript{91} When all of these interests are balanced, Scherer argues that the cost to the government of providing counsel would be outweighed by the tremendous benefits representation in eviction proceedings would provide.\textsuperscript{92}

C. New York State Right to Counsel

Though the federal Due Process argument for the right to counsel in civil cases has not yet been successful in court, there is support for the right to counsel for indigents in eviction cases through the Due Process clauses in numerous state constitutions.\textsuperscript{93} As Scherer notes, many state constitutions contain Due Process clauses, and state courts have at times interpreted these clauses as conferring broader rights than those bestowed by the federal Constitution.\textsuperscript{94} For example, the New York Court of Appeals "has construed broad protections from the 'unique language' of the state's constitutional due process clause and given greater protection to New York residents than those afforded in the U.S. Constitution."\textsuperscript{95}

In his article about eviction proceedings in New York, Karas argues that the courts should recognize the right to counsel for indigent defendants based on New York State's Due Process clause.\textsuperscript{96} Karas adds that "[w]hile the courts can do little to improve the

\textsuperscript{89} See id. at 577-78. Though increased access to counsel will certainly not cure affordable housing shortages or homelessness, Scherer's argument is that providing counsel and preventing wrongful evictions will at least be a big step in the right direction. Id. at 591-92.

\textsuperscript{90} See id. at 577.

\textsuperscript{91} See id. at 578-79.

\textsuperscript{92} See id.

\textsuperscript{93} See, e.g., Miss. Const. art. III, § 14 (1890) ("No person shall be deprived of life, liberty, or property except by due process of law."); NEV. CONST. art. I, § 8 (1864) ("No person shall be . . . deprived of life, liberty, or property, without due process of law.").

\textsuperscript{94} See Scherer, supra note 8, at 583.

\textsuperscript{95} See Karas, supra note 8, at 541 (citing Sharrock v. Dell Buick-Cadillac, Inc., 379 N.E.2d 1169, 1173 (N.Y. 1978)); see also N.Y. CONST. art. I, § 6 ("No person shall be deprived of life, liberty or property without due process of law.").

\textsuperscript{96} See Karas, supra note 8, at 543.
New York housing market or public assistance programs, they can demonstrate their commitment and obligation to preserve due process of law by providing counsel for tenants faced with eviction." 97

D. Provision of Expanded Legal Services

Those who argue that indigents have a legal right to counsel in eviction cases, such as Scherer and Karas, present suggestions for how the state could meet the demand for attorneys. 98 One option is for states to expand current systems for appointing attorneys to criminal defendants to include attorneys for civil cases. 99 Such an expansion would likely tend to replicate the problems that already exist on the criminal defense side. 100 In states where any member of the bar can be appointed to defend an indigent client, the state cannot guarantee a lawyer with expertise in the particular area for which the client requires legal assistance. 101 In states where courts appoint attorneys who have voluntarily placed themselves on a list of those willing to take indigent cases, the compensation from the state for representing an indigent client is vastly lower than the compensation that the lawyers could earn from a paying client. 102 Low rates serve to reduce the pool of competent attorneys who are willing to take on these cases, and induce those who do to take on as many cases as possible in order to make a living. 103 Thus, if this system were adopted in civil cases, similar factors could contribute to a lower quality of lawyering than is provided to the paying client.

The state could also provide qualified attorneys to indigents in housing cases by increasing funding for public legal services. Legal services organizations cannot now meet the demand for represen-

97. Id. at 543.
98. See Scherer, supra note 8, at 589-91 (advocating the creation of a pool of volunteer attorneys or, in the alternative, legislative funding for tenant representation); see also Karas, supra note 8, at 556-61 (suggesting the solicitation of volunteer attorneys or mandatory court appointments).
99. See, e.g., Scherer, supra note 8, at 590 (concluding that such an expansion would not be the most efficient solution).
100. See id; see generally Bright, supra note 2.
101. See Bright, supra note 2, at 789 (stating that judges may appoint attorneys who try cases quickly rather than capably).
102. See DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 253 (2001) (noting that ceilings on fees for representing indigent clients can result in payment as low as $2 an hour).
103. See id.
If the courts were to recognize a right to counsel, the legislature could accompany this finding with an increase in funding for organizations that already have the needed expertise for defending tenants in eviction hearings. Though this may be appealing in theory, it seems unlikely to be politically viable.\textsuperscript{105}

A third option for providing attorneys in civil cases, including evictions, is for the state to rely on a scheme in which lawyers volunteer their legal services free of charge. Unless the court enforced a system of mandatory pro bono service for attorneys and law students, however, it is unlikely that supply could ever meet demand.\textsuperscript{106} The arguments for requiring all members of the bar to provide free legal services to the poor are wide-ranging, and certainly go beyond the issue of recognizing a right to counsel in eviction cases.\textsuperscript{107} Though the legal community has been engaged in debate about instituting mandatory pro bono for decades and the ABA has adopted Model Rule 6.1 which calls for the performance of fifty hours a year of pro bono service, no state or federal government has adopted such a system.\textsuperscript{108}

Though the provision of an adequate supply of attorneys for indigents in need of help with eviction proceedings would certainly prove complicated, these complications do not weaken the doctrinal arguments for judicial-recognition of the right to counsel in eviction cases. In fact, a judicial recognition of the right to counsel could serve as incentive for politicians, lawyers, and scholars to come up with creative and appropriate remedies for increasing indigents' access to legal services.

\section{Critiques of Recognizing a Right to Counsel}

The arguments against recognizing a right to representation for indigents in eviction proceedings go beyond questions about possible methods by which the state could provide such legal represen-

\textsuperscript{104} See Bindra & Ben-Cohen, supra note 7, at 4 (explaining that, although there are legal resources available to indigent litigants in civil cases, the demand exceeds the supply).

\textsuperscript{105} See id. at 4-5 (noting that those in power often view the pro bono initiatives currently in place as sufficient to meet the needs of indigent civil litigants, thereby rendering increased funding for such programs unnecessary).

\textsuperscript{106} See id.; Karas, supra note 8, at 557 (positing that “the supply of available attorneys will likely remain insufficient without a mandatory pro bono requirement”).

\textsuperscript{107} See RHODE & LUBAN, supra note 102, at 761-74 (discussing an attorney’s ethical obligation to provide pro bono services).

Critics point to cost, increased incentive to litigate, the likelihood that access to counsel will not rectify many structural deficiencies in housing courts, and the possibility of increased inequality within the justice system as reasons for not recognizing this right. 109 Though each of these critiques raises interesting problems, none of them ultimately destroys the doctrinal support or the brutal need for counsel for indigents facing the loss of their homes.

A. Government Cost

One critique of recognizing a right to counsel follows directly from Scherer’s position that the Due Process clause confers a federal right to counsel, and more precisely from the balancing test put forth in Mathews v. Eldridge. 110 While Scherer and others argue that cost should be unimportant in a court’s recognition of this right to counsel, 111 one cannot ignore that the financial cost to the government of providing legal services might arguably outweigh other government interests in providing such services. 112 A court that finds that the government’s interest in conserving resources (or using resources in another manner) outweighs the personal interests of people facing eviction from their homes, might reach a different outcome than Scherer did in the Mathews balancing test. 113

Proponents of the right to counsel make compelling arguments that, no matter the cost, the government interest is served by the provision of counsel to indigents and increased equality with respect to access to justice. 114 Although the existence of limited resources is an issue in recognizing any positive right, a judicial

109. *See infra* notes 110-75 and accompanying text.
110. *See* Scherer, *supra* note 8, at 563 (arguing that application of the three-pronged *Mathews* test leads to the conclusion that indigent tenants facing eviction should be appointed counsel).
111. *See id.* at 577-78 (stating that “cost alone should not deter the government from vindicating important legal rights”).
112. *See* Karas, *supra* note 8, at 547 (stating that if providing “the right to counsel would involve mass expenditure of public monies, the courts could conclude that the balance of interests, public and private, weigh against provision of counsel”).
113. *See id.*
114. *See* Gunn, *supra* note 81, at 421 (concluding that counsel for indigents in eviction proceedings provides an essential service to both individual tenants and society as a whole); Karas, *supra* note 8, at 547 (arguing that the provision of legal services to the poor in eviction proceedings would result in the government saving money by reducing the amount that would need to be spent on services for the homeless); Scherer, *supra* note 8, at 577-78 (concluding that the benefits, both social and financial, of providing free legal counsel to indigent tenants facing eviction outweigh the fiscal costs).
recognition of high cost as a legitimate governmental interest could lead to the revocation of any number of rights, especially in times of fiscal crisis. While advocates and policy makers would certainly have to take government cost into account in creating an effective system to ensure that a right to counsel is met, the financial cost to government should not come into play in a court's determination of whether such a constitutional right exists.\(^{115}\)

**B. Landlord Cost**

On the surface, a more compelling economic argument addresses the costs that a recognition of the right to counsel for tenants facing eviction proceedings would impose on landlords and, possibly, tenants. In 1973, John Bolton and Stephen Holtzer published the results of a study they had conducted concerning the effects of legal representation for indigents in eviction cases in New Haven.\(^ {116}\) Based on the results of this study, Bolton and Holtzer concluded that providing legal counsel to defendants in eviction proceedings actually increased the financial burden on poor people.\(^ {117}\)

Bolton and Holtzer set out to assess the wider impact of legal counsel in eviction cases in New Haven by comparing cases in which tenants received free legal assistance with those in which tenants litigated pro se or were represented by private counsel.\(^ {118}\) They examined the length of the eviction proceedings in cases where the New Haven Legal Assistance Association ("LAA") provided tenants with legal representation, and concluded that the presence of LAA counsel resulted in an increase in the amount of time it took for eviction proceedings to take place.\(^ {119}\) Bolton and Holtzer argue that the time differential created by lawyers' zealous representation of tenants puts financial burdens on landlords.\(^ {120}\) Landlords facing tenants represented by counsel have increased legal fees of their own, and they do not receive rent from tenants pending the outcomes of these hearings.\(^ {121}\) These costs, according

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115. See Scherer, supra note 8, at 577.
117. See id. at 1503.
118. See id. at 1495-97.
119. See id. at 1497-98 (noting that the time required for disposition when the tenant was represented by a LAA attorney was over four times longer than when the tenant was represented by a private attorney).
120. See id. at 1499, 1502.
121. See id.
to Bolton and Holtzer, are then passed on to other tenants in the form of rent increases and poorer quality in housing conditions.\textsuperscript{122}  
Additionaly, Bolton and Holtzer argue that free legal counsel in eviction proceedings often does not alter the results.\textsuperscript{123} They claim that legal services lawyers usually represent tenants who are being evicted for non-payment of rent and therefore have limited legal defenses to eviction.\textsuperscript{124} Thus representation, while prolonging the process and increasing costs, rarely actually prevents eviction.\textsuperscript{125} Based on their observations about the complications with levels of legal representation in 1973, it is likely that Bolton and Holtzer would criticize the expansion of such services.

In response to the New Haven study and others like it, however, Steven Gunn argues that the costs to landlords and tenants of representation are overstated and can be explained by flaws in the design of the studies.\textsuperscript{126} To begin with, Bolton and Holtzer included defendants who did not contest their evictions in their control group of unrepresented tenants.\textsuperscript{127} The group of represented tenants obviously only includes those tenants who were contesting an eviction. Since uncontested cases are quickly adjudicated, Bolton and Holtzer’s inclusion of these tenants in their control group artificially enlarges the difference in length of cases where tenants are represented and those where they are not.\textsuperscript{128}

Gunn points to another important methodological flaw within Bolton and Holtzer’s study. The authors of the study calculated all cases where a landlord withdrew his action as successful evictions.\textsuperscript{129} According to Gunn, this move seriously underestimates the favorable outcomes that LAA attorneys brought about through their representation.\textsuperscript{130} When a landlord withdraws his eviction action, it can often be because the parties have successfully negotiated, and not because the tenant has agreed to vacate.\textsuperscript{131} These

\begin{itemize}
\item \textsuperscript{122} See id. at 1502-03.
\item \textsuperscript{123} See id. at 1498 ("[T]he landlord almost inevitably obtains judgment of possession.").
\item \textsuperscript{124} See id. 1498 n.8, n.14 (discussing the limited defenses available in a summary process action).
\item \textsuperscript{125} See id. at 1498 n.14 (noting that of the ninety-seven cases defended by LAA in the sample, the tenant only obtained judgment in two).
\item \textsuperscript{126} See Gunn, supra note 81, at 387 (discussing the major problems in Bolton and Holtzer’s methodology).
\item \textsuperscript{127} Id.
\item \textsuperscript{128} Id. (arguing that a more appropriate control group would consist of unrepresented tenants who contested their eviction).
\item \textsuperscript{129} Id. at 388.
\item \textsuperscript{130} Id.
\item \textsuperscript{131} Id.
\end{itemize}
negotiations can include agreements for landlords to repair sub-standard housing. Gunn also adds that, while Bolton and Holtzer are correct in their assertion that the majority of represented tenants were facing eviction for non-payment of rent, most of them also had valid defenses or counterclaims. Thus, according to Gunn, while landlords might bear some costs if the judiciary were to recognize a right to counsel, these costs do not outweigh the overall benefits to indigent tenants or to society as a whole.

C. Incentive to Litigate

Some critics oppose an increase in access to lawyers because of fear over what they perceive as an overly-litigious society. If the right to counsel were absolute, critics say, then there would be nothing to prevent indigent clients from bringing frivolous claims or putting forth unmeritorious defenses. Some legal scholars have pointed out, however, that in countries where a right to counsel in civil cases has already been recognized, the government has devised successful systems by which to screen cases. Additionally, in eviction cases, the party with a lawyer has the opportunity to bring any and all claims that she believes to have legal merit. Giving this opportunity to the indigent defendant, whether or not it increases litigiousness, is an important way for the courts to provide equal access. Finally, in eviction cases the tenant does not initiate the proceedings. Thus, while access to an attorney may increase an indigent's incentive to fight back, it would not lead to an increase in the number of cases brought to court.

D. Beyond the Risk of Homelessness

Scherer’s Due Process argument relies on the example of a tenant who becomes homeless because of an error in an eviction case. Thus, it addresses neither the larger issue of homelessness that does not stem from a wrongful eviction, nor the problem of

132. Id.
133. Id. at 420-21.
134. Id. at 421.
135. See RHODE AND LUBAN, supra note 102, at 727 (“If parties had a right to subsidized lawyers in any civil case, what would deter them from pursuing unmerited claims and inflicting unwarranted costs, not only on the state . . . but also on innocent individual opponents?”).
136. Id.
137. Id.
138. See supra Part I.B (discussing a Due Process argument for recognizing a right to counsel in eviction cases).
tenants whose wrongful eviction would not result in homelessness. Though it seems unlikely that any argument for increased access to counsel could result in a solution to homelessness, it is possible to make a Due Process argument for those tenants who do not face homelessness as a result of eviction.

Though Scherer's description of the liberty interest at stake when a tenant becomes homeless is compelling, focusing almost exclusively on this harm weakens his argument. Instead of adopting this approach, in her article *Property and Personhood*, Margaret Radin uses the example of the relationship of a tenant to his rented home to illustrate her conception of a "personhood" interest in property.\(^{139}\) As she describes it, "[t]he premise underlying the personhood perspective is that to achieve proper self-development—to be a person—an individual needs some control over resources in the external environment."\(^ {140}\)

Looking at privacy-related jurisprudence, she argues that the home can be seen as "a moral nexus between liberty, privacy, and freedom of association."\(^ {141}\) While tenants' homes may be seen as partially belonging to them because of the rent they have paid, and partially belonging to the landlord, Radin argues that strong landlord-tenant laws actually reflect society's valuation of tenants' personhood interest in property as superior to a landlord's property interest.\(^ {142}\) This special relationship to the home, Radin argues, goes beyond society's interest in providing a "sanctuary" for individual liberty.\(^ {143}\) She maintains that society (and the courts) see the home as "the scene of one's history and future, one's life and growth."\(^ {144}\) Considering this conception of the home, one can see how homelessness may be the most severe, though certainly not the only interest at stake in eviction proceedings.

If the home is a space that embodies a person's history and future, a forced separation from this physical space would almost un-

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\(^{140}\) Id. at 957 (emphasis in original).

\(^{141}\) Id. at 991. Radin discusses the case *Stanley v. Georgia*, 394 U.S. 557 (1969), in which the Supreme Court held that a state can not prosecute individuals for having obscene materials in their home. Id. at 558. She argues that it is clear from this decision that the Court was influenced by the traditional conception of the home being connected to autonomy and personhood. Radin, *supra* note 139, at 992.

\(^{142}\) Radin, *supra* note 139, at 992-93.

\(^{143}\) Id. at 992 (describing the state's invasion of the "sanctity of the home" as a violation of one's personhood).

\(^{144}\) Id.
doubtedly have negative psychological effects on a tenant. Additionally, being forced out of one's home could dislocate a person not just from the four walls of the home, but from the community at large. Those who are evicted could lose their personal connection to family, friends, and other neighbors, as well as to the support networks that these people provide. The argument for the right to counsel in eviction cases could be bolstered if, in addition to describing the risk of homelessness, proponents pointed to the possible loss of this personhood interest involved in evictions. An argument that focuses primarily on the risk of homelessness allows room for critics to argue that other reforms have alleviated the need for the assistance of counsel. For example, in New York City, where advocates have won a recognized right to housing for homeless individuals, the risk of homelessness after an eviction is decreased. Thus, while a great need for indigents to have representation in eviction cases may still exist, the liberty interest at stake would no longer appear to tip the scales in the Mathews test.

E. The Exaggerated Role of the Attorney

Other criticisms of focusing on a right to counsel stem from an argument that such strategies rely on an exaggerated vision of the power of the advocate. In her article about housing court in Baltimore, Barbara Bezdek identifies the source of inequitable outcomes as being broader than a lack of legal representation. She argues that the mostly female, black, and poor tenants that come through the court are "silenced by dynamics occurring in and around the court room. This is due both to differences in speech and to dissonant interpretations between speakers and listeners, since they do not share a culture of claiming." Bezdek's study does point to better outcomes for tenants who had the assistance of another person in housing court. This assistance, however, did not have to come from a lawyer to produce a better outcome for a

145. See supra notes 139-40 and accompanying text.
146. See supra notes 53-65 and accompanying text.
147. See id.
149. See Bezdek, supra note 11, at 539-40 (offering a critique of the standard “access to justice” analysis).
150. See id. at 540.
151. Id. at 536.
152. Id. at 562.
This observation leads Bezdek to speculate that "qualities other than legal representation" are important in overcoming the silencing effect of housing court. Thus, while the presence of an attorney may help an individual tenant articulate legal claims and defenses, a recognition of the right to counsel might not significantly alter the bias of the court towards landlords.

Persuasive arguments about the potential pitfalls of recognizing a right to counsel for poor people come from Gary Bellow and Jeanne Kettleson in their 1978 article about fairness in public interest practice. Bellow and Kettleson's argument grows out of an understanding the inequities in the administration of justice in this country, and the disadvantages that are largely borne by poor people and other groups who do not have access to legal counsel. Despite this understanding, Bellow and Kettleson express real concern about a large scale expansion of the number of lawyers involved in resolving disputes.

Bellow and Kettleson begin their analysis discussing arguments in favor of recognizing a right to counsel for indigents in civil cases. They point to the enormous gap between the demand for legal services for the poor and the legal services actually provided, and recognize that publicly-funded legal services can provide indigent clients with their only opportunity for meaningful access to and participation in the legal system.

After pointing out the relative advantage in the justice system for those who have counsel, however, Bellow and Kettleson proceed to argue that the provision of access to this counsel will not effectively address the inequalities that are built into our system. They argue instead that lawyers, even in larger numbers, are unlikely to substantively alter the balance of power in the United States. In fact, Bellow and Kettleson examine the possibility that increased representation could potentially perpetuate the
same inequalities of the system that lead to the need for publicly-funded legal services.\textsuperscript{163}

Though Bellow and Kettleson agree that there is a short-term benefit by providing attorneys to the poor, they maintain that the bar and members of the legal profession cannot hope to provide the poor meaningful access to justice until they reexamine the repercussions of having an intensely adversarial, complicated, and professionalized system.\textsuperscript{164} They argue that while expansion of this system might seem like the best way to level the playing field, in the long run, this expansion might actually "intensify the legal disadvantages that public interest law is supposed to ameliorate."\textsuperscript{165} Bellow and Kettleson maintain that proponents of the right to counsel for indigents in civil cases must consider the likelihood that providing legal services to everyone in an unequal society "may exacerbate the very problems of unfairness and inequality that access is ultimately intended to resolve."\textsuperscript{166}

Bellow and Kettleson claim that arguments for recognizing a right to counsel and for expanding the provision of legal services tend to ignore the realities that accompany these services.\textsuperscript{167} Because legal services lawyers often have the power to decide what becomes defined as a "legal problem," as their numbers and funding increase, lawyers would tend to include more and more problems within the universe of legally addressable issues.\textsuperscript{168} Supply would once again be dwarfed by demand, and the expansion of legal services would simply replicate the problems with access that currently exist, but on an even-larger scale.\textsuperscript{169} Thus, even if a court were to recognize a right to counsel in civil cases, the problem of scarcity, and the economic and social inequalities that go hand-in-hand with this scarcity, would persist.\textsuperscript{170}

\begin{enumerate}
\item[163.] See \textit{id}.
\item[164.] \textit{Id.} at 379 (arguing that the inherent flaws of our social and political institutions present problems of scarcity and fairness that cannot be solved merely by injecting more public interest lawyers into the system).
\item[165.] \textit{Id}.
\item[166.] \textit{Id.} at 379-80.
\item[167.] \textit{Id.} at 380.
\item[168.] See \textit{id.} ("[D]efinitions of legal need are not static.").
\item[169.] See \textit{id.} (noting that "demand for services will increase to the limits of available supply").
\item[170.] \textit{Id.} at 383. The authors point out that disadvantaged clients often do not have the resources to take advantage of litigation gains. \textit{Id}. For example, a client who wins a lawsuit requiring special education services for her child may not have transportation to parent conferences, easy telecommunication services to contact the school, or money to pay for a lawyer who could help this child as he grows and his educational needs change. \textit{Id}. at 383 n.177.
\end{enumerate}
Instead of an expansion of legal services, Bellow and Kettleson call for a re-conception of the role of the lawyer.\textsuperscript{171} Though they think that the bar should support the provision of more lawyers for the poor in the short term, they argue that in order to create change at this level, the ABA needs to amend the Model Rules of Professional Responsibility.\textsuperscript{172} They believe that the bar should alter the code to proscribe one side taking advantage of the other side’s ignorance or inexperience with the law.\textsuperscript{173} Their vision of the code would also demand that lawyers make efforts to prevent serious personal injury to any party, require attorneys who are going up against pro se litigants to advise them how and why to get counsel, and compel such attorneys to communicate to the court any valid defenses that they reasonably believe could be available to the unrepresented side.\textsuperscript{174} According to Bellow and Kettleson, these changes would “remove a particularly unwarranted competitive edge of those who are experienced in using legal institutions,” no matter the size of the legal system.\textsuperscript{175}

III. Solutions for Indigent Tenants

A. Beyond the Model Rules

Since Bellow and Kettleson made their arguments in 1978, poor people and advocates have watched the federal government decrease its commitment to legal services and set limits on the way that publicly funded providers are allowed to serve their clients.\textsuperscript{176} In this light, arguments about the futility of looking to the expansion of legal services as a way to address inequities are more convincing than ever. Bellow and Kettleson’s model for change, however, has flaws of its own. These flaws become particularly apparent when examined in light of the arguments for a right to counsel in eviction cases.

Lack of counsel for indigents facing the loss of their homes is much more than an indicator of the inequities of our system of

\textsuperscript{171} Id. at 384-85.
\textsuperscript{172} Id. at 386-87. Since Bellow and Kettleson’s article was published in 1977, the Model Rules have been amended. These amendments, however, have not incorporated Bellow and Kettleson’s proposed amendments.
\textsuperscript{173} Id. at 387.
\textsuperscript{174} See id.
\textsuperscript{175} Id.
\textsuperscript{176} See Legal Services Corporation Restrictions—Fact Sheets, at http://www.brennancenter.org/programs/pov/factsheets.html (last visited Nov. 26, 2004) (presenting fact sheets regarding the restrictions on funding from the Legal Services Corporation for bringing class actions, representing aliens, and soliciting clients).
justice. The deficiency of legal services for tenants is a reality that leads to increased homelessness, poverty, and disenfranchise-
ment. As advocates have pointed out, tenants who have the as-
sistance of counsel fare better than those who do not in eviction proceedings. Therefore, though legal assistance will not correct all of the inequities in housing court nor the larger problem of homelessness, and despite the potential pitfalls associated with increasing the size of the adversary system, advocates must make arguments that indigent tenants have a right to access legal advice and representation. Bellow and Kettleson do recognize the need to increase the adversarial system in the short term, but they de-emphasize the necessity of providing lawyers for the poor in favor of an emphasis on reforming the Model Rules. Though it is cru-
ical for advocates to look at possibilities for long term systemic change if they are truly committed to providing equal access to justice, in reality poor tenants do not have the luxury of relying on idealistic procedural solutions to the problem of eviction.

While Bellow and Kettleson are rightfully cautious about em-
bracing a wholesale expansion of legal services to include attorneys for poor people in all civil cases, they do not address the possibili-
ties of a slower, piecemeal expansion. Such an expansion would require the courts to create a hierarchy of legal needs, and to de-
clare a right to counsel in areas where the need is the most press-
ing. The courts could erase the possibility of lawyers expanding the universe of problems to be addressed by the legal system by describing the problems (e.g. eviction proceedings) to be addressed from the outset. In essence, this is what the Mathews balancing test allows courts to do: evaluate the need for a right to counsel in specific areas. With these limits, Bellow and Kettleson would not be able to subject the expansion of legal services to the same analysis as the declaration of a right to counsel in general. The judiciary could have a huge impact on peoples' lives by recognizing a right to counsel in eviction proceedings, and they could do this without increasing the number of issues resolved by the adversarial process.

In addition to de-emphasizing short term solutions, Bellow and Kettleson rely too heavily on the ABA and the Model Rules to precipitate a radical change in lawyers' perceptions of their roles. In theory, the Model Rules are the governing ethical code of all attorneys. In as much as the Model Rules reflect the aspirations

177. See supra notes 66-76 and accompanying text.
178. See supra notes 79-81 and accompanying text.
179. See Bellow and Kettleson, supra note 4, at 386-88.
and ideals of the legal profession, the bar should amend them to reflect any shift in understanding of the lawyer’s role. But in light of the marginalization of public service and ethics among lawyers, it is unlikely that advocates could successfully use the Model Rules to overturn deeply-entrenched understandings of the lawyer as a zealous advocate and a player in an adversarial system.\textsuperscript{180}

To create a widespread change in the lawyer’s role, advocates need to start their project at the training academies for the next generation of lawyers. Law schools do teach professional responsibility and ethics, but these topics remain “no better than a second class subject in the eyes of students and faculty.”\textsuperscript{181} Most law schools do not even require students to take a legal ethics class until their upper class years.\textsuperscript{182} By the second year, students have already taken a number of law classes, and their professors may not have asked them to think about the Model Rules or other sources of ethical standards while learning and applying legal doctrine. Thus, it is unlikely that a shift in the understanding of a lawyer’s role embodied in the Model Rules will have a large trickle down effect on law students.

In order to make the changes in a lawyer’s perception of her role that Bellow and Kettleson recognize as necessary to promote equality in the justice system, law school faculties and administrators, along with practitioners, need to be on the front lines of any push for change. Law schools need to place more emphasis on legal ethics and change the content of such classes.\textsuperscript{183}

If courts were to recognize the right to counsel for indigents in eviction cases and in other situations where the stakes are similarly high, many more attorneys could end up representing indigent clients and being forced to face the inequities that are built in to our adversary system. Perhaps a critical mass of attorneys, confronted with and frustrated by these inequities, would serve as the impetus for a widespread recognition of the need for change in the lawyer’s role. In the meantime, however, it is crucial for us to look for substantive solutions to the lack of affordable housing and homeless-

\footnotesize{\textsuperscript{180} See generally Russell G. Pearce, Lawyers as America’s Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer’s Role, 8 U. CHI. L. SCH. ROUNDTABLE 381 (2001) (discussing the role of the modern lawyer).

\textsuperscript{181} Russell G. Pearce, Legal Ethics Must Be the Heart of the Law School Curriculum, 26 J. LEGAL PROF. 159, 159 (2001-2002).

\textsuperscript{182} Id. at 160 n.7.

\textsuperscript{183} See id. at 160 (discussing the place of ethics in law school curricula).}
ness that can make immediate and concrete differences in people's lives.

B. Problem-Solving Courts and the Active Judge

Other substantive solutions that could produce better outcomes for tenants lie in between the recognition of a right to counsel and a complete transformation in the conception of the lawyer's role. For example, in recent years, most states have experimented with so called "problem-solving courts."\(^{184}\) Such courts are usually structured to handle the whole range of a person's legal and social issues at once, and to provide solutions to these problems that benefit the community in which the courts are situated.\(^{185}\) It is possible that these courts, which generally aim to give voice to a litigant's story, could alleviate the "silencing" problem identified by Bezdek.\(^{186}\) This might serve to reduce error and allow a forum for a tenant's argument to be articulated without the presence of counsel.

In a talk about the Harlem Community Justice Center, Rolando Acosta, the presiding judge, discussed the benefits of handling housing issues in a non-traditional court.\(^{187}\) Through the Housing Court that is part of the Justice Center, judges are able to "increase the stability and improve the overall health of the housing stock in Upper Manhattan . . . by linking tenants to service and benefit providers, to city and state government and other local service providers."\(^{188}\) In such courts, the judge and other court employees take on the role of monitors, trying to ensure that the landlord receives the rent and the tenant receives decent housing.\(^{189}\) Though many states' attempts at problem-solving courts are still in the experimental stages, these courts may actually be able to help circumvent the risk of homelessness and the lack of affordable, decent housing.

Additionally, judges who preside over traditional housing courts where the average litigant is proceeding pro se may have the power

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\(^{185}\) Id; see also, Judith S. Kaye, Delivering Justice Today: A Problem Solving Approach, 22 YALE. L. & Pol'y REV. 125, 127-28 (2004).

\(^{186}\) See supra notes 150-55 and accompanying text.


\(^{188}\) Id. at 1762.

\(^{189}\) See id.
to impact fairer outcomes. In his article addressing solutions to the "pro se crisis," 190 Russell Engler argues that the traditional role of the judge is based on the assumption that in an adversarial system, both parties are represented by counsel. 191 Since this idealized version of the system does not describe the reality of most housing courts, Engler argues that it is appropriate for judges, mediators, and clerks in these courts to reexamine their traditional roles. 192 Though the traditional role of the judiciary is one of impartiality, 193 Engler proposes that the housing court itself should provide help to the unrepresented party and should explain to all parties why it is giving more aid to one party than the other. 194 This help can consist of giving legal advice, calling witnesses, and conducting direct or cross-examinations for the pro se litigant. 195 As Engler states, a judge "must be as active as necessary to ensure that the legal system's promise of fairness and substantial justice is not frustrated by the litigant's appearance without a lawyer." 196 A judge who is willing to seek justice actively for the tenant in housing court can fill some of the void left by the absence of counsel, thus maintaining the overall impartiality of the system. 197

**Conclusion**

Overall, advocates make very strong legal, practical, and moral arguments for a recognition of a right to counsel in eviction cases. In order for the poor to have any sort of meaningful access to justice in complicated and high stakes eviction proceedings, it seems crucial and just for the courts to recognize this right. As critics point out, however, when we look towards expansion as a way to solve social and political problems, we must be critical of the system we are expanding. Advocates for expanding the right to counsel must take precautions not to replicate the weaknesses of the adversarial system, thus amplifying the system's negative effects and its contribution to inequality. With a combined effort, however, the courts, law schools, and practicing professionals may actually create lasting change in a system which now produces so much inequality.

191. See id. at 1988.
192. See id. at 1990.
193. See id. at 2023.
194. See id. at 2023-24, 2028.
195. See id.
196. Id. at 2028
197. See id. at 2028-31.
IN PURSUIT OF SAFETY AND SOUNDNESS: AN ANALYSIS OF THE OCC’S ANTI-PREDATORY LENDING STANDARD

Diana McMonagle*

To borrow a concept from the animal kingdom . . . a classic predator traps the unwary and preys on the weak. Put in the lending context, a predatory lender ensnares . . . vulnerable customers, offering loan products designed to prey on their weakness, bleed them financially and . . . strip them of their most precious possessions.1

PROLOGUE

George Campbell lived his entire life in the same home in Queens, New York.2 Disabled, living solely on monthly Supplemental Security Income checks, Mr. Campbell had one significant financial asset: the value of his home appreciated substantially over the years and he amassed considerable equity in the property.3 A few years ago, an aggressive mortgage broker persuaded Mr. Campbell to take out a second mortgage to finance much-needed repairs.4 The broker claimed Mr. Campbell, with neither a checking account nor an established credit history, was ineligible for a bank loan.5 Unable to read well, Mr. Campbell did not understand his obligations under the agreement; like countless other unsuspecting borrowers in the United States, Mr. Campbell became the victim of a predatory lender.6 The terms of the mortgage required

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3. Id.
4. Id.
5. Id.
6. Id.
monthly payments almost equal to Mr. Campbell’s social security income.\textsuperscript{7} Predictably, he defaulted.\textsuperscript{8}

\textbf{INTRODUCTION}

Predatory lenders are unscrupulous, aggressively marketing their loans to borrowers who cannot afford their credit on the onerous terms offered. Their prey are some of the most vulnerable members of society: the elderly, persons living in low-income areas, the socially and economically disadvantaged, the financially unsophisticated. The consequences are devastating, and include enormous personal losses, foreclosures on homes, and the devastation that foreclosure brings to entire neighborhoods. Many common abusive lending practices are already illegal under federal law,\textsuperscript{9} yet predatory lending continues to destroy communities.\textsuperscript{10}

In response to this escalating problem, the Office of the Comptroller of the Currency ("OCC"), a federal regulator of the national banking industry, issued a Final Rule on January 7, 2004 ("Final Rule").\textsuperscript{11} The OCC has always prohibited banks from engaging in predatory lending, but difficulties defining "predatory" and the problematic application of conflicting state-lending laws has caused significant supervisory and enforcement problems.\textsuperscript{12} The Final Rule addresses these problems and sets forth a uniform federal standard to guide banking policies on predatory practices and to aid regulators’ identification of predatory loans.\textsuperscript{13} The Final Rule forbids national banks from making consumer loans, includ-

\textsuperscript{7} Id.
\textsuperscript{8} Id.
\textsuperscript{10} See Hevesi, supra note 2.
\textsuperscript{11} Bank Activities and Operations, 12 C.F.R. \textsection 7.4008 (2004); Real Estate Lending and Appraisals, 12 C.F.R. \textsection 34.3 (2004).
\textsuperscript{13} See 12 C.F.R. \textsection\textsection 7.4008, 34.3.
ing mortgage loans, car loans, and student loans,\textsuperscript{14} based predominantly on the foreclosure value of the borrower's collateral.\textsuperscript{15} The rationale lies in the OCC's belief that the value of a borrower's collateral does not indicate their ability to repay the loan. As a result, such loans are now per se predatory, and for that reason, prohibited.\textsuperscript{16}

The Final Rule also preempts several categories of state banking laws\textsuperscript{17} that are no longer enforceable against national banks.\textsuperscript{18} States now have little authority to regulate the lending practices of those national banks situated within their jurisdictions.\textsuperscript{19} Specifically, the Final Rule preempts state regulation of lending licenses, loan terms, interest rates, terms of credit, disclosure requirements, and other conditions of lending.\textsuperscript{20} The Final Rule also codifies the judge-made determination that the OCC has authority to enforce Section 5 of the Federal Trade Commission Act ("FTC Act")\textsuperscript{21} and regulations thereunder against unfair and deceptive trade practices in banking.\textsuperscript{22}

Effectively, as a result of the Final Rule national banks are no longer subject to state anti-predatory lending laws.\textsuperscript{23} The OCC


\textsuperscript{15} 12 C.F.R. §§ 7.4008, 34.3.

\textsuperscript{16} See 12 C.F.R. §§ 7.4008, 34.3.

\textsuperscript{17} See 12 C.F.R. §§ 7.4008(d), 34.4(a). Pursuant to the National Bank Act, the OCC has authority to issue preemption regulation. 12 U.S.C. § 93(a); see also CSBS v. Conover, 710 F.2d 878 (D.C. Cir. 1983) (holding that the Comptroller of the Currency has authority under the National Bank Act to issue regulations preempting state laws that are inconsistent with national banking activities).

\textsuperscript{18} See 12 C.F.R. §§ 7.4007-7.4009. The OCC's authority to preempt state laws that place limitations and restrictions on national banks is based on constitutional principles under the Supremacy Clause. See McCullough v. Maryland, 17 U.S. 316 (1819) (applying the doctrine of preemption to banking regulation).

\textsuperscript{19} See 12 C.F.R. § 7.4008. The Final Rule also identifies those state laws that are not preempted. State laws that only incidentally affect lending are not preempted, including state regulation over matters pertaining to contract law, debt collection remedies, zoning restrictions, tort law, rules for the transfer of property, tax law, criminal law, and homestead rights. Id.; 12 C.F.R. §34.4(b).

\textsuperscript{20} See 12 C.F.R. § 34.4.


\textsuperscript{22} 12 C.F.R. §§ 7.4008(c), 34.3(c).

\textsuperscript{23} See 12 C.F.R. §§ 7.4008, 34.4.
standard has replaced a multitude of state laws, and national banks are now only accountable to the OCC and its single standard.\textsuperscript{24}

This Comment will analyze the potential ineffectiveness and possible consequences of the OCC's anti-predatory lending standard and argue that, despite the perceived comfort in having a single federal standard for evaluating predatory lending, the standard set forth in the Final Rule is inadequate, and inherently flawed.

Part I of this Comment attempts to define predatory lending and distinguishes predatory lending from non-predatory subprime lending.\textsuperscript{25} Part I also explains the OCC's role in regulating predatory lending.\textsuperscript{26} Part II examines the standard set forth in the Final Rule and analyzes it in light of the agency's justifications for adopting the rule,\textsuperscript{27} which include agency concerns for the maintenance of the safety and soundness of the national banking system and the goal of ensuring fair and equal access to financial services for all Americans.\textsuperscript{28} Part II concludes that the OCC's preemption of state anti-predatory lending laws and substitution of a single anti-predatory lending standard cannot reasonably be justified on these grounds.\textsuperscript{29} Part II also explores the potential negative social and economic consequences that this regulation may have for low-income borrowers.\textsuperscript{30} Part II suggests that this effect may increase the predatory lending problem by forcing these individuals to seek subprime loans from the largely unregulated non-bank sector, the segment of the financial industry notorious for committing predatory lending.\textsuperscript{31} Part III proposes a solution to ameliorate the potential social and economic costs of the regulation.\textsuperscript{32} It suggests that the OCC should interpret and enforce the regulation so that it only prohibits loans extended with a calculated intent to foreclose, and provides guidelines for determining a bank's intent.\textsuperscript{33}

\textsuperscript{24} See 12 C.F.R. §§ 7.4008(e), 34.4(b).
\textsuperscript{25} See infra notes 34-65 and accompanying text.
\textsuperscript{26} See infra notes 66-88 and accompanying text.
\textsuperscript{27} See infra notes 89-165 and accompanying text.
\textsuperscript{28} See infra notes 99-165 and accompanying text.
\textsuperscript{29} See infra notes 109-33, 139-65 and accompanying text.
\textsuperscript{30} See infra notes 151-65 and accompanying text.
\textsuperscript{31} See infra notes 162-65 and accompanying text.
\textsuperscript{32} See infra notes 166-68 and accompanying text.
\textsuperscript{33} See infra notes 166-68 and accompanying text.
I. Predatory Lending in the Subprime Market and the Role of the OCC

A. Defining the Problem

John D. Hawke, Comptroller of the Currency, defines predatory lending as "the aggressive marketing of credit to people who simply cannot afford it." This may be an oversimplification. Other commentators argue that the term in fact applies to a catalogue of exploitative lending practices that generally fall into one of two categories. The first consists of illegal and unconscionable lending tactics, such as forging signatures on loan documents, fraudulently misrepresenting the terms of a loan, double billing, hidden fees, and charging for services that were never rendered. The second category addresses activities which are not as obviously abusive—legal lending practices which are misused by unprincipled lenders. This includes loan flipping, equity stripping, high interest rates and hidden fees, among other abusive lending practices. Still others believe that the term defies traditional defini-

35. See Kurt Eggert, Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine, 35 CREIGHTON L. REV. 503, 513 (2002).
36. Id.
37. Loan flipping is the frequent refinancing of a loan, where the service fees and credit insurance costs are financed by the loan so that the principal continually rises, even as the borrower makes payments on the loan. For a discussion of the Federal Reserve Board's attempt to curb predatory loan flipping, see Michael J. Pyle, Comment, A "Flip" Look at Predatory Lending: Will the Fed's Revised Regulation Z End Abusive Refinancing Practices?, 112 YALE L.J. 1919, 1924 (2003) (analyzing the Federal Reserve Board's Regulation Z prohibiting certain forms of loan flipping).
38. In mortgage lending, equity stripping refers to two related practices. One is the practice of lending to individuals with considerable equity in their home who have no means to repay the loan. See Better Business Bureau, Beware of Predatory Practices in Home Mortgage Lending, at http://bbb.org/alerts/article.asp?ID=240 (last visited Nov. 4, 2004). When the homeowner defaults the lender forecloses and sells the home, stripping the borrower of his equity. Id. The term also applies to the practice where lenders charge excessive fees at closing that are paid out of the borrower's equity. See Eric Stein, Quantifying the Economic Cost of Predatory Lending 4 (2001), available at http://www.predatorylending.org/pdfs/Quant10-01.pdf This practice is particularly deceptive because when paid out of equity the borrower "does not feel the pain of counting out thousands of dollars in cash. The borrower parts with the money only later, when the loan is paid off and the equity value remaining in his or her home is reduced by the amount of fees owed." Id.
tion, since it encompasses loan terms and products that, on their face, are impossible to differentiate from legitimate lending practices. These commentators instead characterize predatory lending on a "you know [it] when you see it" basis, recognizing that any practice "targeted at vulnerable populations [that causes] devastating personal losses, including bankruptcy, poverty, and foreclosure" is predatory.

Another problem in defining predatory lending arises because predatory lending occurs primarily in the subprime market. Subprime loans are loans with higher interest rates designed for borrowers who would not qualify for loans at the prime rate because of a blemished, or nonexistent, credit history. The emergence and growth of the subprime market is considered a national economic success, and has given low-income borrowers access to credit where they did not have access before. By allowing families and individuals who are ineligible for prime rate loans to obtain subprime rate mortgages, the increased availability of subprime credit has been critical in aiding a recent increase in rates of homeownership. Subprime lending has also been credited with increasing mortgage lending to minority borrowers, particularly Hispanics and African-Americans during the 1990s. The difficult question is whether regulators can proscribe predatory lending while at the same time encouraging beneficial subprime lending.

While not all subprime lenders are predatory, nearly all predatory loans are subprime. Although predatory loans constitute only a subset of subprime lending, the whole is sometimes mis-

41. See Eggert, supra note 35, at 513.
43. Id.
44. See id. at 1261.
45. See id.
49. See id.
taken for the part, resulting in an overly-broad and inaccurate definition.\textsuperscript{51} A primary distinction between subprime and predatory lending lies in the lender's intent in extending the loan.\textsuperscript{52} Predatory lenders profit from intentionally and systematically taking advantage of unsophisticated borrowers, and purposefully structure loans to cause economic harm to the borrower—at a significant profit for the lender.\textsuperscript{53} Non-predatory subprime lenders lend with a different intent, that is, to provide valuable credit to individuals with a higher risk of default. The higher interest and foreclosure rates that accompany subprime loans result from the additional risk inherent in lending to an individual with imperfect credit, not from intentional planning on the part of the lender. The substance of "ground level" interactions between the lender and the borrower is often indicative of a lender's intent.\textsuperscript{54} Some lenders intentionally seek out vulnerable loan candidates,\textsuperscript{55} going so far as to review public property lien records to find homeowners with serious debt.\textsuperscript{56} After identifying their victims, these lenders become salesmen, aggressively promoting loans that the frequently desperate borrowers cannot afford.

Predatory lenders prey on the most vulnerable members of society.\textsuperscript{57} Their typical victims are financially unsophisticated individuals\textsuperscript{58} who are often "disconnected" from the traditional credit

\begin{itemize}
\item \textsuperscript{51} See id.
\item \textsuperscript{52} See Engel & McCoy, supra note 42, at 1260. Engel & McCoy have set forth a list of five characteristics that distinguish predatory lending from legitimate subprime lending:
\begin{itemize}
\item 1) loans structured to result in seriously disproportionate net harm to borrowers,
\item 2) harmful rent seeking,
\item 3) loans involving fraud or deceptive practices,
\item 4) other forms of lack of transparency in loans that are not actionable as fraud, and
\item 5) loans that require borrowers to waive meaningful legal redress.
\end{itemize}
\item \textsuperscript{53} See id.
\item \textsuperscript{54} Williams & Bylsma, supra note 1, at 118.
\item \textsuperscript{56} See Sandra Block, Guidelines Can Help Reduce Risk of Foreclosure, USA Today, Sept. 20, 2002, at 3B.
\item \textsuperscript{57} Cf. ACORN, SEPARATE AND UNEQUAL 2002, supra note 40, at 1 (showing that the poor and minorities are victims of predatory lending at significantly higher rates than white and more affluent individuals).
\item \textsuperscript{58} See Michelle W. Lewis, Perspectives on Predatory Lending: The Philadelphia Experience, 12 J. Affordable Hous. & Cmtty. Dev. L. 491, 508 (2003). Financially
economy,\textsuperscript{59} in that they have limited experience with banks and often have not developed an official credit history.\textsuperscript{60} Often, these borrowers have relied on the "fringe" credit market: check cashing establishments, pawnshops, and other local businesses that offer credit and limited financial services at significantly higher fees than traditional banks.\textsuperscript{61}

Victims of predatory lending are also generally from low-income communities.\textsuperscript{62} This is partly because low-income borrowers often seek loans when they are desperate for cash, and may not have the information or ability to properly compare lenders,\textsuperscript{63} making them more susceptible to aggressive predatory lenders.\textsuperscript{64} In addition, this class of borrowers makes up a greater percentage of the class of victims adversely affected by predatory lenders, because low-income individuals generally have fewer resources than more affluent individuals, and are more liable to default.\textsuperscript{65}

\textbf{B. The Role of the Office of the Comptroller of the Currency}

Concerns about the growth of predatory lending abuses prompted action by the OCC,\textsuperscript{66} a bureau of the U.S. Department of the Treasury charged with regulating the national banking system.\textsuperscript{67} The OCC, under the direction of Comptroller Hawke, charters new banks and has exclusive "visitorial powers" to examine and supervise the affairs of existing national banks.\textsuperscript{68} Its primary goal is to maintain stability and fair competition within the banking system.\textsuperscript{69} The agency breaks this goal down into four objectives. The first is to ensure the safety and soundness of the national bank-

\begin{itemize}
\item \textsuperscript{59} See Engel & McCoy, supra note 42, at 1281.
\item \textsuperscript{60} For purposes of this Comment, "official credit history" refers to an individual's credit history as recorded on their credit report.
\item \textsuperscript{61} See Engel & McCoy, supra note 42, at 1281.
\item \textsuperscript{62} See id.
\item \textsuperscript{63} Id. at 1282.
\item \textsuperscript{64} Id. at 1281-82.
\item \textsuperscript{65} Id.
\item \textsuperscript{66} See supra text accompanying notes 5-18.
\item \textsuperscript{67} See The National Bank Act, 12 U.S.C. § 93 (1864) (authorizing the Comptroller to hire a staff to supervise and examine national banks).
\item \textsuperscript{68} See 12 U.S.C. § 484(a) (2004).
\item \textsuperscript{69} See About the OCC, at http://www.occ.treas.gov/aboutocc.htm (last visited Nov. 16, 2004).
\end{itemize}
ing system.\textsuperscript{70} That is, to maintain the financial health of banks and the integrity of the banking system.\textsuperscript{71} Second, the agency aims to foster competition by allowing banks to offer new products and services.\textsuperscript{72} The third goal is to improve the efficiency and effectiveness of the OCC.\textsuperscript{73} Finally, the agency strives to ensure fair and equal access to financial services for all Americans.\textsuperscript{74} This Comment focuses on the first and last of these objectives.

The OCC is not the sole federal regulator of the national banking system.\textsuperscript{75} The Federal Reserve and the Federal Deposit Insurance Corporation also have regulatory authority.\textsuperscript{76} Banks pick their primary regulator when they elect to have either a national or a state charter.\textsuperscript{77} The OCC is responsible for the nationally chartered banks,\textsuperscript{78} whereas the Federal Reserve and the Federal Deposit Insurance Corporation regulate the state chartered banks.\textsuperscript{79} Some commentators believe that this competition influences the substance of banking regulations\textsuperscript{80} because banks' ability to choose their regulator creates a competitive atmosphere\textsuperscript{81} by "enabling banking organizations to shop for the most lenient regulator."\textsuperscript{82} These commentators believe that this competition fuels a "race to the bottom,"\textsuperscript{83} where the regulators, in an attempt to

\textsuperscript{70} See id.

\textsuperscript{71} Safety and soundness regulations aim to control a bank's exposure to risk, often by imposing financial safeguards such as minimum capital requirements and limitations on risky endeavors. See Jonathan R. Macey et al., Banking Law and Regulation 75 (3d ed. 2001).

\textsuperscript{72} See id.

\textsuperscript{73} See supra note 69.

\textsuperscript{74} Id.

\textsuperscript{75} See Macey et al., supra note 71, at 70.

\textsuperscript{76} Id.

\textsuperscript{77} See supra note 75; see also John A. Weinberg, Competition Among Bank Regulators, 88 Fed. Res. Bank Richmond Econ. Q. 19 (2002).

\textsuperscript{78} See Macey et al., supra note 71, at 70.

\textsuperscript{79} Id.

\textsuperscript{80} See supra note 77, at 19.

\textsuperscript{81} See supra note 77, at 19.

\textsuperscript{82} Macey et al., supra note 71, at 19-75.

\textsuperscript{83} Weinberg, supra note 77, at 20 (discussing how proposals to restructure and consolidate bank regulation are partly based on the idea that regulators are currently engaged in a race to the bottom). But see Richard J. Rosen, Do Regulators Search for the Quiet Life? The Relationship Between Regulators and the Regulated in Banking (2001) (explaining that competition can be beneficial, as banks tend to improve their performance following a switch from one regulator to another and that under certain conditions, regulatory competition leads to optimal standard setting), available at http://www.chicagofed.org/publications/workingpapers/papers/wp2001-05.pdf.
attract new banks to their constituency and to retain the banks that they already regulate, will comply with industry demands. Commentators claim that this often results in regulations that disproportionately favor the industry at the expense of the agency’s interest in managing bank operations and the public interest. The OCC is particularly susceptible to the pressures of competition because, unlike most federal agencies, it is funded entirely by the banks it regulates, in the form of examination fees.

II. THE OCC’S RESPONSE TO THE PREDA TORY LENDING PROBLEM

The OCC has made clear its position that predatory lending practices “whether in connection with mortgage lending or other national bank activities . . . have no place in the national banking system.” Such practices are inconsistent with the agency’s goals of fair access to credit for all Americans, community development and renewal, and increased opportunities for homeownership.

In February 2003, the OCC issued an Advisory Letter addressing its views on predatory lending (“Advisory Letter”). The Advisory Letter communicated the OCC’s position that predatory lending would not be tolerated in the banking system. It provided banks with notice of what practices the agency considered predatory, and guidelines for avoiding the purchase of predatory loans originated by third parties. It also advised banks as to what lend-

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84. See Weinberg, supra note 77, at 20.
86. See Weinberg, supra note 77, at 20.
87. See Rosen, supra note 83, at 5.
88. Macey et al., supra note 71, at 70. Since the agency’s budget depends exclusively on the number of banks it regulates, there is a great incentive for the OCC to make its regulations lenient and favorable to industry, so as not to lose “market share” to another regulator. Id. at 75; see also Jess Bravin & Paul Beckett, Dependent on Lenders’ Fees, the OCC Takes Banks Side Against Local Laws, WALL ST. J., Jan. 28, 2002, at A1.
89. Bank Activities and Operations, 12 C.F.R. § 7.4008 (2004); Real Estate Lending and Appraisals, 12 C.F.R. § 34.3 (2004).
91. Id.
92. Id.
93. Id.
ing practices may be considered unfair and deceptive under Section 5 of the FTC Act.\textsuperscript{94} According to the Comptroller, the purpose of the Advisory Letter was to provide guidance “to deal effectively with predatory lending without setting up a rigid system that creates burdens and obstacles to serve low-income customers.”\textsuperscript{95}

Despite the Comptroller’s previous interest in avoiding a “rigid system,” the OCC issued the Final Rule on January 7, 2004,\textsuperscript{96} contradicting its previously stated intent.\textsuperscript{97} The Rule sets forth a single anti-predatory lending standard (“Standard”), which provides that “[a] national bank shall not make a consumer loan . . . based predominantly on the bank’s realization of the foreclosure or liquidation value of the borrower’s collateral, without regard to the borrower’s ability to repay the loan according to its terms.”\textsuperscript{98} Notably missing from the rule is any reference to the bank’s intent in extending the loan. Under the Standard a lender who intends to take advantage of a borrower is treated the same as a lender who lends in the possibly negligent, though earnest, hope that the borrower will be able to fulfill the terms of the loan.

A. Analysis of the Standard and the OCC’s Objectives

The OCC relies on two agency objectives in support of its adoption of the Final Rule: the maintenance of the safety and soundness of the national banking system, and the provision of fair and equal access to financial services for all Americans.

94. \textit{Id.} According to the Advisory Letter, practices may be labeled deceptive if “[t]here is a representation, omission, act or practice that is likely to mislead; [t]he act or practice would likely mislead a reasonable consumer [in the targeted audience]; and the representation, omission, act, or practice is likely to mislead in a material way.” \textit{Id.} In addition, a practice may be labeled unfair for purposes of the FTC Act if “[t]he practice causes substantial consumer injury such as monetary harm; [t]he injury is not outweighed by benefits to the consumer or to competition; and the [i]njury caused by the practice is one that consumers could not reasonably have avoided.” \textit{Id.}


96. The Final Rule amends \textit{Bank Activities and Operations, 12 C.F.R. § 7} (2003), and \textit{Real Estate Lending and Appraisals, 12 C.F.R. § 34} (2003).

97. Administrative rules promulgated through the notice and comment process (as was this OCC Final Rule) are considered “legislative,” are binding as law on the regulated industry, and are given \textit{Chevron} deference during judicial review. See \textit{Chevron U.S.A. Inc., v. Natural Res. Def. Council, Inc.}, 467 U.S. 837 (1984). By contrast, Advisory Letters are nonbinding and do not carry the force of law.

98. 12 C.F.R. §§ 7.4008, 34.3.
1. **Principles of Safety and Soundness**

The OCC relied upon a safety and soundness rationale for pre-empting state regulation of national banks. The Comptroller stated that

"[w]hen national banks are unable to operate under uniform, consistent and predictable standards, their business suffers and so does the safety and soundness of the national banking system . . . . The application of multiple and often unpredictable state laws interferes with their ability to plan and manage their business, as well as their ability to serve the people . . . and the economy of the United States."\(^9^9\)

Safety and soundness goals are common to all of the federal bank regulators.\(^1^0^0\) In general terms, maintaining safety and soundness refers to maintenance of the financial health of banks and the integrity of the banking system.\(^1^0^1\) Safety and soundness regulations aim to control a bank's exposure to risk, often by imposing financial safeguards such as minimum capital requirements, limitations on risky lending, and other safeguards.\(^1^0^2\)

The OCC also relied on a safety and soundness rationale for adopting the Standard. The press release that accompanied the Final Rule states: "The prohibition on basing loans on the foreclosure value of the borrower’s collateral is grounded in safety and soundness principles."\(^1^0^3\) As applied to predatory lending, the OCC takes the position that loans extended with the expectation of foreclosing on the borrower’s collateral for repayment are inherently unsafe and unsound\(^1^0^4\) because loans extended in reliance on the foreclosure value of the borrower’s collateral carry a greater risk of default than loans extended after a careful calculation of the borrower’s ability to repay through future income and other financial resources.\(^1^0^5\) The OCC believes that repeat origination or purchase of such loans from brokers would constitute a threat to the safety and soundness of the banking system because these loans carry a high risk of default,\(^1^0^6\) and defaults expose a bank to loss when the sale of the collateral does not cover the balance of

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\(^1^0^0\) See *Macey et al.*, *supra* note 71, at 75.

\(^1^0^1\) *Id.*

\(^1^0^2\) *Id.*

\(^1^0^3\) OCC Final Rule Press Release, *supra* note 12.

\(^1^0^4\) Bank Activities and Operations, 12 C.F.R. § 7.4008 (2004); Real Estate Lending and Appraisals, 12 C.F.R. § 34.3 (2004).

\(^1^0^5\) OCC Final Rule Press Release, *supra* note 12.

\(^1^0^6\) OCC Advisory Letter 2003-2, *supra* note 90.
the loan after accounting for all the costs associated with liquidation.\textsuperscript{107} Yet, while safety and soundness concerns may justify the preemption of state laws, they do not justify the adoption of the Standard. Predatory lending is not prevalent in the national banking system, and therefore is not a significant threat to its Safety and Soundness. Furthermore, application of the Standard will not prohibit most predatory lending practices.

\textit{a. Most National Banks Are Not Engaged in Predatory Lending}

Many American communities are plagued by predatory lending,\textsuperscript{108} but national banks are not the primary offenders because most national banks do not originate predatory loans.\textsuperscript{109} According to the Comptroller, there are only "isolated cases of abusive practices"\textsuperscript{110} among regulated banks.\textsuperscript{111} The Standard is a "preventative measure,"\textsuperscript{112} to ensure regulated banks do not become involved in predatory lending.

The OCC has also expressed concerns that national banks could inadvertently facilitate predatory lending by purchasing predatory loans from brokers and other third parties.\textsuperscript{113} This is a legitimate concern and was addressed by the OCC in its February 2003 Advisory Letter.\textsuperscript{114} The Advisory Letter outlined common abusive lending practices and advised banks to exercise caution in purchasing brokered and third party originated loans.\textsuperscript{115} The OCC urged national banks only to do business with companies that have strong anti-predatory lending policies in connection with loans they sell or pool for securitization.\textsuperscript{116}

\footnotesize
\textsuperscript{107} Id.
\textsuperscript{108} See generally, ACORN, \textit{Separate and Unequal} 2002, \textit{supra} note 34 (documenting the increase in predatory lending that has accompanied increased subprime lending).
\textsuperscript{110} OCC Final Rule Press Release, \textit{supra} note 12.
\textsuperscript{111} \textit{But see} Hudson, \textit{supra} note 109 (noting charges of predatory lending against Citigroup).
\textsuperscript{112} \textit{See} OCC Final Rule Press Release, \textit{supra} note 12.
\textsuperscript{113} \textit{See} OCC Advisory Letter 2003-2, \textit{supra} note 90.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
b. Application of the Standard Will Not Prohibit Most Predatory Lending Practices

For those isolated cases where national banks engage in predatory lending, the Standard will do little to stop them. As discussed earlier, defining predatory lending is difficult because it consists of a multitude of abusive lending practices. Application of the Standard will only prohibit one practice, equity stripping, where a lender extends a loan to a borrower who has no reasonable means to repay, and upon the anticipated default, the lender forecloses on the collateral and strips whatever equity remains in the property. Comptroller Hawke has referred to equity stripping as "the most egregious aspect of predatory lending," because it involves a deliberate seizure of the borrower's collateral and the valuable equity therein. A lender, who is aware that the borrower cannot afford the loan but extends the loan anyway, anticipating the borrower's default, is in clear violation of the Standard.

Application of the Standard will do little to prohibit other predatory practices in secured lending. It will not prohibit lenders from charging unjustifiably high interest rates and service fees, so long as it is reasonable for the bank to believe that the borrower will be able to repay the loan from future income. For the same reason, the Standard will not affect loan packing, a practice in which credit insurance premiums are incorporated into the principal and financed over the span of the loan. (This practice is labeled predatory when the lender either does not inform the borrower of the cost of the insurance and/or that it is optional.) Similarly, it will have no effect on negative amortization, where the borrower's principal balance increases monthly because the scheduled payments are so low that they do not cover the monthly interest. In effect, onerous terms are permissible according to the OCC rule, so long as the borrower can afford the monthly payments. Yet all

117. See, e.g., Hudson, supra note 109.
118. See supra notes 30-36 and accompanying text.
119. See id.
121. See Motto, supra note 55, at 864 ("[O]ne noted subprime lender sets quotas on credit insurance, which is 'pure profit,' mainly because the lender itself underwrites it.").
122. See id.
123. See id. at 865.
these practices are predatory; they take advantage of the borrower, jeopardizing his financial welfare, at a significant profit for the lender.124

The OCC may be able to take action against such behaviors under its FTC Act enforcement authority,125 if they qualify as unfair and deceptive trade practices under that Act.126 Yet, the effect of this authority is questionable. Under the Act, the Federal Reserve Board has exclusive authority to promulgate regulations against unfair and deceptive banking practices.127 The OCC merely has enforcement authority, the power to sanction national banks for violating the Act.128 Whether this authority will effectively prohibit those types of predatory lending that are not proscribed by the Standard depends largely on the OCC’s use of the authority. Strict enforcement of the Act is unlikely, because as noted earlier, the competitive nature of banking regulation creates a strong financial incentive for the OCC to support lenient regulation as it derives all of its funding from the banks it regulates.129

Moreover, application of the Standard will not prohibit predatory lending practices in unsecured lending. The Standard provides that banks cannot grant a loan based predominantly on the “foreclosure or liquidation value of the borrower’s collateral, without regard to the borrower’s ability to repay.”130 Therefore, the Standard requires banks to investigate a borrower’s ability to repay the loan from income only when the bank is extending a secured loan.131 The Standard is inapplicable to unsecured loans.132 Accordingly, a bank can be in full compliance with the Standard yet make unsecured loans to individuals who have no foreseeable means to repay the debt.133

2. Fair and Equal Access to Financial Services for All Americans

To further support the regulation, OCC representatives have stated that the Standard is consistent with the agency’s fair and

124. See Engel & McCoy, supra note 42, at 1261 (explaining that loans structured to result in serious financial harm to the borrower are predatory).
125. 12 C.F.R. §§ 7.4008(c), 34.3(c).
127. Id.
128. 12 C.F.R. §§ 7.4008(c), 34.3(c).
129. See supra text accompanying notes 80–88.
130. See 12 C.F.R. §§ 7.4008(b), 34.3(b).
131. Id.
132. Id.
133. Id.
equal access objectives and will not adversely affect access to financial services. Comptroller Hawke argues that application of the Standard will deal with the predatory lending problem without impeding access for low-income borrowers to legitimate subprime credit. Hawke has also stated that predatory lending practices are inconsistent with the OCC's fair-lending goals because they are often discriminatory. Low-income individuals, minorities, and the elderly are the most vulnerable to aggressive lending tactics and are often specifically targeted by predatory lenders. By combating predatory lending, the OCC hopes to reduce this discrimination within the banking system, but by squeezing banks to prevent predatory lending, the OCC may unintentionally foster the growth of predatory lending in minority communities.

a. The Pre-Standard Condition: An Unequal Distribution of Financial Services

Individuals seeking subprime loans often do not have access to legitimate subprime loans from banks for two reasons: banks often do not service low-income neighborhoods, and those banks with branches in low-income neighborhoods often do not offer subprime loans. According to a study by the Association of Community Organizations for Reform Now ("ACORN"), banks have effectively abandoned low-income and minority communities. The study analyzed Federal Reserve data, and found that the number of branch offices in low and lower-middle class neighborhoods fell twenty-one percent from 1975 to 1995, while the total number of banks rose twenty-nine percent during that same time.

135. Id.
136. See Testimony of Comptroller Hawke, supra note 50.
137. See, e.g., Calomiris & Litan, supra note 47; Motto, supra note 55, at 860-61; Spitzer Threatens to Sue U.S. Regulator Over Loan Exemption, supra note 109.
139. See ACORN, SEPARATE AND UNEQUAL 2002, supra note 40.
141. ACORN, SEPARATE AND UNEQUAL 2002, supra note 40.
142. Id.
cal presence is important; the study notes that "the proximity of a bank’s branches to low and moderate income neighborhoods is directly related to the level of lending made by the bank in those neighborhoods."\textsuperscript{143}

Furthermore, national banks are not major players in the subprime market.\textsuperscript{144} Most subprime lenders are non-bank mortgage and finance companies that are not regulated by the OCC\textsuperscript{145} (and aside from consumer protection laws, are subject to little federal regulation). A report by the Department of Housing and Urban Development ("HUD") shows that in 2001 only twenty percent of the lenders whose business focus was subprime mortgage lending were banks or their affiliates.\textsuperscript{146} Banks are cautious of extending subprime credit, either because bank management is risk averse or because they fear potential damage to the bank’s reputation if they lend to higher risk customers.\textsuperscript{147}

While finance companies and non-bank mortgage lenders extend the majority of subprime credit,\textsuperscript{148} some banks have realized the value in subprime lending.\textsuperscript{149} The Center for Responsible Lending ("CRL") disagrees with the HUD analysis, stating "many of the depository institutions doing primarily prime lending are also doing some subprime lending. Given that many national banks are prime mortgage originators, a national bank could be a large subprime lender without being classified as such by HUD."\textsuperscript{150} The predatory non-bank lenders, however, are present and thriving.

\textsuperscript{143} Id.

\textsuperscript{144} See OCC Working Paper, \textit{supra} note 140, at 4 (noting that in 2001 there were 178 subprime mortgage lenders, and only 36 were banks or their affiliates); see also Litan, \textit{supra} note 46, at 6 (documenting the market share for the top twenty largest subprime lenders for first quarter of 2002). Citigroup, however, is an exception to this generalization. \textit{See generally} Hudson, \textit{supra} note 109 (documenting Citigroup’s involvement in predatory subprime lending).

\textsuperscript{145} See OCC Working Paper, \textit{supra} note 140, at 5.

\textsuperscript{146} Id. at 4.

\textsuperscript{147} See Litan, \textit{supra} note 46, at 5. Bank management is also wary of the increased safety and soundness regulatory scrutiny that comes along with charging higher interest rates and the increased foreclosure rates that often accompany subprime lending. \textit{Id.}; see also OCC Working Paper, \textit{supra} note 136, at 4.

\textsuperscript{148} See \textit{supra} notes 144-52 and accompanying text.

\textsuperscript{149} Litan, \textit{supra} note 40, at 4. Banks are becoming increasingly more involved in the subprime market. \textit{Id.} For the first quarter of 2002 only one of the top five subprime lenders, comprising approximately sixty percent of the market share, was a bank. \textit{Id.} That bank, however, holds over twenty-one percent of the market share. \textit{Id.}

b. The Standard May Further Impede Access to Legitimate Subprime Credit

The OCC is aware that many state anti-predatory lending laws have had the unintended effect of making non-predatory credit inaccessible for many creditworthy subprime borrowers.151 In an analysis of the effect of state anti-predatory lending laws on national banks, both OCC and independent empirical studies document the fact that these laws restrict the availability of credit to subprime borrowers.152 Specifically, after the enactment of North Carolina’s anti-predatory lending law in 1999,153 the origination of subprime mortgages in North Carolina decreased by fourteen percent,154 and fell fifty percent for borrowers with incomes below $25,000.155 Similarly, Chicago’s anti-predatory lending drove many seeking a subprime mortgage into the non-bank sector,156 and in Philadelphia, a law targeting predatory lenders caused many legitimate subprime lenders to withdraw from the market.157

The agency used these unintended effects of state anti-predatory lending laws as support for its decision to preempt state regulation of national banks.158 The OCC’s position is that they were “avoid[ing] the overbroad and unintended adverse effects of . . . one-size-fits-all [state] laws.”159 The OCC, however, has failed to explain why the federal Standard will not similarly affect access to legitimate subprime credit.

In addition to the geographic unavailability of banks, and the general reluctance of banks to make subprime loans, application of

151. See Hawke, supra note 34; see also OCC Working Paper, supra note 140, at 20.
152. See ACORN, SEPARATE AND UNEQUAL 2002, supra note 40.
156. Hawke, supra note 34.
157. Id.
158. See id. According to Comptroller Hawke, “[in] preemption situations, the only relevant issue is whether the state law would impair or interfere with the national bank’s exercise of powers granted to it under federal law. If such an impact is found to exist, federal law must prevail.” Id.
159. Id.
the Standard may act as an additional obstacle to legitimate subprime credit. It has the potential to prohibit access to bank loans for an entire class of individuals; those borrowers with equity in their homes, or other valuable collateral, but with low incomes.

Recall the story about Mr. Campbell in the Prologue. He is a prime example of an equity-rich, cash-poor individual who, because of the new federal Standard, will not have access to subprime credit from national banks. A bank complying with the Standard might well deny his application for a loan, notwithstanding the considerable equity in his home. First, even if the bank reasonably believed that despite Mr. Campbell's low income he would be able to make the payments on the loan, loan officers might be reluctant to grant the loan to prevent any appearance that they were basing the loan on the foreclosure value of his home. Extending a loan to a borrower on a fixed income would send out a red flag for closer OCC scrutiny of the bank's lending practices. Banks do not want to risk an OCC audit, or be labeled a predatory lender, even if only for the interim during an investigation; the effect could be devastating and cause them to lose prime market customers.

Second, if the bank extended the loan, and was later forced to foreclose on Mr. Campbell's home, an OCC investigation could potentially reach a different conclusion than the bank as to Mr. Campbell's ability to repay the loan from income. In hindsight, an examination into the ability of a low-income individual to pay from his income would seem questionable, especially in the case of many low-income individuals who face unexpected interruptions in their cash flow. For example, suppose circumstances arose where the Social Security administration stopped Mr. Campbell's SSI checks on the mistaken grounds that he was no longer disabled. Mr. Campbell would lose his sole source of income, and have no option but to default on the loan. The question is whether OCC examiners would consider such an interruption in income foreseeable, and conclude that the bank provided the loan despite Mr. Campbell's uncertain future income.

The OCC's goal in adopting the Standard is to prohibit the "most egregious" type of predatory lending: loans where the lender grants the loan with the intent of foreclosing on the borrower's collateral. The potential result, however, will be to effectively ban loans to otherwise eligible subprime borrowers who, despite low incomes, have collateral that would traditionally support a loan.

160. See supra notes 2-8 and accompanying text.
161. See Statement of Comptroller Hawke, supra note 114.
This cannot be reconciled with the OCC’s objective of ensuring fair and equal access to financial services for all Americans, at least as it applies to low-income Americans.

c. The Potential to Increase Predatory Lending

The institutional denial of credit to this class of subprime borrowers creates a larger pool of potential victims for the unscrupulous lenders. When denied a bank loan, desperate borrowers turn to the non-bank lenders, concentrated in low-income and minority communities. A study by HUD found that subprime lending is three times more prevalent in low-income communities than higher income communities. Since these non-bank lenders are not subject to federal oversight and examination, there exists a great potential for abuse. According to the ACORN study, predatory lenders systematically rely on banks to deny credit to large numbers of low-income individuals; they have found their niche.

III. Proposal for OCC Interpretation and Enforcement of the Standard

The OCC has broad discretion to interpret and apply the Standard as it sees fit. As noted by one commentator, the results of the regulation “will only be known as the examiners roll into banks and . . . give [it] practical definition.” While there is some comfort in having a single federal standard, substitution of the OCC’s Standard to replace state anti-predatory lending laws may have the negative consequence of reducing access to subprime credit. In order to ameliorate this problem, the OCC should narrowly construe the Standard so that it only prohibits intentional equity stripping without preventing legitimate asset-based lending to low-income borrowers.

Not all risk-priced, asset-based loans should be labeled predatory, and it is important for homeowners to benefit from the equity in their homes and use it to meet their credit needs. The OCC has the authority to interpret and apply the Standard as it deems appropriate. The OCC should focus less on how the bank calculated

163. See id.; see also OCC Working Paper, supra note 140, at 2.
164. Testimony of Comptroller Hawke, supra note 50.
165. See ACORN, SEPARATE AND UNEQUAL 2002, supra note 40.
166. Rockett, supra note 109.
the borrower’s eligibility and how heavily the bank relied upon the borrower’s collateral, and instead construe the Standard so that it prohibits only intentional equity stripping, where the lender had the requisite bad intent and “an eye out” to take the borrower’s home.

Addressing the difficulties that exist in assessing a bank’s intent in extending a loan, I propose that the OCC take the following factors into consideration when examining a bank’s compliance with their anti-predatory lending standard:

1. *The time lapse before foreclosure.*

A relatively short period of time between origination of a loan and foreclosure may be an indication that the loan was not based predominantly on the borrower’s ability to repay the loan from future income, and that the bank relied too heavily on the value of the borrower’s collateral. According to a study documenting trends in loan foreclosures in Boston, the median age of subprime loans at foreclosure is three years.\(^{167}\) The OCC should conduct a similar survey to determine a span of time before foreclosure that is characteristic of a predatory loan.

2. *The foreseeability of an interruption to income.*

When examining a bank’s investigation into the borrower’s ability to repay the loan from future income, the OCC should not hold the bank responsible for unforeseeable future interruptions to the borrower’s income. The determination should be made based on the information available to the bank at the time it extended the loan. Furthermore, the OCC should give deference to the bank’s determination, made before extending the loan, regarding a borrower’s ability to repay the loan from his future income. Since banks co-exist with their customers, they are better able to assess their customers’ present and anticipated future financial situations than remote federal regulators.

3. *Whether the borrower was well informed before entering into the loan agreement.*

As noted earlier, one characteristic that distinguishes predatory lending from legitimate subprime lending is what happens at

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"ground level" interactions between the borrower and the lender. The OCC should investigate whether the borrower was informed of, and understood, the terms of the loan. While unrefined borrowers are not expected to have a comprehensive understanding of a complex loan agreement, the lender should be charged with a duty to ensure that the borrower has a basic understanding of his obligations under the agreement and the consequences of default. A lender who fails to ensure that the borrower has this minimal level of understanding is engaging in behavior illustrative of predatory intent.

CONCLUSION

The OCC's anti-predatory lending standard, which preempts state lending laws, places an unjustifiable restriction on the ability of banks to extend loans to low-income individuals. By restricting access to legitimate bank loans, application of the Standard may effectively increase the predatory lending problem outside of the national banking system, as borrowers are forced to seek credit in the largely unregulated non-bank lending market, where predatory lending is rampant. In addition, the efficacy of replacing state anti-predatory lending laws with a single federal standard is questionable. The consequences of the regulation depend in large part upon the OCC's interpretation and enforcement of the Standard. Thus, the OCC should interpret the Standard so that it does not prohibit banks from extending loans to all low-income borrowers, and prohibits only those loans extended with an intent to foreclose on the borrower's collateral.

168. See supra note 48 and accompanying text.