Falling Between the *Atkins* and *Heller* Cracks: Intellectual Disabilities and Firearms

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INTRODUCTION

With citizenship comes certain rights: the right to vote,[1] the right to marry,[2] and now, the individual right to bear arms—at least the right to possess handguns for personal self-defense purposes.[3] The right to bear arms may be taken away, but that is done either through a judicial determination of incompetency or as a consequence to related or even unrelated occurrence of criminal conviction.[4] However, with the United States Supreme Court's recent application of the Second Amendment to the states, having determined that the Second Amendment included the individual right to possess handguns in one's home for self-defense purposes, that right to bear arms, left unclear, may do more harm than good.[5] The future of Second Amendment litigation will be in challenging those laws that restrict rights of gun ownership and use. Without a clear standard of review,[6] it is difficult to predict if many of the existing limitations in gun control will survive challenges.

But case law does not live in a vacuum. One judgment, addressing one right, can surely affect—or be affected by—another judgment addressing a seemingly unrelated issue. This occurs at the intersection of that right to bear arms and intellectual disabilities.

Addressing the Eighth Amendment in 2002, the Supreme Court, reversing precedent only thirteen years old, held that the execution of persons with intellectual disabilities was a violation of the Eighth Amendment's prohibition against cruel and

1 Although the right to vote is not explicitly granted in the Constitution, the Constitution does prohibit the denial of the right to vote based on race, U.S. CONST. amend. XV, § 1, gender, U.S. CONST. amend. XIX, § 1, or age if that age is eighteen or over, U.S. CONST. amend. XXVI, § 1. However, some interpret the Fourteenth Amendment as granting the right to vote as a political right, not a civil right. *See* Steven G. Calabresi, *Does the Fourteenth Amendment Guarantee Equal Justice for All?*, 34 HARV. J.L. & PUB. POL'Y 149, 152 (2011). *See also* Harper v. Virginia. Bd. of Elections, 383 U.S. 663, 665 (1966).

2 *See* Loving v. Virginia, 388 U.S. 1, 11 (1967). *See generally* Ariela R. Dubler, *Sexing* Skinner*: History and the Politics of the Right to Marry*, 110 COLUM. L. REV. 1348 (2010) (revisiting Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) and *Loving* under the question of current issues related to the right to marry).

3 McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010) (applying the Second Amendment to the States); District of Columbia v. Heller, 544 U.S. 570, 570 (2008) (interpreting a right to possess handguns for personal self-defense).

4 16 U.S.C. § 922(g) (2006); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 513–14 (2010).

5 *See, e.g.*, Michael D. de Leeuw et al., *Ready, Aim, Fire?* District of Columbia v. Heller *and Communities of Color*, 25 HARV. BLACKLETTER L.J. 133, 148–50 (2009).

6 *See, e.g.*, Brannon P. Denning & Glenn H. Reynolds, *Five Takes on* McDonald v. Chicago, 26 J.L. & POL. 273, 296–97 (2011) (pointing out the repeated denial of the Court (even the plurality) to articulate a standard of review in either *Heller* or *McDonald*).

unusual punishment.[7] Persons in this population do not have the same criminal culpability as others, and the death penalty should not be applied.[8] Given that the Court has prohibited the execution of persons with intellectual disabilities because of this lower culpability,[9] perhaps that right to arms under the Second Amendment should not apply equally to persons with intellectual disabilities either. Rather than debating over executions, preventing some of the crimes that could lead to an execution might be even better.

Congress may have tried to address this over forty years ago. One of the major objectives of the Gun Control Act of 1968 (Gun Control Act) was to deny specific populations access to firearms—felons, minors, and "persons who had been adjudicated as mental defectives or committed to mental institutions."[10] The goal was to deny access to firearms to these "special risk groups" or, at the very least, punish those who provided such access.[11] The Gun Control Act barred the knowing transfer of guns or ammunition to the named groups.[12] The Gun Control Act achieved this task easily with some groups: determining who is a minor is as easy as seeing proof of age, something most people have.[13] Also, felony convictions are recorded and tracked.[14]

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7 Atkins v. Virginia, 536 U.S. 304, 321 (2002).

8 *Id.* at 320–21.

9 The term "intellectual disability" is synonymous with "mental retardation." *FAQ on Intellectual Disability*, AAIDD (last visited Sept. 15, 2011), http://www.aaidd.org/content_104.cfm. But intellectual disability is gaining currency as the preferred term. In fact, the American Association on Mental Retardation changed its name in 2007 to the American Association on Intellectual and Developmental Disabilities. *Id.* Based on the preference for the former term, it will be used throughout this article, although the author will recognize the use of "mental retardation" in quoted material. The AAIDD has noted:

> It is crucial that "mental retardation" and "intellectual disability" should be precisely synonymous in definition and in all related classification because current federal and state laws contain the term "mental retardation." That is the term used in law and public policy to determine eligibility for state and federal programs, including the Individuals With Disabilities Education Act—IDEA (2004), Social Security Disability Insurance, and Medicaid Home and Community Based Waiver. Also, the term "mental retardation" is used for citizenship and legal status, civil and criminal justice, early care and education, training and employment, income support, health care, and housing and zoning.

Id.

10 Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 149 (1975).

11 *Id.* at 152.

12 18 U.S.C. § 922(g) (2006).

13 However, as has been argued and seen in voter disenfranchisement situations, many citizens do not have government-issued identification. *See* Julien Kern, *As-Applied Constitutional Challenges, Class Actions, and Other Strategies: Potential Solutions to Challenging Voter Identification Laws After* Crawford v. Marion County Election Board, 42 LOY. L.A. L. REV. 629, 631–32 (2009). This calls into question issues of discrimination regarding the lawful purchase of firearms for persons, especially rural persons without

But the restriction regarding persons with intellectual disabilities is too vague to measure, track, or enforce in the manner surely intended.[15] Further, the rights we have taken away from minors and felons fall in line with other rights similarly removed. Minors' rights are restricted in a number of ways: they cannot vote, marry, enter into contracts, etc.[16] But a person with intellectual disabilities often explicitly has all the rights of a person without similar disabilities by way of bills of rights that explicitly guarantee all rights will be recognized unless a person is adjudicated incompetent.[17]

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proof of age.

14 The Brady Handgun Violence Prevention (Brady Bill) Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921–22 (2006)) requires that background checks are conducted prior to sales by licensed firearms dealers, and as a method to complete those checks, Congress required the FBI to implement the National Instant Criminal Background Check System (NICS), which tracks felony convictions, within five years of the passage of the Brady Bill. *See* James B. Jacobs & Jennifer Jones, *Keeping Firearms Out of the Hands of the Dangerously Mentally Ill*, 47 CRIM. L. BULL. 388, 393 (2011); *see also National Instant Criminal Background Check System*, FED. BUREAU OF INVESTIGATION (last visited Sept. 15, 2011), http://www.fbi.gov/about-us/cjis/nics. However, states did not necessarily submit the required data to the NICS, which led to the passage of the NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180 § 2, 121 Stat. 2559 (2008).

15 *See generally* Jacobs & Jones, *supra* note 14.

16 *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 824 (1988):

> There is . . . complete or near unanimity among all 50 States and the District of Columbia in treating a person under sixteen as a minor for several important purposes. In no State may a fifteen-year-old vote or serve on a jury. Further, in all but one State a fifteen-year-old may not drive without parental consent, and in all but four States a fifteen-year-old may not marry without parental consent.

17 States have individualized bills of rights that explicitly state that rights may not be denied unless a formal adjudication has occurred: "To articulate the existing legal and human rights of persons with developmental disabilities so that they may be exercised and protected. Persons with developmental disabilities shall have all the rights enjoyed by citizens of the state and the United States." FLA. STAT. ANN. § 393.13(2)(d) (West 2011).

> Because persons with mental retardation have been denied rights solely because of their retardation, the general public should be educated to the fact that persons with mental retardation who have not been adjudicated incompetent and for whom a guardian has not been appointed by a due process proceeding in a court have the same rights and responsibilities enjoyed by all citizens of this state. All citizens are urged to assist persons with mental retardation in acquiring and maintaining rights and in participating in community life as fully as possible.

TEX. HEALTH & SAFETY CODE ANN. § 591.002(e) (West 2010). "Each person with mental retardation in this state has the rights, benefits, and privileges guaranteed by the constitution and laws of the United States and this state." HEALTH & SAFETY § 592.011(a). Further, the federal government has noted that rights are not reduced based on an intellectual disability:

> Congress finds that—(1) disability is a natural part of the human experience that does not diminish the right of individuals with developmental disabilities to live independently, to exert control and choice over their own lives, and to fully participate in and contribute to their communities through full

However, the effectiveness of the language that addresses persons with intellectual disabilities is debatable. The Gun Control Act, and subsequent amendments, left a wide gap in its limitations on "mental defective," ignoring not only the need to use control measures to protect society, but also to protect special risk groups, namely, those with intellectual disabilities. And regardless of whether such persons are covered, indeed, their coverage is inadequate. There is no database of persons with intellectual disabilities,[18] and the prohibition against owning a firearm applies only to those so adjudicated by a court as mental defectives and only when notice of the adjudication is provided to a national database.[19] If this hole cannot be filled, clearly, denying rights of access is not enough. Therefore, to achieve the goal of protecting society as well as persons with intellectual disabilities, we must aim to prevent access to guns through an alternative avenue: criminalize allowing a person with intellectual disabilities access to a personally-owned firearm.

> integration and inclusion in the economic, political, social, cultural, and educational mainstream of United States society.

42 U.S.C. § 15001(a)(1) (2006). "The rights of individuals with developmental disabilities described in findings made in this section shall be considered to be in addition to any constitutional or other rights otherwise afforded to all individuals." 42 U.S.C. § 15009(b).

18 This is not to suggest that a database of persons with intellectual disabilities is recommended. Such a database could too easily lead to improper discrimination in areas of housing, employment, and the like. *See, e.g.*, City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 442, 450 (1985) (although refusing to find persons with intellectual disabilities to belong to a quasi-suspect class, holding that equal protection was violated for failure of any rational basis to justify requiring a special permit for homes for persons with intellectual disabilities).

19 18 U.S.C. § 922(d)(1) (2006). "Adjudicated as a mental defective" has been defined as:

> (a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:
>
> (1) Is a danger to himself or to others; or
>
> (2) Lacks the mental capacity to contract or manage his own affairs.
>
> (b) The term shall include—
>
> (1) A finding of insanity by a court in a criminal case; and
>
> (2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b

27 C.F.R. 478.11(a) (2010). *See also* Allen Rostron, *Incrementalism, Comprehensive Rationality, and the Future of Gun Control*, 67 MD. L. REV. 511, 551–52 (2008) [hereinafter Rostron, *Incrementalism*].(addressing the lack of notice of mental illness adjudication in Virginia which allowed Seung-Hui Cho to purchase firearms in spite of a background check). In 2008, only four states regularly provided the information needed to keep the database current, and less than half of the states provided any information regarding mental health records. *Id.* at 552–53. Of particular concern, though, is what qualifies as that court, "board, commission, or other lawful authority" as an entity that could remove someone's (now-understood) Constitutional right.

This Article begins this discussion and supports adopting such legislation for two distinct reasons. First, guns should not be possessed by persons with significantly limited cognitive and reasoning skills.[20] Second, similar to child-access prevention laws, legislation should hold accountable those persons who improperly store their guns. Part I provides background, including legislative information as related to the Gun Control Act and its implementation, focusing on its language and applicable amendments regarding persons prohibited from firearm possession. Part I also explains child-access prevention laws, a newer area of gun control legislation. Part II reviews judicial interpretation of legislative language related to persons with intellectual disabilities under the Gun Control Act before moving to a discussion of the Supreme Court's holding in *Atkins v. Virginia*, the case in which the Court held the execution of persons with intellectual disabilities to be unconstitutional.[21] By comparing the justifications of *Atkins* and other Court language, there exists an argument that child-access prevention laws should be extended to cover persons with intellectual disabilities. Thus, Part III proposes ways in which to fill the gap of the population mentioned, but for all practical purposes unaddressed, in gun control legislation by extending child-access prevention laws to persons with intellectual disabilities.

I. RELEVANT GUN CONTROL LEGISLATION

A. Intellectually Disabled Under the Gun Control Act of 1968: "Mental Defects"

In 1968, in the wake of assassinations of Dr. Martin Luther King, Jr. and Senator Robert Kennedy, Congress passed the Gun Control Act.[22] One of the primary purposes of the Gun Control Act was to restrict firearms possession, prohibiting certain special risk groups from possessing guns and prohibiting the

20 *See generally* Richard J. Bonnie, *The American Psychiatric Association's Resource Document on Mental Retardation and Capital Sentencing: Implementing* Atkins v. Virginia, 28 MENTAL & PHYSICAL DISABILITY L. REP. 11 (2004) (discussing the meaning of "significant").

21 Atkins v. Virginia, 536 U.S. 304, 304 (2002).

22 Gun Control Act of 1968, Pub. L. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921–928 and in scattered sections of 26 U.S.C. (2006)). This was the first primary firearms legislation since the National Firearms Act, 26 U.S.C. §§ 5801–5872, passed in 1934, which had been prompted especially by concerns of gangsters and organized crime. *See* Zimring, *supra* note 10, at 138 ("The National Firearms Act of 1934, after the handgun registration provisions were deleted, was a concentrated attack on civilian ownership of machine guns, sawed-off shotguns, silencers, and other relatively rare firearms that had acquired reputations as gangster weapons during the years preceding its passage.").

transfer of guns to such groups by licensed dealers.[23] The Gun Control Act addresses this in two provisions. The first provision states: "It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person . . . has been adjudicated as a mental defective or has been committed to any mental institution."[24] The second provision states:

> It shall be unlawful for any person . . . who has been adjudicated as a mental defective or has been committed to any mental institution . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.[25]

The only reference to persons with intellectual disabilities could be found under the inclusion of persons "who have been adjudicated as a mental defective."[26]

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23 Zimring, *supra* note 10, at 149.

24 18 U.S.C. § 922(d)(4) (2006). Other prohibitions include the ability to sell firearms to one who has been convicted of a felony, dishonorably discharged from the Armed Forces, or has been convicted of a misdemeanor crime of domestic violence. 18 U.S.C. § 922(g)(1), (6), (9). Congress couches its prohibitions under commerce restrictions; however, the Supreme Court held that Congress exceeded its Commerce Clause authority in enacting the Gun-Free School Zones Act of 1990. *See* United States v. Lopez, 514 U.S. 549, 549 (1995) (holding 18 U.S.C. § 922(q)(1) unconstitutional because it is a "criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly those terms are defined").

25 18 U.S.C. § 922(g)(4). Although the *Lopez* Court held that the Gun-Free School Zones Act was unconstitutional, some circuits have upheld subsequent constitutional challenges to the Act because it contained a "jurisdictional" clause. *See* United States v. Dorsey, 418 F.3d 1038, 1045–46 (9th Cir. 2005). Interestingly, despite the Court finding Congress does not generally have the power to regulate guns, the Court has been willing to find that Congress has the authority to regulate drugs. *See* Gonzales v. Raich, 545 U.S. 1, 42 (2005) (Scalia, J., concurring) (recognizing that Congress has the authority to regulate controlled substances under the Commerce Clause).

26 18 U.S.C. §§ 922(d)(4), (g)(4). States use a variety of terms to discuss mental impairment in gun legislation. The District of Columbia prohibits the sale of firearms to persons whom the seller "has reasonable cause to believe is not of sound mind" or who is under the age of twenty-one. D.C. CODE § 22-4507 (LexisNexis through 2011 legislation). Alabama prohibits the delivery of a pistol to a person "of unsound mind." ALA. CODE § 13A-11-76 (LexisNexis 2005). California bans firearm possession by (and transfer to) persons adjudicated as "a danger to others as a result of a mental disorder or mental illness, or who has been adjudicated to be a mentally disordered sex offender." CAL. WELF. & INST. CODE § 8103(a)(1) (West 2010). Key in California is section 8103 of its Welfare and Institutions Code. Under this section, persons who have "been placed under conservatorship by a court . . . because the person is gravely disabled as a result of a mental disorder or impairment by chronic alcoholism" may not possess a firearm. *Id.* at § 8103(e)(1). Further, section 8101 states that no one shall "knowingly supply, sell, give, or allow possession or control of a firearm," to anyone covered in section 8103, violation of which is subject to a two-to-four-year prison sentence. *Id.* at § 8101(b). However, California appellate courts have stated that a person who is "capable of surviving safely in freedom with the help of willing and responsible family members, friends, or third parties" is not gravely disabled and may still own a firearm. San Diego Cnty. Dep't of Soc. Serv. v. Neal (*In re* Conservatorship of Neal), 235 Cal. Rptr. 577, 578 (1987); Estate of Davis v. Treharne (*In re* Conservatorship of Davis), 177 Cal. Rptr. 369, 373 (1981).

The ban against transferring guns to the special risk populations was not strengthened with any means of verification for any group other than minors; a purchaser merely needed to state he or she was eligible, and the dealer was able to rely on her word.[27]

In 1993, after the shooting of President Ronald Reagan, Congress responded with the Brady Bill,[28] which attempted to address the hole in the 1968 Gun Control Act by implementing a waiting period before the purchase of a handgun and by establishing a national background system check.[29] This law was implemented in two stages, giving states time to gather the records and time to institute the computerized system to maintain those records.[30] But the Bill did not seem to account for how it would motivate states to provide information related to those who had been adjudicated "as a mental defective."[31] It would be fifteen years before any attempt was successful in trying to strengthen the meaning behind the Brady Bill regarding this particular group, and even then, the group is again only a tag-along.[32]

That improvement to the Brady Law came after the shooting at Virginia Polytechnic Institute and State University (Virginia Tech),[33] in which thirty-two people were murdered and twenty-four wounded by Seung-Hui Cho, who had purchased firearms in spite of having been ordered to receive outpatient treatment for

Further, the Welfare and Institutions Code specifically states that "gravely disabled does not include mentally retarded persons by reason of being mentally retarded alone." CAL. WELF. & INST. CODE § 5008(h)(3) (West 2010).

27 Zimring, *supra* note 10, at 152–53.

28 Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921–22). Scholars note that the piecemeal approach to gun legislation should be replaced with a comprehensive reform. *See, e.g.*, Rostron, *Incrementalism*, *supra* note 19, at 568.

29 Brady Handgun Violence Prevention Act § 103.

30 *Id.*

31 *Id.*

32 In the interim, other gun control legislation passed, including the controversial federal assault weapons ban, which subsequently expired in 2004. Public Safety and Recreational Firearms Use Protection Act, Pub. L. No 103-322, 108 Stat. 1996 (1994) (repealed 2004). Whether a renewed assault weapons ban would survive constitutional scrutiny under *Heller* is debatable. It has been concluded that the type of arm possessed can indeed be regulated, and if the arm is not in "common use at the time" among Americans, the arm is not protected under the Second Amendment. District of Columbia v. Heller, 554 U.S 570, 624–27 (2008); Allen Rostron, *Protecting Gun Rights and Improving Gun Control After* District of Columbia v. Heller, 13 LEWIS & CLARK L. REV. 383, 388 (2009) [hereinafter Rostron, *Protecting*].

33 *See Investigation of April 16, 2007 Critical Incident At Virginia Tech*, OFFICE OF THE INSPECTOR GEN. FOR MENTAL HEALTH, MENTAL RETARDATION & SUBSTANCE ABUSE SERVICES 3, *available at* http://www.oig.virginia.gov/documents/VATechRpt-140.pdf. Gun control legislation often follows shootings that gain national recognition. *See, e.g.*, Rostron, *Incrementalism*, *supra* note 19, at 561–62.

mental illness.[34] After that shooting, Congress passed the NICS Improvement Amendments Act.[35] The Act was intended to strengthen the Brady Bill's background check system through the National Instant Check System (NICS).[36]

As part of the desired improvement, Congress sought to increase the availability of information that would result in disqualification of gun ownership by automating the information related to mental illness.[37] That access could be automated, or at least improved, if the information were computerized.[38] The Act required that federal agencies with information related to a person falling under the categories of prohibited possessors[39] report that information to the Attorney General at least quarterly.[40] The Attorney General is then charged with updating the NICS.[41] Further, states are to make similar information available when a person is adjudicated as a mental defective.[42] Federal funds may be withheld from states that fail to comply.[43] States were to be provided grants to assist with the cost of upgrading their information—creating electronic systems, and collecting and analyzing data.[44] Failure to comply results in loss of funds as allocated under the Crime Control and Safe Streets Act of 1968.[45] The initial review period to determine compliance would not begin until 2011; that review would extend for two years.[46]

The deadline to comply with the NICS Improvement Amendments Act has come and gone, and in spite of the threat of losing federal funds, not all states are complying.[47] In February

34 *See, e.g.*, Rostron, *Incrementalism*, *supra* note 19, at 550–51.

35 NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 121 Stat. 2559 (2008).

36 § 2, 121 Stat. at 2559–60.

37 *Id. See also* Associated Press, *Mental Health Records Not in Gun Database*, MSNBC.COM (Nov. 26, 2005), http://www.msnbc.msn.com/id/10214838/ns/us_news-crime_and_courts/. Some complained that prohibiting gun possession by persons with mental illness was unfair in that it denied their rights based on a medical condition. Associated Press, *supra*. Although Justice Scalia, writing for the majority in *Heller* seemed to dismiss any question of constitutionality of this prohibition, it certainly has not been analyzed as a distinct issue. *See Heller*, 554 U.S. at 626. The NRA, however, supported the NICS Improvement Act; it also negotiated for a release from disabilities provision, which was included. *See* Rostron, *Incrementalism*, *supra* note 19, at 555.

38 § 2, 121 Stat. at 2560.

39 This applies to persons listed under 18 U.S.C. § 922 (g) and (n). § 101, 121 Stat. at 2561.

40 *Id.*

41 *Id.*

42 *Id.* at 2566–67.

43 *Id.* at 2565.

44 *Id.* at 2567.

45 *Id.* at 2569.

46 *Id.*

47 Greg Bluestein, *Most U.S. States Don't Follow Mental Illness Gun Law*,

2011, a month after the compliance deadline passed, nine states had provided no information,[48] and seventeen other states had sent fewer than twenty-five names.[49] Surely, those states have more than twenty-five persons who have been adjudicated as mental defects.

In passing the NICS Improvement Amendments Act of 2007, Congress stated:

> On April 16, 2007, a student with a history of mental illness at the Virginia Polytechnic Institute and State University shot to death 32 students and faculty members, wounded an additional 26 individuals, and then took his own life. The shooting, the deadliest campus shooting in United States history, renewed the need to improve information-sharing that would enable Federal and State law enforcement agencies to conduct complete background checks on potential firearms purchasers. In spite of a proven history of mental illness, the shooter was able to purchase the two firearms used in the shooting. Improved coordination between State and Federal authorities could have ensured that the shooter's disqualifying mental health information was available to NICS.[50]

Further, in discussing the findings and definitions, the focus regarding the inadequate data was on "mental health" and mental illnesses.[51] Congress did not appear to focus on issues of intellectual disabilities, which left an entire population of persons often considered incompetent in other ways, able to purchase and possess firearms.

Of course, regulations can cover only those who are required to abide by them. Not covered by the Gun Control Act or the NICS Improvement Amendment Act are private sales of firearms to persons.[52] While gun possession itself is prohibited for persons adjudicated mentally defective, the transfer of the gun is not prohibited so long as that transfer is done by a private individual who is not engaged in the business of selling firearms.[53] Some have estimated that half of all gun sales involve used guns, and thus are likely not covered by the required background checks.[54]

HUFFINGTON POST (Feb. 17, 2011, 02:04 PM), http://www.huffingtonpost.com/2011/02/17/few-states-follow-mental-_n_824738.html.

48 *Id.* Problems with the distribution of promised funds and with privacy laws were cited as roadblocks to the information being submitted by the states. *Id.*

49 *Id.*

50 NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 2(9), 121 Stat. at 2559, 2260 (2008).

51 *Id.* at 2560–61.

52 *See* Rostron, *Incrementalism*, *supra* note 19, at 556.

53 *See id.* Some states, such as California and Pennsylvania, have implemented the background-check requirement for all transfers. *Id.*

54 *See* Philip J. Cook, Stephanie Molliconi & Thomas B. Cole, *Regulating Gun Markets*, 86 J. CRIM. L. & CRIMINOLOGY 1, 69–70 (1995) (finding data supportive of the

B. Child-Access Prevention Laws[55]

The federal prohibition against providing firearms to minors has been in place for over forty years, but child-access prevention laws (CAP laws) are, by comparison, relatively recent. Although possession by a minor and transfer to a minor is prohibited under federal law and most state laws, CAP laws extend this one step further by holding a private gun owner criminally liable when a minor gains access to that person's gun.[56]

Although not a part of federal law, at least twenty-seven states and the District of Columbia have enacted CAP laws.[57] A handful of these states actually provide for criminal liability even if the child who gains access does not cause injury.[58] Some statutes merely prevent providing a firearm to a minor, while others impose criminal liability for negligently storing even unloaded firearms such that a minor gains access to it.[59]

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conclusions that approximately half of all gun sales involve used guns and that approximately forty percent occur in secondary markets rather than in regulated markets).

55 This Article accepts CAP laws as a beneficial part of gun policy. For an informative analysis of CAP laws, see Andrew J. McClurg, *Child Access Prevention Laws: A Commonsense Approach to Gun Control*, 18 ST. LOUIS U. PUB. L. REV. 47, 51–53, 58 (1999). For a listing and categorization of CAP laws, see generally *Child Access Prevention*, LEGAL COMMUNITY AGAINST VIOLENCE (Feb. 2008), http://www.lcav.org/content/child_access_prevention.pdf.

56 Other statutes create civil liability for similar situations when the minor gains access to a gun and injures herself or another. *See* Rostron, *Protecting*, *supra* note 32, at 385 (arguing that the decision in *Heller* will, contrary to popular thought, help push toward "strong, sensible gun laws").

57 CAL. PENAL CODE §§ 12035-12036 (West 2009); CAL. CIV. CODE § 1714.3 (West 2009); COLO. REV. STAT. ANN. § 18-12-108.7 (West 2004); CONN. GEN. STAT. ANN. § 29-37(i) (West 2009); CONN. GEN. STAT. ANN. § 52-571(g) (West 2005); CONN. GEN. STAT. ANN. § 53(a)A-217(a) (West 2007); DEL. CODE ANN. tit. 11, §§ 603, 1456 (2007); D.C. CODE § 7-2507.02 (LexisNexis 2008); FLA. STAT. ANN. § 790-174 (West 2007); GA. CODE ANN. § 16-11-101.1 (2011); HAW. REV. STAT. ANN. § 134-10.5 (LexisNexis 2006); HAW. REV. STAT. ANN. §§ 707-714.5 (LexisNexis 2007); 720 ILL. COMP. STAT. 5/24-9(a) (West 2010); 430 ILL. COMP. STAT. 65/4(c) (West 2004); IND. CODE ANN. § 35-47-10-7 (West 2004); IOWA CODE ANN. § 724.22(7) (West 2003); KY. REV. STAT. ANN. § 527.110 (West 2006); MD. CODE ANN., CRIM. LAW § 4-104 (LexisNexis 2002); MASS. GEN. LAWS ANN. ch. 140, § 131L (West 2002); MINN. STAT. ANN. § 609.666 (West 2009); MISS. CODE ANN. §§ 97-37-14, 97-37-15 (West 2011); MO. REV. STAT. § 571.060(1)-(2) (West 2003); NEV. REV. STAT. ANN. §§ 41.472, 202.300 (LexisNexis 2006); N.H. REV. STAT. ANN. § 650-C:1 (LexisNexis 2007); N.J. STAT. ANN. § 2C:58-15 (West 2005); N.C. GEN. STAT. § 14-315.1 (LexisNexis 2009); OKLA. STAT. ANN. tit. 21, § 1273(B) (West 2002); R.I. GEN. LAWS ANN. § 11-47-60.1 (2002); TENN. CODE ANN. §§ 39-17-1319, 39-17-1320 (2010); TEX. PENAL CODE ANN. § 46.13 (West 2011); UTAH CODE ANN. § 76-10-509.6 (LexisNexis 2008); VA. CODE ANN. § 18.2-56.2 (2009); WIS. STAT. ANN. § 948.55 (West 2005).

58 HAW. REV. STAT. ANN. § 134-10.5 (LexisNexis 2006); HAW. REV. STAT. ANN. § 707-714.5 (LexisNexis 2007); MD. CODE ANN., CRIM. LAW § 4-104 (LexisNexis 2002); MASS. GEN. LAWS ANN. ch. 140, § 131L (West 2002); MINN. STAT. ANN. § 609.666 (West 2009); N.J. STAT. ANN. § 2C:58-15 (West 2005); TEX. PENAL CODE ANN. § 46.13 (West 2011).

59 *See* HAW. REV. STAT. ANN. § 134-10.5 (LexisNexis 2006); HAW. REV. STAT. ANN. § 707-714.5 (LexisNexis 2007); MASS. GEN. LAWS ANN. ch. 140, § 131L (West 2002).

Gun control legislation tends to be reactive rather than proactive. This is how many of the child-access prevention laws have come about.[60] However, the idea that a person with limited intellectual functioning can access a firearm seems absurd to most, but nothing works to actually prevent it. No database exists. A gun dealer has no way to determine whether a person has been adjudicated mentally defective. We could not expect a dealer to refuse to sell a gun to a person merely because that person was unable to complete an application form; after all, nothing in the regulations prohibit illiterate persons from gun possession.[61] Gun shows have even less controlled measures for selling firearms.[62]

Of course, given Congress's already reactionary manner, the likelihood of legislation being enacted before a problem is noticed is quite low. This is why the incremental nature of gun policy harms our full picture of the issues.[63]

Although states vary widely, review of specific statutory language can be instructive as to the nature of CAP laws. Below, the laws in California and the District of Columbia are examined.

i. California

In California:

> a person commits the crime of "criminal storage of a firearm of the first degree" if he or she keeps any loaded firearm within any premises that are under his or her custody or control and he or she knows or reasonably should know that a child is likely to gain access to the firearm without the permission of the child's parent or legal guardian and the child obtains access to the firearm and thereby causes death or great bodily injury to himself, herself, or any other person.[64]

This becomes "criminal storage of a firearm of the second degree" if the child causes injury other than serious bodily injury or carries the firearm "either to a public place or in violation of section 417 (drawing a weapon in a rude or threatening manner).[65]

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60 Although most have come about as a means to prevent accidental shootings by children, CAP laws can also be useful in reducing intentional shootings. *See* McClurg et al., *supra* note 55, at 53 ("CAP laws are a reasonable and feasible way to reduce all variety of gun tragedies that result from guns getting into the hands of unauthorized users.").

61 This would also work a great discrimination against those uneducated or undereducated.

62 One of the primary areas of legislative debate involves the gun show loophole.

63 *See, e.g.*, Rostron, *Incrementalism*, *supra* note 19, at 552–53.

64 CAL. PENAL CODE § 12035(b)(1) (West 2009).

65 § 12035(b)(2); CAL. PENAL CODE § 417 (West 2010).

Criminal liability, though, extends only so far. It is not a crime if the child "obtains the firearm as a result of an illegal entry to any premises by any person," or if the firearm was kept locked such that a reasonable person believed it to be secure, the firearm was carried on the person or was locked with a locking device, or if the person has no reason to believe a child would be present on the premises.[66] Further, it is not a violation if the person whose firearm is accessed was performing her duties as a peace officer of the armed forces or National Guard, or if the child obtains the firearm and uses it "in a lawful act of self-defense or defense of another person . . . ."[67]

California extends the liability further if the child removes the gun from the owner's premises. If the child who gains access to the firearm carries it off the premises from where it was obtained, a separate crime occurs leading to up to one year in jail and/or a fine up to $1000.[68] If the child carries the firearm to a school or school activity, that fine increases to up to $5000.[69] Factors that are considered in arrest and punishment include: if the child is injured, if the firearm obtained belonged to the child's parent, and if the person in possession of the firearm had taken a firearms safety training course.[70]

ii. District of Columbia

Having had part of its gun control legislation at the center of *District of Columbia v. Heller*, the District of Columbia revised its laws and enacted the Firearms Registration Amendment Act of 2008.[71] Included in the District's current firearms law is the imposition of criminal liability if a minor gains access to one's firearm.

> No person shall store or keep any firearm on any premises under his control if he knows or reasonably should know that a minor is likely to gain access to the firearm without the permission of the parent or

66 § 12035(c).
67 § 12035(c).
68 § 12035(b).
69 § 12036(c).
70 § 12036(f)–(h).
71 Firearms Registration Amendment Act of 2008, 17-372, 56 D.C. Reg. 1365 (Jan. 28, 2008); *see* Rostron, *Protecting*, *supra* note 32, at 398–99 (discussing the District of Columbia's response to *Heller*). Among the changes, the District of Columbia extended the waiting period, allowed registration of even semi-automatic pistols (previously prohibited), and banned extremely high-powered rifles. *Id.*; *see* D.C. CODE § 7-2502.01 (LexisNexis 2008). In the year after *Heller*, the District first passed emergency legislation (the Firearms Registration Emergency Amendment Act), with the laws becoming permanent by that December. *See Firearm Registration in the District of Columbia*, METROPOLITAN POLICE DEPARTMENT (last visited Sept. 18, 2011), http://mpdc.dc.gov/mpdc/cwp/view,a,1237,q,547431,mpdcNav_GID,1523,mpdcNav,%7C.asp.

> guardian of the minor unless such person: (1) Keeps the firearm in a securely locked box, secured container, or in a location which a reasonable person would believe to be secure; or (2) Carries the firearm on his person or within such close proximity that he can readily retrieve and use it as if he carried it on his person.[72]

Violation of this law results in criminal liability including a fine up to $1000 and/or 180 days in jail.[73] The punishment increases to $5000 and/or five years of imprisonment if injury or death is caused by the minor.[74] However, liability is not found if the minor gains access by "unlawful entry or burglary to any premises by any person."[75]

II. SINGLING OUT THE INTELLECTUALLY DISABLED

One of the hallmarks of legislation advocating for the rights of persons with intellectual disabilities is how they deserve the same rights and the same treatment as persons without intellectual disabilities. Groups advocate for bills of rights in which it is declared, and often codified as law, that persons with intellectual disabilities have all the same rights guaranteed to others under the Constitution.[76] Organizations promote policies assuring such equal treatment. For example, The Arc "promotes and protects the human rights of people with intellectual and developmental disabilities and actively supports their full inclusion and participation in the community throughout their lifetimes,"[77] and the American Association on Intellectual and Developmental Disabilities "promotes progressive policies, sound research, effective practices, and universal human rights for people with intellectual and developmental disabilities."[78] In spite of all of the effort to achieve equality, the law has not treated persons with intellectual disabilities the same as persons without such limitations. Nor should it—at least not when it comes to their protection involving firearms.

First, in the Gun Control Act, persons with intellectual disabilities seem to be a part of a list of identified "special risk groups" whose rights are limited. Second, the Supreme Court

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72 D.C. CODE § 7-2507.02(b). This second section, though, is arguably without bite as this could allow a person to keep a loaded weapon within reach but also not on one's person.

73 § 7-2507.02(c)(1).

74 § 7-2507.02(c)(2).

75 § 7-2507.02(c)(3).

76 *See supra* text accompanying note 17.

77 *Mission & Core Values*, THE ARC (last visited Sept. 20, 2011), http://www.thearc.org/page.aspx?pid=2345.

78 *Mission,* AAIDD (last visited Feb. 21, 2011), http://www.aaidd.org/content_443.cfm?navID=129.

has also, in reversing itself, determined that persons with intellectual disabilities are not as culpable as persons without similar disabilities.

A. Understanding "Mental Defective" Under the Gun Control Act

When the Gun Control Act was passed, debate took place regarding who should be, as a matter of law, prohibited from possessing firearms. In discussing the prohibition that eventually resulted in the adopted language, "adjudicated as a mental defective or has been committed to any mental institution," senators most often used "mentally incompetent"[79] to describe such persons, intermittently using "psychotics,"[80] "psychopaths,"[81] "mentally deficient,"[82] "mentally or emotionally disturbed persons,"[83] and "deranged persons."[84] Despite this wide variety of terms used in the process of passing the Act, no actual definition of "mental defective" appears in the Act.

The Supreme Court had the opportunity to comment on the language of the Gun Control Act in *Huddleston v. United States*.[85] In dicta, the Court considered the aims of the legislation prohibiting possession by specified groups. The goal involved "keeping 'these lethal weapons out of the hands of criminals, drug addicts, mentally disordered persons, juveniles, and other persons whose possession of them is too high a price in danger to us all to allow.'"[86] Thus, if we look too closely at legislative history solely as related to the phrase "adjudicated mentally defective," it could be determined that persons deficient in learning and rationalization are not included. On the other hand, the Court also noted that the goal was to keep firearms from persons where it "would be contrary to public interest."[87] The Court later noted that the Act was intended, in addition to

79 *See* Anthony P. Dunbar, *Torts—Liability of a Gun Dealer for Selling to a "Mental Incompetent,"* 58 TUL. L. REV. 1263, 1276 (1984) (citing congressional remarks in revealing the history of the Gun Control Act's adopted language including 114 CONG. REC. 26,718 (1968) (remarks of Sen. Dodd)); *Id.* at 27,406 (letter submitted by Sen. Ervin); *Id.* at 25,786 (statement submitted by Sen. Mansfield & Sen. Tydings); *Id.* at 26,826, 27,409, 27,416 (remarks of Sen. Tydings); *Id.* at 23,070 (remarks of Rep. Corman).

80 114 CONG. REC. 23,070 (1968) (remarks of Rep. Anderson).

81 *Id.* at 23,072 (remarks of Rep. Horton).

82 *Id.* at 27,404 (remarks of Sen. Percy).

83 *Id.* at 27,420 (remarks of Sen. Cannon).

84 *Id.* (remarks of Sen. Byrd).

85 Huddleston v. United States, 415 U.S. 814, 825 (1974).

86 *Id.* (commenting about who Congress wanted to keep firearms from (quoting 114 CONG. REC. 13,219 (1968) (remarks of Sen. Tidings)).

87 *Huddleston*, 415 U.S. at 824.

affect sales, to "keep firearms away from the persons Congress classified as potentially irresponsible and dangerous."[88]

Circuit Courts have also addressed the language in the Gun Control Act. In defining "adjudicated as mental defective or who has been committed to a mental institution," the Eighth Circuit concluded that "mental defective" differed from mental illness.[89] The court referred to the testimony of the doctor from the case who said he understood "mental defective" to be "synonymous with mental retardation."[90] Further, as the court noted, "[i]n law, a distinction has usually been made between those persons who are mentally defective or deficient on the one hand, and those who are mentally diseased or ill on the other."[91] The conclusion focused on subnormal intelligence as the target of legislation prohibiting those adjudicated as mentally defective from possessing firearms.[92] And although the court pointed to at least one other decision that interpreted "mental defective" differently, the court asserted it was giving the phrase its general meaning.[93] Finally, the court distinguished a person with intellectual disabilities from a person with mental illness by stating: "A mental defective, therefore, as has often been said, is a person who has never possessed a normal degree of intellectual capacity, whereas in an insane person faculties which were originally normal have been impaired by mental disease."[94]

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88 Barrett v. United States, 423 U.S. 212, 212, 218 (1976) (addressing the conviction of a person who possessed a firearm in violation on the Gun Control Act due to his status as a convicted felon and concluding that the Act applied to the behavior in question, the intrastate receipt of a firearm that had previously been transported in interstate commerce).

89 United States v. Hansel, 474 F.2d 1120, 1123 (8th Cir. 1973). In *Hansel*, the defendant had been admitted to a hospital "for a brief period of observation." *Id.* at 1122. Because this hospitalization was not in accord with civil commitment statutes in Nebraska, the State conceded that the defendant had not been "committed." *Id.* Thus, the case turned on whether it could be held that the defendant had been "adjudicated" mentally defective. The Mental Health Board found that the defendant was mentally ill. *Id.* at 1123. However, even if that could be an "adjudication," the Eighth Circuit held it was not the same as being adjudicated as mental defective. *Id.*

90 *Id.*

91 *Id.* at 1124.

92 *Id.* at 1124–25.

93 *Id.* at 1125.

94 *Id.* at 1124. The court concluded that Congress had not intended to prohibit possession from all persons who had any history of mental illness. *Id.* at 1125. This is in stark contrast to what is often understood about the Gun Control Act. The Eighth Circuit thus concluded that, for a person with a mental illness to be prohibited from possessing a firearm, that person must have been committed to a mental institution. *Accord* United States v. Giardina, 861 F.2d 1334, 1337 (5th Cir. 1988) (following *Hansel*); *cf.* United States v. Vertz, 40 F. App'x 69, 74 (6th Cir. 2002) (refusing to rely on Michigan commitment requirements in determining whether the defendant had been "committed" such as would preclude legal firearm possession: "[t]o give preclusive effect to each state's individual definition of terms in the firearms statute would be to frustrate one of the main purposes of the law, which is to provide for national uniformity in the application of

Disagreeing with the Eighth Circuit's interpretation of "mental defective," one district court specifically concluded that the definition provided by Federal Firearms Regulations showed that the Eighth Circuit's interpretation was incorrect:

> Adjudicated as a mental defective.
>
> (a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:
>
> (1) Is a danger to himself or to others; or
> (2) Lacks the mental capacity to contract or manage his own affairs.[95]

The use of "as a result of marked subnormal intelligence" is instructive, but not determinative; how far below normal is unspecified.[96] Regardless, the Code of Federal Regulations seems to clarify that the term addresses both intellectual disabilities (subnormal intelligence) and mental illness.

On the other hand, in interpreting the same phrase, but as used in another statute, the Second Circuit excluded those with subnormal intelligence as being covered by the language: "The term 'mentally defective,' as used in the statute, is a concept embracing more than intellectual capacity or the lack thereof. The statute in subsection (a) specifically provides for the exclusion of those lacking in intellectual capacity."[97]

Although one may argue that the specific reference to persons with subnormal intelligence in one section of the statute and the addition of those with a mental defect in a subsequent section indicates that the two mean different things, the Gun

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firearms restrictions"). The Sixth Circuit further distinguished the term "mental defect" as a condition *requiring* formal adjudication, whereas commitment to a mental institution, by contrast due to the language used in the statute, did not require a court's involvement. *Id.* at 75.

95 United States v. Vertz, 102 F. Supp. 2d 787, 788 (W.D. Mich. 2000) (quoting 27 C.F.R. § 178.11 (2010) (current version at 27 C.F.R. § 478.11 (2010)).

96 For a person to receive a diagnosis of intellectual disability, there must be a "significant limitation" in intellectual functioning. *Definition of Intellectual Disability*, AAIDD (last visited Sept. 20, 2011), http://www.aaidd.org/content_100.cfm ("Intellectual disability is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior, which covers many everyday social and practical skills. This disability originates before the age of 18."). Although not required, an IQ test may be used, and that score must typically measure below seventy—more than two standard deviations below the median—for such a diagnosis. *See, e.g.*, *id.* This provides some sort of objective data regarding how far below normal qualifies as an intellectual disability and means that only people who fall *statistically* and *significantly* below the "normal" scale, and not merely those with below average intelligence, are considered disabled.

97 United States v. Flores-Rodriguez, 237 F.2d 405, 409–11 (2d Cir. 1956) (interpreting a statute prohibiting the immigration of "idiots, imbeciles, feebleminded persons [and those certified as mentally defective]").

Control Act did not list both. This is unclear, but it would appear the Eight Circuit's interpretation—at least that "mental defect" does cover those with subnormal intelligence—is correct.

B. Reducing Criminal Culpability: From *Penry* to *Atkins*

i. *Penry v. Lynaugh*: Crafting a National Consensus

In 2002, responding to dissenters in precedent and to the changing national consensus regarding death penalty issues, the Supreme Court held that executions of persons with developmental disabilities constitute "cruel and unusual punishment" in violation of the Eighth Amendment.[98] In so doing, the Court reversed its 1989 precedent from *Penry v. Lynaugh*, which had been based in great part on the Court's analysis of the history of the Eighth Amendment, the then-present death penalty national consensus (or lack thereof), and historical common law treatment of "lunatics" and "idiots."[99] Understanding the Court's treatment of this history sheds great light on the wording—and almost certain interpretation of that wording—of the Gun Control Act of 1968.[100]

Johnny Paul Penry was convicted of the 1979 rape and murder of Pamela Carpenter, a crime committed when Penry was twenty-two.[101] Penry had been diagnosed as a child with organic brain syndrome, his IQ having been measured between 50 and 63—a number falling in the mild range for developmental disabilities.[102] His mental ability was limited, compared to that of a six and one-half year-old child.[103] After his conviction and

98 *See* Atkins v. Virginia, 536 U.S. 304, 304, 321 (2002).

99 *See* Penry v. Lynaugh, 492 U.S. 302, 331–40 (1989). The conviction, however, was reversed on other grounds, granting Penry a new trial. *Id.* Penry was again convicted in the subsequent trial, and the Supreme Court again reversed the verdict. Penry v. Johnson, 532 U.S. 782, 804 (2001). The second reversal resulted in a third trial for sentencing issues, in which Penry was once again sentenced to death. Penry v. State, 178 S.W.3d 782, 784 (Tex. Crim. App. 2005). The Texas Court of Criminal Appeals reversed that sentence and ordered a new punishment trial. *Penry*, 178 S.W.3d at 789. Penry's sentencing issues ended, however, with a plea deal in 2008 in which he agreed to three life sentences, with no parole, and in which he was required to stipulate that he was not mentally retarded. Mike Tolson, *Deal Keeps Penry Imprisoned for Life*, HOUSTON CHRONICLE, Feb. 16, 2008, at B1, *available at* http://www.chron.com/disp/story.mpl/front/5546646.html. Guilt was never a factor as Penry had signed a confession. *Id*. at B1. The Supreme Court's decisions left untouched, though, the issue of the risk of false confessions by persons with developmental disabilities. *See, e.g.*, Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 143–45 (2010).

100 *See supra* Part I (discussion of "mental defect" in the Gun Control Act).

101 *Penry*, 492 U.S. at 307–10.

102 *Id.* at 307–08.

103 *Id.* at 308. Disturbingly, after Penry's death sentence was reversed a third time, prosecutors accepted three life sentences for him in lieu of seeking the death penalty a fourth time. Tolson, *supra* note 99, at B1. The State had likely spent millions of dollars on Penry's appeals. *See* Adam M. Gershowitz, *Statewide Capital Punishment: The Case*

sentence to death, Penry's appeal was eventually heard by the Supreme Court, where he argued that executing a person with the reasoning capacity of a seven-year-old, a person with developmental disabilities, would be cruel and unusual punishment in violation of the Eighth Amendment.[104]

In holding against Penry, the Court first considered the Eighth Amendment. The Court noted that punishment considered cruel and unusual at the time of the Eighth Amendment's drafting would also be prohibited in modern times.[105] The Court recognized, however, that "evolving standards of decency" must also be considered in determining if newer punishments might too be prohibited.[106]

Turning first, then, to eighteenth century common law, the Court accepted that "idiots" and "lunatics" were not subject to punishment.[107] Idiocy, "understood as 'a defect of understanding from the moment of birth,'" was distinguished from lunacy, "a partial derangement of the intellectual faculties, the senses returning at uncertain intervals."[108] But the Court also indicated the general common law understanding for an "idiot" was one who had "a total lack of reason or understanding."[109] And from this, the Court, focusing on the "permanent, congenital mental deficiency," found a similarity for previous treatment of "idiocy" and the modern definition of developmental disabilities.[110] But the Court then narrowed the application of the prohibition on punishing idiots to those persons who lacked the "capacity to form criminal intent or to understand the difference between good and evil," drawing comparisons to the modern understanding of one diagnosed as having severe or profound mental retardation.[111] The Court, however, sidestepped

for Eliminating Counties' Role in the Death Penalty, 63 VAND. L. REV. 307, 310 n.14 (2010). As part of Penry's deal, though, the State required Penry to state he did not have intellectual disabilities. Tolson, *supra* note 99, at B1. And although it would appear the prosecutors never believed Penry when he, his doctors, and his lawyers said he had intellectual disabilities—a claim supported by medical evidence, IQ tests, and by anecdotal evidence such as Penry's taking a year of daily instruction, as an adult, to learn to write his name. Brief of Petitioner at 6, Penry v. Lynaugh, 492 U.S. 302 (1989) (No. 87-6177). They and others took Penry's word when he said he was not mentally retarded—a statement made in a deal to avoid yet another death sentence. Tolson, *supra* note 99, at B1 (quoting the victim's niece: "[Penry] admitted he is not retarded. Now we know that he was lying. He's committed the biggest fraud ever on the criminal justice system").

104 *Penry*, 492 U.S. at 328.

105 *Id.* at 330.

106 *Id.* at 330–31 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

107 *Id.* at 331.

108 *Id.* (quoting W. HAWKINS, PLEAS OF THE CROWN 1–2 n.2 (7th ed. 1795).

109 *Id.* at 331–32.

110 *Id.* at 332.

111 *Id.* at 333. The person with a diagnosis of severe mental retardation has an IQ measured between 20–25 and 35–40. *Id.* at 308 n.1 (citing AM. ASS'N ON MENTAL

addressing whether punishing such persons would today be violative of the Eighth Amendment, relying instead on an assumption that such persons would find protections under an insanity defense.[112]

Addressing the case before it, the Court rationalized that because Penry had been found competent to stand trial, and because the jury rejected his insanity defense, Penry was deemed to have known that what he had done was wrong and thus could have conformed his conduct to the legal requirements.[113] In doing so, the Court essentially ignored the fact that Penry's IQ was measured under sixty-three, that he never finished the first grade, and that he had "the ability to learn and the learning or the knowledge of the average six and one-half year-old kid."[114]

In urging the Court to so hold, the State noted that intellectual disabilities fell under the phrase "mental defect" as used in insanity defenses.[115] Because insanity defenses relied on functional and not clinical components, the State argued, so too should the application of the death penalty.[116]

In spite of having noted that at common law at the time of the drafting of the Eighth Amendment it would have been considered cruel and unusual to punish a "lunatic" or "idiot," the Court pushed aside that analysis in favor of maintaining the not-prohibited (as opposed to actually accepted and implemented) practice among states, that is, that other states had not outright prohibited the practice of executing persons with intellectual disabilities.[117] The Court used this to conclude there was not a

DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 1, 13 (H. Grossman ed., 1983)). One with a diagnosis of profound mental retardation has an IQ measured below 20 or 25. *Id*.

112 *Id.*

113 *Id.* But incompetence and intellectual disabilities are not the same. In addressing the differences regarding the application of the death penalty and criminal trials, one legal scholar said, "[y]ou can't stand trial if you are unable to understand the death penalty but there is a vast chasm between incompetence and mental retardation. . . . If you are mentally retarded you are not protected." Maria F. Durand, *Texas Executes Two Inmates*, ABCNEWS.COM (Aug. 10, 2000), http://abcnews.go.com/US/story?id=96212&page=1 (quoting University of Texas at Austin law professor Jordan Steiker).

114 *Penry*, 492 U.S. at 307–08 (quoting Dr. Jerome Brown, a clinical psychologist who testified at Penry's competency hearing).

115 Respondent's Brief at 47, Penry v. Lynaugh, 492 U.S. 302 (1989) (No. 87-6177). In the same brief, though, the State analogized intellectual disabilities to "mental disorder," showing further confusion of the two terms. *Id.* at 48. As later pointed out by Penry, though, the two are not the same. Reply Brief of Petitioner at 7, Penry v. Lynaugh, 492 U.S. 302 (1989) (No. 87-6177) ("There are reasonably precise tests that measure the degree of retardation and in addition mental retardation will be apparent from an early age or else can be traced to an accident that damaged the brain.").

116 Respondent's Brief, *supra* note 115, at 47.

117 *Penry*, 492 U.S. at 330–31.

national consensus against the practice.[118] The Court did not, however, indicate that the practice was actually used—that any states regularly pursued the death penalty when faced with a capital crime committed by a person with an intellectual disability.

The Court heavily relied on a national consensus when it addressed such support for its decision in *Ford v. Wainwright*, in which it held that executing the insane violated the Eighth Amendment.[119] The Court in *Penry* clearly accepted that the prohibition against punishing the mentally insane was established at common law, therefore, it seems redundant to have had to rely on a national consensus in agreeing with that practice, but it did. Even with the historical analysis against executing the insane, the *Penry* Court justified its holding in *Wainwright* based on a national consensus.[120] And in considering execution of persons with intellectual disabilities, the Court recognized that only the federal government and two states had enacted legislation prohibiting the execution of persons with intellectual disabilities.[121] The Court then concluded that the two states prohibiting these executions, even when considered with the fourteen states that rejected *any* application of the death penalty, did not support the finding of a national consensus.[122]

Finally, the Court also analyzed whether punishing a particular class of offenders, here, persons with intellectual disabilities, contributed to the goals of punishment, namely, retribution and deterrence, when considering the death

118 *Id.* at 331–34.

119 Ford v. Wainwright, 477 U.S. 399, 408 (1986). The Court used the term "insane" in deciding *Ford*, yet the case makes clear that the issue was mental illness as Ford had a condition similar to paranoid schizophrenia. *Id*. at 402–03.

120 *Penry*, 492 U.S. at 334 (citing *Wainwright*, 477 U.S. at 408, which held that execution of the insane violated the Eighth Amendment). The Court also relied on a national consensus in *Thompson v. Oklahoma*, in which it considered a minimum age for consideration of the death penalty. Thompson v. Oklahoma, 487 U.S. 815, 826–29 (1988).

121 *Penry*, 492 U.S. at 334 (These two states were Georgia and Maryland). Chief Justice Rehnquist, however, dissenting in *Atkins*, pointed out that some studies have estimated that as many as ten percent of death row inmates have an intellectual disability. Atkins v. Virginia, 536 U.S. 304, 325, n.* (2002) (Rehnquist, J., dissenting) (citing R. Bonner & S. Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift*, N.Y. TIMES, Aug. 7, 2000, at A1, *available at* http://www.nytimes.com/2000/08/07/us/executing-the-mentally-retarded-even-as-laws-begin-to-shift.html). However, also pointed out was the fact that "[m]ost people charged with capital murder are poor, and so are represented by appointed lawyers. Many of these lawyers are inexperienced, even incompetent, and often fail during the mitigation phase of the trial to present the evidence of mental retardation that could persuade the jury to spare their client's life." *Id.* Further, the problem is exacerbated by defendants who are ashamed to admit to being disabled. Bonner & Rimer, *supra* note 121, at A1.

122 *Penry*, 492 U.S. at 335.

penalty.[123] For retribution to be meaningful, the sentence needs to be related to the culpability of the offender.[124] The Court considered Penry's argument that because his reasoning capacity was like that of a seven-year-old (due to his intellectual disability), executing him would be cruel and unusual in the same way the Court had held that executing a juvenile was cruel and unusual.[125] Supporting Penry's arguments, the AAIDD[126] argued as *amici* that executing persons with intellectual disabilities would not serve the retributive purposes of punishment; their moral culpability was not the same as others'.[127]

Again, the Court focused narrowly only on those with the most severe disabilities, agreeing their moral culpability was less.[128] Additionally, the Court highlighted language in some states' statutes: "mental defect."[129] The Court noted that the states that explicitly used that term did so as part of identified mitigating circumstances that could be used by a fact-finder in deciding whether the defendant's capacity to "appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."[130] But the Court maintained that the issue of intellectual disabilities should be only that: mitigating evidence.[131] The Court refused to hold that all persons with intellectual disabilities should be similarly treated.[132]

With the vast range of persons who are classified as having an intellectual disability, the Court seemed uncomfortable with a blanket prohibition on executing people based on which side of seventy their IQ fell.[133] Even on looking at "mental age," with an argument by Penry that his was effectively seven years or younger, the Court declined to rely on that due to several noted

123 *Id.* at 335–36. Unless the punishment of imposing death contributes to one of the two identified purposes of the death penalty, retribution and deterrence, then that punishment is "nothing more than the purposeless and needless imposition of pain and suffering"—an unconstitutional punishment. Enmund v. Florida, 458 U.S. 782, 798 (1982).

124 *Penry*, 492 U.S. at 336.

125 *Id.* (citing Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (plurality opinion)).

126 The American Association on Mental Retardation (AAMR) changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD) in 2007. *FAQ on Intellectual Disability*, *supra* note 9.

127 *Penry*, 492 U.S. at 336–37.

128 *Id.* at 337.

129 *Id.*

130 *Id.* (citing several state statutes including Alabama, New Hampshire, and Wyoming).

131 *Id.* at 337–38.

132 *Id.* at 338–39.

133 *Id.*

problems.[134] Using the AAIDD amicus brief as support, the Court pointed out that the "equivalence between nonretarded children and retarded adults is, of course, imprecise."[135] The Court appeared concerned that limiting executions strictly based on the classification of having an intellectual disability could be extended to limit such persons' other rights, such as the right to marry and the right to contract.[136] The Court concluded that because of those considerations, reiterating the lack of a national consensus, it would not hold that executing persons with intellectual disabilities was, per se, a violation of the Eighth Amendment.[137]

The Court punted on the issue of national consensus. There was no consensus favoring the execution of persons with intellectual disabilities, there was merely not one with specific prohibitions. Even if a disproportionate number of persons sentenced to death have an intellectual disability, this is no indication that the issue was presented in each case.[138] But the Court proceeded to craft one due to this lack of widespread prohibitions. It seemed, though, that the real issue was the Court's desire to avoid a bright line: the persons that would be protected under such a prohibition. In this case, a hard decision led to a bad decision. At least it was not in place for long.

ii. *Atkins v. Virginia*: Evolving Standards in the Wake of *Penry*

Thirteen years after *Penry*, the Court changed direction. In 2002, revisiting the issue of executing persons with intellectual disabilities, the Court concluded that applying the death penalty to such persons was excessive and in violation of the Constitution, citing "evolving standards of decency" as reflected by the debate and review engaged in by the American public, legislators, scholars, and judges since *Penry*.[139]

A jury convicted Daryl Renard Atkins for a 1996 armed robbery and capital murder of Eric Nesbitt.[140] Atkins and

134 *Id.* at 339.

135 *Id.* (quoting Brief of AAMR et al. as *Amici Curiae* in Support of Petitioner at 14 n.6, Penry v. Lynaugh, 492 U.S. 302 (1989) (No. 87-6177)).

136 *Id.* at 340. Of course, the Court seemed to review most of this information through a frame of considering exculpating criminal responsibility—something Penry never requested.

137 *Id.*

138 *See supra* text accompanying note 121. A deeper analysis of this issue would be instructive, especially one that categorized the manner in which the crimes had been committed.

139 Atkins v. Virginia, 536 U.S. 304, 307, 321 (2002).

140 *Id.* at 307.

William Jones, armed with a semiautomatic handgun, abducted Nesbitt, drove him to an automatic teller machine, and took him to an isolated location.[141] Nesbitt was shot eight times.[142] Confronted with a video recording of Atkins and Jones at the ATM with Nesbitt, both testified.[143] Their stories differed, however, regarding who did the shooting.[144] Jones' story, though, was more coherent and credible, and the State allowed Jones to plead guilty to first-degree murder and to become ineligible for the death penalty.[145] Jones' testimony appeared to be crucial in the jury's determination of the guilt of Atkins and its sentence of death.[146]

In determining the sentence, the jury heard conflicting testimony regarding Atkins' mental capacity. Originally, a forensic psychologist testified that Atkins was mildly mentally retarded based on interviews with persons who knew Atkins, reviews of school and court records, and the administration of an intelligence test in which Atkins' IQ was measured at 59.[147] During a second sentencing phase,[148] the same forensic psychologist testified similarly, but the State this time presented a rebuttal witness who said that Atkins was of "average intelligence, at least" and suffered from antisocial personality disorder.[149] The State's witness concluded that Atkins' "by and large terrible" academic performance was due to Atkins' choices.[150]

Facing the death penalty, Atkins appealed and argued that he could not be sentenced to death because of his intellectual disability.[151] The Virginia Supreme Court disagreed, but two justices dissented and stated that the State's witness's "opinion

141 *Id.*

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.* at 307 n.1.

146 *Id.* Additionally, Jones refused to provide an initial statement on arrest. Atkins, however, failed to refuse; the inconsistencies between his initial and subsequent statements further hurt his credibility. *Id.* at 307 n.2. As one defense attorney has stated, "[t]he smart guy who doesn't confess, who knows better than to give evidence against himself, gets the deal. . . . But the guy who is retarded, who doesn't understand all the words of his Miranda warning, he gets death." Bonner & Rimer, *supra* note 121, at A1 (quoting Jeffrey Pokorak, defense counsel for Oliver Cruz, sentenced to death and executed in Texas in spite of an IQ of 64 or 76). *See generally* Eugene R. Milhizer, *Confessions after* Connelly*: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 TEMP. L. REV. 1 (2008).

147 *Atkins*, 536 U.S. at 308–09.

148 The Supreme Court of Virginia reversed the first sentence of death due to a misleading verdict form. *Id.* at 309.

149 *Id.*

150 *Id.* at 310 n.6.

151 *Id.* at 310.

that Atkins possesses average intelligence [was] 'incredulous as a matter of law,' and concluded that 'the imposition of the sentence of death upon a criminal defendant who has the mental age of a child between the ages of 9 and 12 [was] excessive.'"[152] The United States Supreme Court agreed to revisit the issue.[153]

Since the Court's decision in *Penry*, legislatures across the country had been spurred to take action. Recognizing this, the Court highlighted seventeen states that had enacted legislation exempting persons with intellectual disabilities from application of the death penalty.[154] It was not simply about how many states had done so, though. The Court pointed out that more notable was the move toward laws that protected persons who were guilty of violent crime, something that was by no means popular.[155] Further, no states had moved to *allow* such executions.[156] The Court concluded that this was evidence that society did not see criminals with intellectual disabilities as having the same level of culpability as possessed by other criminals.[157] Thus, a national consensus had developed.[158]

The matter that made this issue difficult though, still existed.[159] The Court had to decide to whom the prohibition would apply. Unable to hide behind a contrived lack of national consensus, the Court had to take a stand. And making the situation even more challenging, the parties in *Atkins* actually disagreed whether Atkins had intellectual disabilities.[160] The Court dipped back into its purpose of punishment reasoning for assistance.

The Court highlighted some definitional requirements to determine whether a person has intellectual disabilities,

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152 *Id.* (quoting Atkins v. Commonwealth, 534 S.E.2d 312, 323–24 (Va. 2000) (Hassell, J., dissenting)).

153 *Id.*

154 *Id.* at 314–15.

155 *Id.* at 315.

156 *Id.* at 315–16.

157 *Id.* at 316.

158 *Id.* Or more likely, a national consensus had been made known. After all, even the Court acknowledged that the change across the country was likely prompted by the Court's ruling in *Penry*. In other words, the states that enacted the prohibitive legislation likely already adhered to the practice of not executing persons with intellectual disabilities, but after *Penry* those states recognized the need to enact formal legislation. The Court further pointed to other evidence of a consensus, highlighting positions taken by religious communities and the AAIDD opposing the use of the death penalty for offenders with intellectual disabilities. *Id.* at 316 n.21. However, this was not *new*; it just had not been affirmatively stated by all such organizations before.

159 *See id.* at 340 (Scalia, J., dissenting) (discussing the easily discernable cases of those who are severely or profoundly mentally retarded and contrasting them to cases involving mild cases).

160 *Id.* at 317.

including "subaverage intellectual functioning" and "significant limitations in adaptive skills."[161] However, persons in this population also likely possess deficiencies in communication, learning, reasoning, and impulse control.[162] These deficiencies, while not enough to eliminate responsibility for criminal acts, do reduce the personal culpability involved.[163] With a reduced culpability, the retributive purposes of the death penalty are not served.[164]

Further, deterrent purposes are not served because persons with intellectual disabilities, being less likely to control impulses and to learn from experience, are less likely to think through the potential consequences and less likely to premeditate an action—the very sort of thing targeted with deterrent-objective punishments.[165] For deterrence to have an effect as a reason for punishment, the person being deterred must be able to appreciate the weight of the decision to commit the crime and be able to choose to proceed or not with the conduct based on the risk of the punishment.

The Court's decision was not unanimous. Both Justice Rehnquist and Justice Scalia, joined by each other and Justice Thomas, wrote separately. Both dissenting opinions primarily focused on a complaint that the majority's holding that executing persons is unconstitutional as a violation of the Eighth Amendment was based too much on a determination that eighteen additional states represented a "national consensus" and on review of foreign law and the views of professional or religious organizations.[166] Justice Rehnquist asserted that setting a national standard based on such was an improper application of federalism.[167] Instead, he argued, to analyze whether punishment violates the Eighth Amendment, the best evidence of contemporary values is current legislation.[168] Legislatures respond to the will of the people, not courts,[169] and punishment is about legislative policy.[170]

In spite of the dissent's strong language, the law changed. Even though individual states had used intellectual disabilities

161 *Id.* at 318.
162 *Id.*
163 *Id.*
164 *Id.* at 319 (recognizing the death penalty should apply to "a narrow category of the most serious crimes").
165 *Id.* at 320.
166 *Id.* at 322, 342.
167 *Id.* at 322.
168 *Id.* at 322–23.
169 *Id.* at 323.
170 *Id.*

as a factor to consider in assessing punishment, the Court determined that the risk of false confessions, the reduced ability to show mitigating factors, and a reduced capacity to assist counsel all supported a conclusion that executing persons with intellectual disabilities would violate the Eighth Amendment to the Constitution. What the Court could not address, as it had nothing to do with the issues presented, was how Atkins had access to a firearm at all. Without that firearm, Eric Nesbitt could not have been shot eight times.

III. FALLING BETWEEN THE CRACKS

The Gun Control Act of 1968 prohibits transfer of a firearm to, or possession of a firearm by, minors and felons and persons with mental illness or who have been adjudicated mentally defective.[171] In the recent Supreme Court cases that have—finally—addressed the Second Amendment, not only did no one question this area (it was not before the Court), but Justice Scalia, writing for the majority in *Heller,* noted that some of these prohibitions are almost presumed to be Constitutional:

> Like most rights, the right secured by the Second Amendment is not unlimited. . . . Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[172]

Thus, the limitation in the Gun Control Act prohibiting transfer of firearms to persons with mental illness appears to be an acceptable limitation to the recognized Second Amendment right to possess a handgun in one's home for self-defense purposes.[173] Justice Scalia does not, however, offer any explanation for this conclusion, only that the regulation is presumptively lawful.[174]

Of course, as is common, the group referenced in *Heller* was persons with mental illness—not those with intellectual disabilities.[175] This serves as another example of how those with intellectual disabilities are seemingly included in the Gun Control Act yet are also ignored as part of the groups who are

171 18 U.S.C. § 922(d) (2006).

172 District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008). *See generally* cases cited *supra* note 3.

173 *Heller*, 554 U.S. at 626–27.

174 *See id.*; *see also* Rostron, *Protecting*, *supra* note 32, at 387.

175 *Heller*, 554 U.S. at 626; *see* 18 U.S.C. § 922.

prohibited from possessing guns. But because "adjudicated as a mental defective or has been committed to any mental institution" is stated together, as a phrase, in the Act, it would appear the treatment of one identified special risk group (those with mental illness) applies to the other (those with intellectual disabilities). The problem, though, is that this is unclear. Not only is this lack of clarity a problem for dealers, who must determine to whom they may sell firearms, but it is also a problem for society.

Not discussed specifically by Justice Scalia in the *Heller* opinion, though, was the prohibition pertaining to minors. In spite of legislation specifying age restrictions regarding firearms existing in every state, many states knew that such a limitation was not enough and that a gap existed between the goal of preventing minors from possessing firearms—and harming someone—and actual enforcement.[176] After all, the Act covers only the transfer from a firearms dealer. Nothing prevented the private transfer. Thus, many states enacted child-access prevention laws.[177] The same gap exists, though, for persons with intellectual disabilities. The gun used by Daryl Renard Atkins to shoot Eric Nesbitt came from somewhere. Therefore, legislation similar to CAP laws should be in place that would

176 *See, e.g.*, ALASKA STAT. § 11.61.210 (2010); ARIZ. REV. STAT. ANN. § 13-311 (2000); TEX. PENAL CODE ANN. § 46.06(2) (West 2011). This and many other restrictions involved in state gun policy remain prime for challenges after *Heller* and *McDonald*. *See, e.g.*, Derek P. Langhauser, *Gun Regulation on Campus: Understanding* Heller *and Preparing for Subsequent Litigation and Legislation*, 36 J.C. & U.L. 63, 66 (2009); Brannon P. Denning & Glenn H. Reynolds, Heller*, High Water(mark?) Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245, 1245 (2009). Although neither *Heller* nor *McDonald* clarified how future challenges regarding the Second Amendment rights should be reviewed, courts have begun to establish a standard of review. The United States Court of Appeals for the D.C. Circuit applied intermediate scrutiny in its opinion in which it upheld the constitutionality of a ban against assault weapons and high-capacity magazines. Heller v. District of Columbia, No. 10-7036, 2011 WL 4551558, at *10, *13–15 (D.C. Cir. Oct. 4, 2011). The United States Court of Appeals for the Seventh Circuit adopted a standard of review similar to that used in First Amendment challenges:

> First, a severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end. Second, laws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified. How much more easily depends on the relative severity of the burden and its proximity to the core of the right.

Ezell v. City of Chicago, No. 10-3525, 2011 U.S. App. LEXIS 14108, at *59 (7th Cir. July 6, 2011) (case to be published at 651 F.3d 684). The court determined that requiring training to be eligible to possess firearms is improper when the city also banned such training facilities from within the city limits. *Id.* at *61–62.

177 *See supra* text accompanying note 55.

criminalize allowing a person with intellectual disabilities access to one's personally owned firearm.

A. Clarifying the Gun Control Act

The first step in addressing the cracks between *Heller* and *Atkins* is to clarify the language in the Gun Control Act.[178] The Act prohibits possession of firearms by persons adjudicated as a mental defect.[179] This, though, does not solve the concern that the wrong persons may possess guns.

First, at issue is the need for an adjudication. Nothing requires persons with an intellectual disability to be assigned guardianship. Many people who live with intellectual disabilities but who have no family involved in their lives are simply wards of the state; this does not mean, though, that anyone has become guardian of their person or estate.

As personal experience, the author spent over seven years working with persons with intellectual disabilities. Although some of her clients had legal guardians, not all did—not even those with severe and profound diagnoses. This confuses the public, who seem to believe that if someone has an intellectual disability, the person will have been assigned a guardian by the court, but that required a person to petition the court and to be willing to be that guardian.

For example, a dentist, upon determining that a client needed sedation to receive a dental cleaning, requested an informed consent be signed by the client's guardian, as the client had an IQ measured probably between 40 and 55. When told that the client did not have a guardian, the dentist, surely attempting to be diligent, requested paperwork as proof. Trying hard not to be too glib, but wanting to make the point, the author asked the dentist if he carried paperwork to prove he was his own guardian. He did not, of course.[180]

178 The recommendations here are aimed at federal legislation. States too, though, would benefit from amending their legislation to adequately address similar gaps.

179 18 U.S.C. § 922(g).

180 As based on the author's personal experience working for a decade with persons with mental illness and intellectual disabilities, when a person lives in an in-patient treatment setting, typically a group such as a Human Rights Commission is established to review all issues related to treatment and care when those issues could infringe on human rights, such as the decision to subject the patient or resident to medical procedures, prescribed psychotropic medications, and behavioral modification programs. *See, e.g.*, 40 TEX. ADMIN. CODE § 5.406(d) (requiring approval of HRC for implementation of behavioral modification programs); Division of Developmental Disabilities, *Human Rights Committee*, DSHS 3 (May 1, 2009), http://www.dshs.wa.gov/pdf/adsa/ddd/policies/policy5.10.pdf (describing the role of the HRC).

But the Gun Control Act prohibits possession by persons only if they have been *adjudicated* mental defect.[181] The Federal Firearms Regulations clarify that such adjudication can be by "a court, board, commission, or other lawful authority," but that determination must also include a finding that the person is either a danger or unable to contract and manage her own affairs.[182] With managing one's finances as the ultimate measure of independence, that is one area advocates for persons with intellectual disabilities want to remove only when absolutely necessary. However, that is not to say the capacity for actually doing so, without assistance, exists.

When a person enters into a contract, that person can void the agreement if proven that at the time of the contract, the person did not have the capacity required.[183] In other words, the burden is on the party without diminished capacity to assure that the one with whom she is contracting actually has the capacity to do so. The law should be similar for dealers of firearms.

Granted, there is no capacity identification system, and there should not be. But if dealers were required to ensure a person had the capacity, then we could reduce any risk that a person with a *statistically significant* limitation in intelligence could not purchase a firearm.

Alas, implementing some database that lists persons with intellectual disabilities is not ideal. Groups who advocate for the rights of the intellectually disabled would certainly object to such information for fear of discrimination regarding housing, rights to marry, etc. And such fears surely are not unfounded. Thus, one way to address issues of persons with intellectual disabilities having access to firearms is to target the privately-owned arms. This, it is presumed, is a more common way firearms are obtained.

B. Access Prevention Laws

In his dissent in *Atkins*, Justice Scalia disagreed that a person with intellectual disabilities should not be subject to the death penalty.[184] He believed culpability should be analyzed by each jury individually.[185] However, he also agreed that in his

181 18 U.S.C. § 922(d)(4).

182 27 C.F.R. § 478.11.2 (2011).

183 *See* Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 10 (1984).

184 Atkins v. Virginia, 536 U.S. 304, 350 (2002) (Scalia, J., dissenting).

185 *See id.* at 350–51.

experience, those with intellectual disabilities are childlike and more likely to behave innocently than brutally.[186] But the key quality that the majority of the Court focused on was the reduced culpability. It was not about any conclusion that most people with intellectual disabilities would not be likely to behave brutally; the issue was that the ones who did should not be viewed as culpable. Similarly, it is not that we think all children will commit violent acts, it is just that the ones who do are not as culpable as adults who do.[187]

If we look at the decision to draw lines based on age, we can see why lines need to be drawn based on intelligence, especially when we are dealing with intelligence that is measured *statistically* and *significantly* below the average. Applying this to gun control is not about reducing one's criminal liability as the Court did in *Atkins*. Instead, this is about protecting society. But with the holes in the national system of information and because we do not, and likely cannot,[188] have a complete list of all persons who have intellectual disabilities, we need a back-up method for this protection.

A risk exists, though, in comparing a person with intellectual disabilities to a person who is a minor. Groups that advocate for persons with intellectual disabilities are quick to dissuade making such comparisons, and it certainly is devaluing to an adult to say she has child-like qualities, more so to say the person *is* child-like. This issue, though, focuses on the reasoning capability of persons. Those with a significantly reduced capacity to reason and foresee a consequence of behavior should not have firearms.

The Court has recognized and acknowledged that maturity and age is a factor that should be considered in assessing punishment. "[A] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and

186 *Id.*

187 Roper v. Simmons, 543 U.S. 551, 551 (2005) (holding that the execution of persons who committed a crime under the age of eighteen is a violation of the Eighth Amendment's prohibition against cruel and unusual punishment). The Court compared *Roper* to *Atkins*, noting that one of the primary factors it relied on in *Atkins*—the increase in the number of states that had adopted prohibitions against executing those with intellectual disabilities—did not exist in a similar fashion for deciding the issue of whether persons who were juveniles at the time of the crime should be executed, noting sixteen states had made the change in *Atkins* but only five in *Roper*. *Id.* at 565. However, the Court pointed out the significant point was the direction of the change. *Id.* at 565–66.

188 The author is incredibly uncomfortable with the thought of a national database of all persons who have intellectual disabilities. This could be used to remove additional rights or to increase discrimination, neither of which are acceptable consequences. Thus, the access prevention law may be the better method for protecting society and persons with intellectual disabilities.

are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." "[Youth] is a time . . . when a person may be most susceptible to influence . . . . [M]inors . . . generally are less mature and responsible than adults."[189] Furthermore, adolescents are not as able to control their conduct as adults, nor are they able to think in long-range terms.[190] It is the capacity to rationalize, to understand consequences, and to be influenced that makes us treat juveniles differently than adults. It is this same reason we accept, without challenge, other limits on juveniles such as gun possession and driving.

And it is those reasons that we must consider the stronger protection for society and persons with disabilities by making access prevention laws apply not only to children, but also to persons with intellectual disabilities. The Court has stated that "[m]ental retardation . . . diminishes personal culpability even if the offender can distinguish right from wrong."[191] When it comes to criminal culpability, we look at the person's ability to make decisions and judge actions. We should do the same for gun possession.

The Gun Control Act prohibits dealers from selling firearms to underage persons—no rifles or shotguns to anyone under age eighteen, and no other type of firearm to one under twenty-one years of age.[192] Rarely in the debate is this prohibition questioned. We ban use of alcohol based on age,[193] and states base driving privileges on age.[194] Age is a bright-line cut-off where, magically, rights or privileges are bestowed upon reaching a certain birthday.

And many states hold persons criminally liable when the adult, in legal possession of a firearm, allows a child to access that firearm and an injury results.[195] We should have the same laws regarding persons with intellectual disabilities.

Granted, enacting legislation that criminalizes allowing access by a person with an intellectual disability to one's

189 Thompson v. Oklahoma, 487 U.S. 815, 834 (1988) (quoting Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982)).

190 *Id.* (quoting *Eddings*, 455 U.S. at 115 n.11). Penry's doctor in 1973 noted that due to Penry's organic brain damage, he "would be subject to influence and manipulation by people more intelligent or sophisticated than he was." Brief of Petitioner at 44, Penry v. Lynaugh, 492 U.S. 302 (1989) (No. 87-6177).

191 *Roper*, 543 U.S. at 563 (citing Atkins v. Virginia, 536 U.S. 304, 318 (2002)).

192 18 U.S.C. § 922 (b) (2006).

193 23 U.S.C. § 158(a)(1) (2000).

194 *See, e.g.*, CAL. VEH. CODE § 12814.6 (Deering 2000); IND. CODE ANN. § 9-24-3-2 (West 2004); TEX. TRANSP. CODE ANN. § 521.204 (West 2007).

195 *See supra* note 56.

personally-owned firearm is not the entire solution: we should address the issue regarding the definition and information available to firearm dealers as well. And the burden on the private owner is heavy: she must know if the visitor coming into her house has an intellectual disability—one of the areas even the Court struggled with in not applying the death penalty *after* one's IQ is known. This proposal requires the private gun owner to be aware of anyone in her home who might gain access to her gun. If it could be a minor, she must prevent that access. If the person might have an intellectual disability, so too should she prevent any access.

Of course, the firearms dealer need only check the NICS database, and if the person with an intellectual disability who is attempting to purchase a gun is listed in the NICS, the dealer simply refuses to conduct the transaction. But there is no similar NICS system to use when allowing guests into one's home.

Then again, a private owner of firearms should know more about who is in her house. And if she is unsure, all she need do is safely store her firearm. After all, a firearm owner may be unaware if her child's friend is above or below the specified age in the CAP law, but the liability would be the same. But this is irrelevant. The CAP laws do not impose some sort of strict liability regarding a minor accessing one's firearm. Instead, all but a very few are clear on proper storage that would exculpate one from criminal liability. The same should apply to any extended legislation.

Additionally, this legislation not only would encourage safe storage of firearms by the individual owner, this would add a layer of punishment and an extra crime to anyone who might use a person with intellectual disabilities as a tool in committing crimes. Many persons with intellectual disabilities are easier to persuade and very eager to please those believed to be friends. Perhaps if the mere providing the weapon to a person with an intellectual disability were a crime, any such person who did so could be more likely to be found guilty of a crime and punished, with proof easier than that of accomplice or conspiratorial liability.

CONCLUSION

The problem surrounding gun legislation is not so much the guns as it is who has the guns. As is often said, "guns don't kill people; people kill people." The Supreme Court has recognized that many long-standing prohibitions are surely constitutional,

even in light of recent decisions.[196] But these prohibitions are not without holes in coverage and implementation. And the holes, when we consider the Court's treatment of and our reduced culpability attributed to persons with intellectual disabilities, form cracks in legislation. Our aim needs to be to avoid allowing anyone to fall in these cracks.

The person with intellectual disabilities does not rationalize the same as one without these limitations, nor does she foresee the consequences of all of her acts. If we have determined that, therefore, she is not to be punished in the same manner as others, then we should also work to prevent crimes that we can—to protect the less-culpable person from being in that situation. This applies especially to gun possession, targeting reducing crimes and acts committed with such a deadly weapon.

The current prohibition against a person adjudicated as mental defect does not go far enough. Adjudication is not as common as many believe, and this leaves a vast population of people eligible to purchase a gun. This hole should be closed by removing the requirement for adjudication if a person has intellectual disabilities. Not only might such a prohibition protect persons with intellectual disabilities, but it might also allow better, more consistent treatment. So often when someone with an intellectual disability uses that as part of his defense or as a mitigating factor, public perception and doubt create an additional hurdle. Even in *Penry*, in the prosecution of a man with an IQ of 56, after the Supreme Court sent John Paul Penry's case back for another trial, the Texas Attorney General noted his doubt of Penry's disabilities: "Penry is 'a schemer, a planner and can be purposefully deceptive.'"[197]

Conversations about gun control lead to heated debates, strong opinions, and bantered statistics. The sides that normally cite civil liberties often change their tone when it comes to issues of gun use under the Second Amendment, while those who favor fewer restrictions on gun possession argue about constitutionality and against states' rights to control. However we define gun legislation—as control or rights—we need to better define who falls under restrictions. Failing to do so leaves open categories of citizens who should not possess or use firearms.

The solution is to seek another approach: criminalize allowing access. This will not prevent all access of firearms by persons with reduced criminal culpability, but it is a step in the

196 District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

197 *Top Court Stops Controversial Execution*, CBS NEWS (Feb. 11, 2009, 9:35 PM), http://www.cbsnews.com/stories/2000/11/17/deathpenalty/main250352.shtml.

right direction. Assuming, as the jury decided, that Daryl Renard Atkins did shoot Eric Nesbitt eight times, he could not have done so had he not had a gun.

How Medical Apology Programs Harm Patients

Gabriel H. Teninbaum[*]

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INTRODUCTION

From President Barack Obama and Secretary of State Hillary Clinton to *The New York Times*, the popular perception of medical apology programs is that they are wonderful things.[1] These programs call on doctors who have committed an error to meet with their injured patient, explain why the mistakes happened and apologize accordingly. Taken in isolation, the concept of a doctor admitting his or her unintended error to a harmed patient seems appropriate, humanitarian, and fair. This Article explains, however, why their perceived nobility is based on a myth.[2] In reality, the design of medical apology programs allows for the manipulation of injured patients as a means to persuade them not to pursue money damages.

A phenomenon called "cooling the mark out" that was first noted in 1952 by the famed sociologist Erving Goffman, explains how apology programs work.[3] Goffman observed that "confidence men" use a tried-and-true set of techniques to convince (or "cool out") their victim (or "mark") not to complain after realizing that he or she had been swindled.[4] Goffman wrote that cooling the mark out also has uses in contexts beyond criminal enterprises.[5] When it does happen in law-abiding society, it uses similar processes in which a person in a position of power uses persuasive methods to control the emotional state of a mark.[6] The intended effect remains to diffuse the mark's righteous anger to the con's benefit.[7] This Article argues that medical apology

1 *See* Hillary Rodham Clinton & Barack Obama, *Making Patient Safety the Centerpiece of Medical Liability Reform*, 354 NEW ENG. J. MED. 2205, 2207 (2006); Kevin Sack, *Doctors Start to Say 'I'm Sorry' Long Before 'See You in Court*,*'* N.Y. TIMES, May 18, 2008, at A1.

2 The sources on this topic use the terms "disclosure program" and "apology program" interchangeably. Ultimately, disclosure programs—where a medical provider simply discloses that an error occurred—do not necessarily have to include an apology. However, for strategic reasons, doctors are nearly universally counseled to apologize for acts of negligence at the time of their disclosure. As a reason for doing so, CRICO/RMF (the insurer that covers physicians at Harvard's hospitals) explained that the disclosure should include an apology "because an apology is often equated with the showing of empathy, a communication that lacks this basic 'human touch' may actually make a situation much worse." CRICO/RMF, *Disclosure and Apology: CRICO's Perspective*, CRICO/RMF (last visited July 1, 2011), http://www.rmf.harvard.edu/files/documents/2003WhitePaper--DisclosureApology.pdf [hereinafter *CRICO's Perspective*]. For the sake of ease, this paper will refer to these programs as "apology programs" except in the context of quotations from other sources that use the term "disclosure" with identical intention.

3 Erving Goffman, *On Cooling the Mark Out: Some Aspects of Adaptation to Failure*, 15 PSYCHIATRY 451, 452 (1952).

4 *Id.*

5 *Id.* at 455.

6 *Id.*

7 *Id.*

programs engage in cooling the mark out. The goal of hospitals that use them is, of course, not to prevent a victim from reporting a crooked game of dice or three-card monte to the police. Instead, modern apology programs appear to cool their marks out as a means of preventing them from speaking to a lawyer and becoming educated about their legal rights.

This Article unfolds in five parts. Part I presents a brief history of apology programs, including their genesis as a calculated attempt to soften the blow from regulatory requirements that forced physicians and institutions to report events of malpractice. Part II develops a typology of the different forms of disclosure programs that have evolved, each of which has become more efficiently designed to restrict a malpractice victim's ability to recover. Part III demonstrates how the current application of medical apology programs is consistent with Goffman's sociological work on cooling the mark out, as well as psychological research on methods of influencing decisions through apologies. Part IV of the Article explains how apology programs create outcomes that are inconsistent with the tort system by influencing patients to receive less compensation than the law entitles them. Part V suggests remedies for the problems created by those who have designed medical apology programs.

I. THE STORY OF DISCLOSURE PROGRAMS

While proponents of apology programs typically claim that they exist to fulfill an ethical necessity, their creation was far more practical: they were formed as a response to regulatory requirements.[8] The impetus occurred in 1999, when researchers at the Institute of Medicine determined that as many as 98,000 Americans die every year as a result of preventable medical errors.[9] Before that time, apology programs were virtually

8 *See CRICO's Perspective*, *supra* note 2, (advocating disclosure because it is the "right thing to do"); ECRI Inst., *Disclosure of Unanticipated Outcomes*, INCIDENT & REPORTING MGMT. 5, at 2 (Jan. 2008), *available at* https://www.ecri.org/Documents/Patient_Safety_Center/HRC_Disclosure_Unanticipated_Events_0108.pdf (describing disclosure as "appropriate," "ethical," and "the right thing to do").

9 INST. OF MED., TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 31 (2000). Subsequent research indicates this figure just scratches the surface of the amount of malpractice that actually occurs. For example, one study found that about 15 *million* incidents of medical harm—unintended physical injury resulting from medical care—occur annually in the United States. C. Joseph McCannon et al., *Miles to Go: An Introduction to the 5 Million Lives Campaign*, 33 JOINT COMMISSION J. ON QUALITY & PATIENT SAFETY 477, 479 (Aug. 2007). A 2011 study funded by the Institute for Healthcare Improvement found that as many as thirty-three percent of all inpatient stays involve malpractice. David C. Classen et al., *'Global Trigger Tool' Shows that Adverse Events in Hospitals May Be Ten Times Greater than Previously Measured*, 30 HEALTH AFF. 581, 584 (2011). This result is consistent with research results from a federally sponsored United States Department of Health and Human Services study and may, even

unheard of in hospitals.[10] However, the shocking figures catalyzed medical regulators to seek ways to improve patient safety. One effect was that, in 2001, the nation's largest hospital accrediting organization, the Joint Commission on Accreditation of Healthcare Organizations,[11] published a new set of patient safety standards.[12] These standards required medical practitioners to disclose all "unanticipated outcomes," including malpractice, to patients.[13] The cost for failing to disclose errors was steep; facilities whose practitioners did not comply could lose Joint Commission accreditation, effectively putting them out of business.[14]

The Joint Commission's transparency rules caused fear among physicians, risk managers at hospital facilities and insurance executives.[15] They were concerned that, if patients learned of acts of malpractice they would not otherwise know about, they would then have a basis to seek compensation for their injuries.[16]

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still, underrate the amount of malpractice because it is based only on record review and experience has proven that "not all adverse events are documented in the patient record." *Id.* at 586.

10 *See* ROBERT D. TRUOG ET AL., TALKING WITH PATIENTS AND FAMILIES ABOUT MEDICAL ERROR 52–56 (2011) (explaining the rise of apology programs in the United States); Nancy Lamo, *Disclosure of Medical Errors: The Right Thing to Do, but What is the Cost?*, LOCKTON COS., LLC 2 (Winter 2011), *available at* http://www.lockton.com/Resource_/PageResource/MKT/disclosure%20of%20medical%20errors.pdf (describing the cultural shift from deny-and-defend to disclosure at some healthcare organizations). *See also* Richard C. Boothman et al., *A Better Approach to Medical Malpractice Claims? The University of Michigan Experience*, 2 J. HEALTH & LIFE SCI. L. 125, 131 (2009) (recounting shift from "deny and defend" to transparency after medical errors).

11 Formerly referred to as "JCAHO," this Article will refer to the organization by its current commonly used moniker, the "Joint Commission."

12 *See* JOINT COMM'N, REVISIONS TO JOINT COMMISSION STANDARDS IN SUPPORT OF PATIENT SAFETY AND MEDICAL/HEALTH CARE ERROR REDUCTION (2001).

13 *Id.* The American Medical Association articulated a similar position, stating that a physician is ethically required to inform the patient when faced with "significant medical complications that may have resulted from the physician's mistake or judgment." AM. MED. ASS'N COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, CODE OF MEDICAL ETHICS (1997), *available at* http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion812.page.

14 The Joint Commission is the nation's largest hospital accreditor, certifying more than 19,000 United States medical facilities. *About The Joint Commission*, JOINTCOMMISSION.ORG (last visited July 27, 2011), http://www.jointcommission.org/about_us/about_the_joint_commission_main.aspx. Accreditation by the Joint Commission or other certifying body is a necessary step before a medical provider can receive payments from Medicare. *See* 42 C.F.R. § 482 (2010).

15 Ed Lovern, *JCAHO's New Tell-All; Standards Require that Patients Know About Below-Par Care*, MOD. HEALTHCARE, Jan. 1, 2001, at 2 ("The challenge, of course, will be what liabilities [the Joint Commission's disclosure requirement] may place upon the hospitals and practitioners" given our litigious society, said Greg Wise, M.D., Vice President of Medical Integration at 410-bed Kettering (Ohio) Medical Center).

16 *See* Rae M. Lamb et al., *Hospital Disclosure Practices: Results of a National Survey*, 22 HEALTH AFF. 73, 76 (2003) (finding physicians' primary concern about disclosing errors is increased litigation); Albert Wu, *Handling Hospital Errors: Is*

With these changes hanging over them, the medical-insurance industry began using its resources to try to protect itself from being held financially accountable for medical errors. Industry lobbyists exerted influence on lawmakers to create special medical apology shield laws: if a patient chooses not to accept an apology in lieu of money damages, the doctor's apology can never be mentioned in court and the doctor can behave as if he never made the mistake to which he or she admitted.[17] With few legislators or members of the public stopping to ask how these laws will affect injured patients, medical apology shield laws have taken hold in thirty-four states and the District of Columbia.[18]

The apology shield laws come in a variety of forms. Some protect a doctor from allowing a jury to learn about only the apology itself, some protect the doctor from a jury learning that the doctor has admitted fault, and some protect both.[19] Ultimately, however, each of the versions mean that a doctor can make statements related to malpractice and if the patient still wishes to pursue money damages in court, the jury would not be able to learn about it. Financially, they mean that as long as patients do not ask for money, doctors are willing to take responsibility; but when a malpractice victim seeks a legal remedy, the doctor is then free to deny responsibility. As one commentator noted, the rationale for these types of laws exposes the motivations of those that push for them:

> One might wonder why physicians and hospitals would seek special protection under the law for being honest with their patients about errors and mistakes. One obvious answer to this question is money, in particular insurance company money. Every doctor and hospital in Massachusetts is insured for damage done by their mistakes. Some

Disclosure the Best Defense, 131 ANNALS INTERNAL MED. 970, 971 (1999) ("Full disclosure could certainly provide an otherwise uninformed patient with a basis for litigation.").

17 Insurance companies often either employ or foster close ties with lobbyists to sway court rules in their favor. *See, e.g.*, *Affiliations*, GALLAGHER HEALTHCARE (July 12, 2011, 8:35 AM), http://www.gallaghermalpractice.com/affiliations-endorsements.aspx (listing seven lobbyist affiliates); *Endorsements*, GALLAGHER HEALTHCARE (July 12, 2011, 8:35 AM), http://www.gallaghermalpractice.com/affiliations-endorsements.aspx (listing three lobbyist groups that endorse Gallagher Healthcare insurance agency); MED. LIABILITY MUTUAL INS. COMPANY, http://www.mlmic.com/portal (last visited July 12, 2011) ("MLMIC is a respected voice in the State legislature and advocates on behalf of its policyholders on liability insurance and tort reform matters."); *Political Advocacy*, THE DOCTORS COMPANY (July 12, 2011, 8:09 AM), http://www.thedoctors.com/KnowledgeCenter/PoliticalAdvocacy/index.htm (explaining The Doctors Company's use of political action committees to advocate and defend tort reform).

18 Anna C. Mastroianni et al., *The Flaws in State 'Apology' and 'Disclosure' Laws Dilute Their Intended Impact on Malpractice Suits*, 29 HEALTH AFF. 1611, 1612 (2010) (reporting thirty-four states and the District of Columbia have medical apology shield laws).

19 *Id.* at 1611 (describing different forms of apology shield laws).

> insurance companies and risk managers believe, based on studies, that if there are more apologies and admissions of mistakes by health care providers, fewer people will pursue their legal rights, and insurers will have to pay fewer claims. Thus, [apology shield laws] allow medical providers to apologize and admit mistakes so long as they do not have to admit those mistakes when it costs their insurer money. [Apology shield laws] are bad policy, unnecessary and should not be enacted as they tend to hide the truth from the judicial system, while giving health care and providers a free pass to "admit" to mistakes without taking any responsibility for them.[20]

But apology shield laws are not the only measure hospitals employ that lessen the potential financial exposure created by disclosure requirements. More significantly, many insurers and hospital risk management departments have created protocols for doctors to make apologies designed to prevent a case from ever getting to a jury, or even to a lawyer.[21]

The discovery that apology programs could be financially beneficial to the average insurer or hospital was serendipitous. Long before the Joint Commission guidelines changed, the Department of Veterans Affairs hospital at Lexington, Kentucky ("Lexington VAMC") created their own apology program based on changes to the VA's internal guidelines.[22] In a subsequent study, data indicated that disclosing errors in specific ways may not result in an increase in the number of malpractice claims or in the amount paid per claim.[23] Its authors did not take too seriously the idea that its principles would be welcomed by

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20 Benjamin Zimmermann, *When Medical Malpractice Occurs, Sorry Seems to be the Hardest Word*, SUGARMAN L. BLOG (Oct. 20, 2010), http://www.sugarman.com/blog/2010/10/when-medical-malpractice-occurs-sorry-seems-to-be-the-hardest-word/.

21 *See infra* Part II (describing apology programs instituted at hospitals). Even though many American hospitals are nominally "non-profit," their risk management departments are akin to for-profit insurance companies. The job of hospital's "bottom-line oriented" risk management team is "to protect the financial assets of the hospital from claims asserted through the tort system." Stephan Landsman, *The Risk of Risk Management*, 78 FORDHAM L. REV. 2315, 2316 (2010). A hospital's risk managers are, by contractual requirement, in league with the malpractice insurers that represent its doctors. Their mission is to "oversee the institution's relationship with those providing insurance coverage to pay awards made against the hospital for medical malpractice." *Id.* at 2317. In fact, this cooperation is contractually required and, as a result, the "required cooperation has serious implications for the care provided to patients after they have suffered injury at the hands of the medical staff. The chief goal shifts from providing treatment to 'paying as little money in settlements as possible . . . .'" *Id.* As a result, it makes no difference whether the information about apology programs comes from risk managers in a hospital or from the insurance company itself. Both are focused on legal liability and money, not the actual provision of medical care.

22 *See infra* notes 28–33 and accompanying text (discussing the VA's guidelines for disclosure of unanticipated medical outcomes).

23 *See infra* notes 34–41 and accompanying text (discussing the results of a study of Lexington VAMC disclosure program).

hospitals outside of the VA system.[24] However, once the Joint Commission ruled, all hospitals subject to their authority had little choice but to consider it.

Subsequent studies supported the idea that many patients were willing to accept a fraction of the amount of money they would get in a malpractice suit if the doctor simply apologized.[25] In response, risk managers began to get serious about examining apology programs much more closely and, once convinced of their pecuniary benefits, began telling the public that they were a moral imperative.[26]

II. REPRESENTATIVE MODELS FOR APOLOGY PROGRAMS

This part of the Article explains the workings of representative apology programs in the United States. It begins with a discussion of the Lexington VAMC's early experience, which disclosed errors to patients and also took measures to expressly advise the patient to seek legal counsel for what has become both a medical and legal issue.

The Lexington VAMC program is important because it is the precursor to the models of apology programs currently employed in the United States. It is also perhaps the last widely publicized program in the United States that included in its published protocol the need to advise unrepresented patients to seek legal counsel before confronting them with an apology and a set of decisions that would have legal consequences for them.

Once the Joint Commission mandated that facilities disclose acts of malpractice, insurers had no choice but to admit acts of malpractice. The VA program, having already created a path, became a model for others, which made subsequent adaptations to further tilt the process of admitting an act of malpractice in their financial favor. This sub-section then goes on to explore the workings of two of these modern programs, the COPIC 3Rs program and the University of Michigan Health Services ("UMHS") model.

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24 *See* Steven S. Kraman & Ginny Hamm, *Risk Management: Extreme Honesty May Be the Best Policy*, 131 ANNALS OF INTERNAL MED. 963, 966 (1999), *available at* http://www.annals.org/content/131/12/963.full.pdf ("If there is a barrier to the adoption of a humanistic risk management policy by nongovernmental hospitals, it may be the involvement of many private malpractice insurers, each of which is interested in paying as little money as possible. We believe that these insurers would have to be convinced of the economical benefits of such a policy before they would consider adopting it.").

25 *See infra* Part III (discussing how apologies affect victims' willingness to settle).

26 *See infra* Part III (discussing psychological effects of apology programs). *See also* note 8 (quoting sources regarding ethical necessity of apology programs).

A. Lexington, Kentucky VA Hospital

Prior to the Joint Commission's disclosure mandate, only one study had evaluated the effectiveness of an American medical malpractice apology program.[27] In 1995, the Department of Veterans Affairs rewrote its policy manual to mandate disclosure to patients who had suffered an unanticipated outcome.[28] In the event of an unanticipated outcome, the rules required that the medical center inform the patient and/or the family, as appropriate, of the event, and assure them that medical measures have been implemented and that additional steps are being taken to minimize disability, death, inconvenience, or financial loss to the patient or family.[29]

In response, the Lexington VAMC created a protocol so that when the hospital's risk management committee found that a doctor had committed malpractice, they would invite the injured patient to the hospital.[30] When doing so, they would tell the patient that he or she was welcome to bring an attorney.[31] When the patient arrived, the physician would explain what happened, express regret, answer any questions and "make an offer of restitution, which can involve subsequent corrective medical or surgical treatment, [and] assistance with filing for [disability] or monetary compensation."[32] The hospital would negotiate with the patient and, in the event the patient had not retained a lawyer and needed claims assistance, the hospital would help get forms to file and once again advise the patient to seek independent counsel.[33]

Researchers tracked the Lexington VAMC's data to test the impact of its apology policy.[34] They determined that during a seven-year period (1990–1996) of studying the Lexington VAMC's apology program, the facility's payments were "moderate" and "comparable to those of similar facilities."[35] Thus, when injured patients were invited to bring legal counsel to discuss the doctor's error and potential financial resolutions, the study suggested

27 *See* Benjamin Ho & Elaine Liu, *Does Sorry Work? The Impact of Apology Laws on Medical Malpractice* 3 (Johnson Sch. Research Paper Series, Paper No. 04-2011), *available at* http://ssrn.com/abstract=1744225.

28 Kraman & Hamm, *supra* note 24, at 964.

29 *Id.*

30 *Id.* at 967.

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.* at 964.

35 *Id.* at 964, 966.

that the injured patients' claim received roughly the same amount of money as in a traditional deny/defend situation.[36]

The program also provided other benefits, like diminishing the injured patient's anger and allowing for a continuing positive relationship between doctor and patient.[37] The study's authors also noted that their approach provided dramatic pecuniary benefits by avoiding unnecessary litigation expenses.[38] They estimated that it costs the government $250,000 to litigate a single malpractice case (for medical experts, travel, appeal, incidental expenses). By contrast, their new apology procedures required only an attorney, a paralegal to assist, and a few other hospital employees.[39]

The Lexington VAMC research suggests that patients who are malpractice victims and who are invited to bring an attorney to negotiate on their behalf fare equally as well economically as those that pursue more traditional litigation methods. The added benefit is that the process happens more quickly, with lower litigation costs and a legitimately ethical exchange that is focused on the patient. The Lexington VAMC study's authors predicted that it would take much more proof of an economic benefit before nongovernmental facilities would participate.[40] The barrier they identified is the involvement of private malpractice insurers, "each of which," as the authors put it, "is interested in paying as little money in settlement as possible."[41]

The Lexington VAMC representatives' prediction that their policy would be met with skepticism proved true. For example, after the Joint Commission's disclosure requirement came into effect, ECRI, a non-profit think-tank, expressed skepticism that other facilities would voluntarily use an apology program: "There are many who believe the experience of a VA hospital cannot be replicated in the private sector because the VA, unlike the private sector, has federal tort protections."[42]

Reflecting the profit motivation of nongovernmental insurers, the Lexington VAMC program is the last one for which there has been published research that specifically recommended that patients seek counsel before filing a claim. The newer generation of apology programs includes some protections that

36 *See id.* at 965–66.
37 *Id.* at 966.
38 *Id.*
39 *Id.*
40 *Id.*
41 *Id.*
42 ECRI Inst., *supra* note 8, at 12.

appear patient-friendly on their face, but remain adversarial at their core.

B. Two Examples of Current Apology Programs

Since the finding that apology programs can be used as a money-saving strategy, various insurance companies and hospitals have instituted them. This section focuses on two examples that represent common practices in the medical field today: COPIC and UMHS. While they operate separately, common concerns are ultimately raised by each model as they both include mechanisms that appear designed to pay injured patients as little money as possible. Further, they both encourage collaborative interpersonal behavior, but treat the financial aspect of claims handling as adversarial.

i. COPIC

One of the models that apology advocates most commonly cite is COPIC's 3Rs program ("Recognize, Respond, Resolve").[43] COPIC is the primary insurer for Colorado physicians and, under the 3Rs program, patients who suffer from an "unanticipated outcome" can be offered up to $100 a day (capped at $5000) for their absence from work and reimbursement for out-of-pocket medical expenses of up to $25,000.[44] COPIC defines their program as a "no-fault" program, meaning that they consider patients eligible regardless of whether there is clear malpractice.[45] Cases involving "never events," which are acts of clear malpractice (e.g., amputating the wrong leg), do not qualify for the 3Rs program.[46] Instead, the program leaves open the

43 Thomas H. Gallagher, David Studdert & Wendy Levinson, *Disclosing Harmful Medical Errors to Patients*, 356 NEW ENG. J. MED. 2713, 2716 (2007) ("The best-known private-sector disclosure program is the '3Rs' program at COPIC."). *See also Medical Liability: New Ideas for Making the System Work Better for Patients: Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 109th Cong. 25 (2006) [hereinafter *Medical Liability*] (statement of David Studdert, Associate Professor of Law and Public Health, Harvard University Sch. of Public Health) (offering a health court proposal with the first level of review "proceed[ing] along the lines developed by the insurer COPIC (the '3-R's' program)").

44 Press Release, COPIC, Clarke Joins Colo. Health Found. Bd. (Jan. 7, 2011), *available at* http://www.callcopic.com/who-we-are/press-room/press-room-detail?id=16; *3Rs Program*, COPIC (last visited May 18, 2011), http://www.callcopic.com/home/what-we-offer/coverages/medical-professional-liability-insurance-co/physicians-medical-practices/special-programs/3rs-program/.

45 Even champions of apology programs question the viability of a no-fault program like COPIC's. For example, the UMHS program's architect and leader, Attorney Richard Boothman, testified before Congress that: "Alternatives loosely characterized as 'no fault' systems will not work. The medical and insurance communities will not be fairly served by creating an entitlement not based on the reasonableness of care." *Medical Liability*, *supra* note 43 (statement of Richard C. Boothman, Chief Risk Officer, UMHS).

46 *See* Richard E. Quinn & Mary C. Eichler, *The 3Rs Program: The Colorado Experience*, 51 CLINICAL OBSTETRICS & GYNECOLOGY 709, 710 (2008) (recounting COPIC history and the exclusion of NQF's "never events").

ability for COPIC to quickly resolve murkier cases that may or may not have been the result of malpractice.

The rules of program eligibility indicate that the program seems intended to avoid reporting insured doctors' malpractice to regulatory authorities. For example, under the 3Rs program, there can be no payments made for non-economic damages.[47] Another rule specifically prevents a patient from involving an attorney, and yet another rule disqualifies any patient who asks for money in writing.[48] Any of these events would require reporting to the National Practitioners Data Bank.[49] Thus, by precluding anyone from participation who would otherwise seek a lawyer or write a demand letter, COPIC can skirt reporting malpractice.

The advocates for 3Rs might defend their program by claiming that if patients participate in the COPIC program, they may still theoretically pursue a malpractice claim because COPIC does not require patients to sign a release.[50] However, the data indicates that not forcing a release is nearly irrelevant because COPIC's research has shown that even without a release, fewer than twenty-four out of every twenty-five participants do not pursue a claim after going through their program.[51] Even more troubling, the decision not to require a release from patients appears motivated by selfish reasons, as requiring a release would force COPIC to report the settlement to state and federal regulators, which they are able to avoid by calling it a "no-fault" program.[52]

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47 *Id.* Payment for non-economic damages may also force COPIC to admit the incident was a result of negligence, thus preventing the carrying-on of the fiction that they make payments regardless of whether negligence was involved.

48 *See A Success Story*, 1 COPIC'S 3RS PROGRAM (COPIC Ins. Co., Denver, Colo.), Mar. 2004 (listing exclusions from participation to include patients who have sent a "[d]emand letter" and stating that "payments are not reported to the National Practitioner Data Bank because they are not made in response to a written demand for monetary compensation"). *See also* Carol Anne Tarrant, Dir., Facility Patient Safety and Risk Mgmt., *COPIC's 3Rs Program: Recognize, Respond to and Resolve Patient Injury*, COPIC 18 (Apr. 30, 2010), http://www.capsac.org/documents/Tarrant.CA.pdf (stating that among the incentives for doctors to participate in 3Rs is no reporting to NPDB (National Practitioners Data Bank) or CBME (Colorado Board of Medical Examiners)).

49 *See Tarrant*, *supra* note 48, at 18.

50 Quinn & Eichler, *supra* note 46, at 710.

51 *Case Studies: Focus on Disclosure*, 3RS PROGRAM (COPIC Tr., Denver, Colo.), May 2011, at 1, *available at* www.callcopic.com/resources/custom/PDF/3rs-newsletter/3rs-may-2011.pdf ("Our continuing experience is that only 3.4 percent of 3Rs cases with reimbursements to patients subsequently result in malpractice claims or lawsuits. Also, only 0.5 percent of such reimbursed 3Rs cases receive additional payments via malpractice claims or lawsuits.").

52 Bruce D. Gehle, *A Quick Check on the Impact of Apology Laws on Claims and Costs of Medical Malpractice*, 11 HEALTHCARE LIABILITY & LITIG., May 2009, at 1, 2.

The idea that 3Rs is only for "minor" cases is also misleading. They purport to be a "limited program designed to handle outcomes that are unlikely to involve serious negligence or injury"; the facts suggest that this claim is misleading.[53] While the 3Rs program does exclude death claims and "never events," the evidence suggests that COPIC still uses the 3Rs program on cases involving very serious claims.[54] In one account, which COPIC fictionalized, but was of the magnitude "often dealt with in COPIC's 3Rs Program," a 41-year-old patient underwent a colonoscopy and suffered a perforation to his colon as a result.[55] After the colonoscopy, the patient had severe abdominal pain due to "free air" (indicating the doctor punctured the patient's colon during the colonoscopy).[56] As a result, the surgical team then had to perform additional surgery to repair the hole in the man's colon.[57] This resulted in the patient being hospitalized for four additional days and missing "approximately six weeks of work."[58] Despite their rhetoric, additional surgery, four days as an inpatient, and six weeks of missed work cannot reasonably be considered "not serious."

Despite the ethical problems it poses, the 3Rs program has been effective in dissuading patients from seeking the damages they would be entitled to under more traditional litigation channels. For example, in 2003, the payments to patients under the 3Rs Program averaged $1820, as opposed to an average cost of more than $250,000 for traditionally-handled claims handled by the same insurer.[59]

Beyond under-compensating malpractice victims, the broader impact of the 3Rs program has not been studied. Specifically, the rules under which the program operates—from not allowing attorney involvement to refusing to allow a patient who has written a letter from participating—seem designed to

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53 *Id.*

54 *See, e.g.*, *Success Story*, 3 COPIC'S 3RS PROGRAM (COPIC Ins. Co., Denver, Colo.), June 2006, *available at* http://www.callcopic.com/resources/custom/PDF/3rs-newsletter/vol-3-issue-1-jun-2006.pdf (recounting a potentially grave injury addressed by the 3Rs program).

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

59 *Will Apologies to Patients Drive Malpractice Lawyers Out of Business?*, MED LEGAL NEWS (Med League Support Servs., N.J.), June 2006, at 2, *available at* http://www.medleague.com/Articles/Newsletters/newsletter26.pdf. This approach has apparently been similarly effective in dissuading patients from seeking damages in other years. For example, a 2005 article quotes a COPIC representative who states that "the average payment in 3Rs cases is $5586, while the average outside the program is about $284,000." Deroy Murdock, *"Sorry" Works*, NAT'L REV. ONLINE (Aug. 29, 2005, 8:03 AM), http://www.nationalreview.com/articles/215270/sorry-works/deroy-murdock.

discourage responsible reporting. In turn, this weakens practitioner accountability and potentially harms patients who subsequently are treated by doctors that have committed malpractice but have not been investigated by the appropriate agencies as a result.

ii. UMHS

The most commonly referenced apology program today is the University of Michigan Healthcare Services' model. UMHS purports to provide quick compensation for viable claims, defend claims they view as non-meritorious and "[r]educe patient injuries . . . by learning from patients' experiences."[60] The architect of the UMHS program is Attorney Richard Boothman, who spent two decades as a medical malpractice defense lawyer before assuming his risk management post at UMHS.[61] Attorney Boothman has become one of the most prominent proponents of apology programs in the United States.[62]

UMHS's philosophy is consistent with the concept of "cooling the mark out."[63] The underlying basis for the program is their belief that people pursue malpractice claims because they seek an explanation for their injury and have a desire to hold the responsible person accountable.[64] To respond to that, UMHS created a system "more directly aimed at what drives a patient to call a lawyer [which] would better address the root cause of the problem."[65] Unlike COPIC, UMHS does allow patients to seek legal advice, although the organization does not do so routinely.[66] UMHS is a self-insured facility, which they state allows for "consistency and alignment of ethical and financial motivation[s] between the hospital, care provider, and insurer" which they consider an "important advantage."[67] However, their program does not have any built-in protection for patients against the conflict of interest this creates. Instead, one must take it on faith that UMHS's risk management department is capable of acting against the facility's own financial interests and fully and fairly compensating injured patients.

60 Boothman et al., *supra* note 10, at 139.

61 *Biography*, U. MICH. HEALTH SYS. (last visited Sept. 25, 2011), http://surgery.med.umich.edu/portal/research/faculty/boothman.shtml.

62 *Biography*, *supra* note 61.

63 *See infra* Part III(A) (explaining the concept of "cooling the mark out" and how UMHS's model squares with it).

64 Boothman et al., *supra* note 10, at 134.

65 *Id.*

66 E-mail from Richard C. Boothman, Chief Risk Officer, UMHS, to author (Aug. 10, 2011, 14:16 EDT) (on file with author) ("We have overtly advised patients to have lawyers . . . but we do not routinely advise them to get a lawyer.").

67 Boothman et al., *supra* note 10, at 137.

UMHS does not publish their strategy for approaching the negotiations with the patients to whom they apologize. However, a vignette UMHS uses to explain the mechanisms of their program suggests that an adversarial mindset underlies the program.[68] In its literature, UMHS tells the story of JW, a thirty-six year-old mother of two.[69] In 2003, she presented to her primary care physician's office that she had found a lump in her breast.[70] No follow-up was ordered by the doctor.[71] Two years later, JW was diagnosed with breast cancer.[72] It was treated with a complete mastectomy and radiation therapy.[73] Her primary care doctor, one year later, "described her as disabled due to chronic fatigue syndrome, depressed, suffering chronic shoulder pain, and plagued by anxiety," because of a perceived increased likelihood of recurrence of cancer.[74]

The UMHS internal investigation committee found that the care JW received was sub-par for many reasons.[75] Three of its reviewers said that the decisions her primary care doctor made were below the standard of care.[76] Some reviewers believed there were ways to defend the case (including blaming JW for not returning for care more aggressively), but admitted "they would have handled it differently and [they] expected more of their colleagues under the same or similar circumstances."[77]

By its own estimate, UMHS believed that the case had a value of somewhere between $3.1 and $3.7 million if JW won.[78] Factoring in the chance of a plaintiff's verdict at trial, which UMHS believed was likely, they determined that the case should settle for somewhere between $2,635,000 and $3,145,000.[79]

UMHS met with JW, along with her husband and their attorney.[80] UMHS brought one of its risk management

68 *Medical Malpractice and Patient Safety at UMHS*, U. MICH. HEALTH SYS. (last visited Sept. 20, 2011), http://www.med.umich.edu/news/newsroom/mm.htm#summary ("Our approach can be summarized as: 'Apologize and learn when we're wrong, explain and vigorously defend when we're right, and view court as a last resort.'").

69 Boothman et al., *supra* note 10, at 151.

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.* at 152, 157.

75 *Id.* at 152 ("All reviewers agreed the covering doctor's care . . . was below expectations for UMHS faculty. Three reviewers said that the decision not to follow up on JW's concerns with mammography and referral to a surgeon was a violation of the standard of care.").

76 *Id.*

77 *Id.*

78 *Id.* at 155.

79 *Id.*

80 *Id.* at 157. That JW was allowed to have an attorney participate is a positive

consultants (most of whom are trained mediators).[81] At the outset of the meeting, UMHS apologized to JW.[82] JW's emotions warmed because of UMHS's collaborative demeanor.[83] JW asked if UMHS would settle the case for $2 million, a figure considerably less than UMHS's projected settlement value.[84] In response, UMHS accused JW of being "unreasonable" and inflating the value of her claim.[85] JW reduced her settlement demand to $1.2 million, less than half of UMHS's original estimate, but UMHS again refused.[86] Eventually, UMHS's tactics prevailed, with JW electing to accept UMHS's $400,000 settlement offer.[87]

As a result, the apology program made it so that a case that UMHS initially believed had a value of between $2.6 and $3.1 million, settled for only $400,000.[88] This amount would cover the cost of JW's children's college expenses, about which JW expressed concern when she learned that her doctor's malpractice might result in her death.[89] By UMHS's initial estimate, the $400,000 for which JW settled did not cover her future medical costs, lost wages/benefits caused by their doctor's negligence, nor any non-economic damages for the emotional impact for JW's ordeal.[90]

advance beyond COPIC's 3Rs program, which would disqualify the patient if she hired counsel. *See* Quinn & Eichler, *supra* note 46, at 710 ("If there was any attorney involvement, 3Rs benefits and involvement would cease."). The point of including this vignette is to demonstrate that UMHS's procedures remain fundamentally adversarial, not to accuse UMHS of refusing to allow JW to seek representation. Although the legal advice JW's attorney provided seems sub-par (as discussed below, JW ultimately settled the case for pennies on the dollar prior to discovery), that is hardly UMHS's fault.

81 Boothman et al., *supra* note 10, at 157.

82 *Id.*

83 *Id.* at 158 ("After that night (of the meeting), I left there like I was on a mountaintop. I felt like I had finally been heard, they listened.").

84 *Id.* at 156.

85 *Id.* ("The plaintiff's lawyer's economic assessment was critically reviewed by an economist expert retained by UMHS and a contra-assessment was prepared, pointing out unreasonable assumptions and inflated calculations.").

86 *Id.* at 157.

87 *Id.*

88 *Id.* at 155, 157.

89 *Id.* at 156, 157.

90 *Id.* at 155. UMHS also claimed that JW, because of UMHS's disclosure and approach to resolution, did not suffer pain and suffering that she would have if they had used the traditional "deny and defend" approach to her claim. Although emotional stress resulting from the litigation process is not compensable in the civil justice system, UMHS's claim that avoiding the stress of litigation benefited JW is certainly a good thing, although it would have no impact on the value of her case at trial. *See, e.g.*, Ortega v. Pajaro Valley Unified Sch. Dist., 75 Cal. Rptr. 2d 777, 800 (1998) (holding that damages may not be awarded for "litigation stress").

This outcome was a good result in the sense that JW was pleased with it.[91] However, the vignette leaves open several questions that should be vitally important to consider:

- In whose interest was UMHS acting when it paid JW $400,000 in a settlement it viewed as being worth more than seven times that amount?
- If JW is unable to pay her future medical costs (which UMHS estimated to be $250,000–$400,000) as a result of accepting this settlement, who will do so?
- How will JW and her family be compensated for the $2,350,000–$2,750,000 in lost wages and benefits that UMHS estimated she suffered as a result of its doctor's negligence if she becomes unable to work?

Because UMHS selectively releases data on their program, it is unclear whether JW's experience in the apology program was representative. Even the statistics that UMHS publishes makes it difficult to see what happens to individual claims with merit. For example, a recent article written by Attorney Boothman and others reported some aspects of the financial effects of UMHS's apology program.[92] They reported that after UMHS implemented the apology program, the overall number of claims dropped, as did the amount of money spent both defending claims and compensating patients.[93] The study did not report, however, statistics explaining whether individual patients that made claims were compensated less after the program was implemented. In other words, it has not been made public whether patients with valid claims for malpractice are giving up some compensation to which they are entitled in exchange for the warm discussions UMHS provides. If the small glimpse provided by JW's case is a representative of what UMHS does, then the organization derives significant financial benefits by paying less money to patients injured by medical errors.[94]

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91 Boothman et al., *supra* note 10, at 158 ("I was perfectly satisfied after that night. What that apology meant to me was that they had listened finally and I had been heard."). UMHS also seems to indicate that the act of taking part in the apology process had a positive medical outcome on JW and drove her damages down. *Id.* at 156–58. The basis for this is that JW's position during negotiation was that her malpractice-related injuries were disabling. *Id.* at 152. However, after the negotiations were completed, she returned to work. *Id.* at 158. The idea that this negotiation single-handedly transformed JW from being totally and permanently disabled to someone who could immediately resume her prior life is simply unsupported by any evidence other than UMHS's say-so.

92 Allen Kachalia et al., *Liability Claims and Costs Before and After Implementation of a Medical Error Disclosure Program*, 153 ANNALS INTERNAL MED. 213, 213 (2010).

93 *Id.* at 215, 217–19.

94 *See* Boothman et al., *supra* note 10, at 151–58.

When Attorney Boothman testified before the United States Senate in 2006, he cited the dramatic successes of the UMHS program in lowering costs and reducing the time of claim-completion.[95] He noted that physicians need to ask, "Why would my patient feel the need for an advocate?"[96] Although this question was undoubtedly meant to be rhetorical, it requires an actual answer: Patients need an advocate because programs like UMHS have attorneys whose primary obligation is to protect the assets of their organization. This dynamic results in what is, in actuality, an adversarial environment that simply uses collaborative language. Without legal advice of their own, patients who take part in apology programs must trust that risk managers would violate their obligation to their own employer (of keeping overall costs low), in order to give them an appropriate settlement. There is simply no evidence that this has, or will, occur and no program has released any data to that effect.

Yet, it should not be lost that the UMHS model does most of the things a good disclosure program should do (including many things COPIC would refuse to allow): it advises the patient of what happened, allows the patient to seek legal counsel (although it does not necessarily advise it), increases the speed of settlement negotiations to keep costs low, and so on.[97] Ultimately, though, stories like that of JW also expose its underlying adversarial nature.

III. CONVINCING PATIENTS THAT LESS MONEY IS BETTER

Because program administrators will not admit to it, it cannot be said with absolute certainty that medical apology programs are specifically designed to exploit the research on influencing patients to accept less compensation for valid injuries caused by malpractice. However, what can be said with accuracy is that what apology programs are willing to publish about their approach makes their behavior at least appear to be consistent with the research on how to influence people to control an outcome in a negotiation.

A. Cooling the Mark Out

In 1952, Erving Goffman explained that when con men "cool the mark out," as a method of preventing their dissatisfied victim from complaining to the authorities, they use a variety of

95 *Medical Justice*, *supra* note 43, at 4.
96 *Id.* at 7.
97 *See generally* Boothman et al., *supra* note 10, at 137–50.

methods.[98] In its most basic form, cooling the mark out requires that "one of the operators stays with the mark and makes an effort to keep the anger of the mark within manageable and sensible proportions . . . and exercises upon the mark the art of consolation."[99] In other words, the primary function of the "cooler"—the person tasked with consoling the mark—is "to define the situation for the mark in a way that makes it easy for him to accept the inevitable" and quietly move on without causing unwanted negative attention for the con men.[100]

Goffman envisioned cooling the mark out as being applied in all sorts of social relationships.[101] Even legitimate organizations, according to Goffman, have a need to cool out customers.[102] In the medical industry, Goffman noted that doctors frequently serve as coolers to break bad news to patients as a way to control their response.[103] The doctor is often the one to do this because it is advisable to "give the task to someone whose status relative to the mark will serve to ease the situation in some way."[104] The doctor-patient relationship involves just this sort of disparate social status. As a result, it should come as no surprise that apology programs frequently use a doctor to have a discussion with the patient.[105]

Goffman said that the effectiveness of cooling the mark out rests in creating a system that allows the mark, "under suitable guidance, to give full vent to his initial shock."[106] In other words,

98 *See* Goffman, *supra* note 5, at 452.

99 *Id.*

100 *Id.*

101 *Id.* at 456. Others have applied the concept of cooling the mark out to different contexts. For example, some see the role of junior/community college administrators to be coolers for students who are not "college material." Burton R. Clark, *The "Cooling-Out" Function in Higher Education*, 65 AM. J. SOC. 569, 569 (1960). Others have studied the process of women who cool out undesirable male suitors at singles bars. *See, e.g.*, David A. Snow et al., *"Cooling Out" Men in Singles Bars and Nightclubs: Observations on the Interpersonal Survival Strategies of Women in Public Places*, 19 J. CONTEMP. ETHNOGRAPHY 423, 423 (1991). The process of cooling out has been studied in legal contexts, including the role of criminal defense attorneys who must prepare their clients to accept a jail sentence. Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 L. & SOC'Y REV. 15, 27 (1967). Cooling out has even subtlety been employed in popular entertainment. In the hit 1989 film, Road House, Dalton (played by Patrick Swayze) is a professional "cooler" who uses his expertise in psychology and New York University philosophy degree to combat a group of violent nightclub patrons who are disrupting a small town bar, the "Double Deuce," and the surrounding community. ROAD HOUSE (United Artists 1989).

102 Goffman, *supra* note 5, at 455.

103 *Id.* at 457.

104 *Id.*

105 *See, e.g.*, Boothman et al., *supra* note 10, at 142 (describing physician-delivered disclosure and apology at UMHS); Quinn & Eichler, *supra* note 46, at 713 (describing the value of direct physician/patient disclosure and apology at COPIC).

106 Goffman, *supra* note 5, at 458.

the mark is encouraged to articulate their righteous anger and move beyond the situation at hand. This part of the process is specifically spelled out in various apology protocols. For example, in the *SorryWorks!*[107] model, diffusion of answer is defined as the first thing that a doctor should understand about effective apologies: "The key is anger . . . .disclosure [sic] and apology keep a lid on anger, whereas traditional deny and defend risk management strategies increase anger felt by patients & families, and increase the likelihood of costly litigation."[108] When they provide this advice, *SorryWorks!* recognizes that its function is not to increase a patient's knowledge or the doctor-patient relationship. Instead, their reason is financial: "An enormous & growing body of data is showing that disclosure coupled with apology (when appropriate) actually reduces lawsuits, litigation expenses, and settlements/judgments."[109] In other words, allowing the patient to vent is a money-saver for hospitals and insurers at patients' expense.

One specific technique Goffman notes is that the cooler can effectuate the process by assigning a new role to the mark.[110] Medical apology programs do this as well, at times asking patients who have been cooled out to tell their story and encourage others to do the same. For example, JW, the cancer survivor about whom UMHS wrote, was enlisted to film a video extolling UMHS's apology program and her satisfaction with it.[111]

Coolers themselves sometimes need to be convinced to follow their role because of internal conflict about what they are doing to the mark. To be able to participate in cooling out, Goffman found that the cooler "protects himself from feelings of guilt by arguing that the customer is not really in need of the service he expected to receive . . . and complaints are a sign of bile, not a sign of injury."[112] The apology literature is replete with rationalizations that the pursuit of damages for malpractice is often based upon an injured patient's anger.[113] Likewise, the

107 *SorryWorks!* is an "advocacy organization for disclosure, apology (when appropriate), and upfront compensation (when necessary) after adverse medical events." *About Us*, SORRYWORKS! (last visited Sept. 25, 2011), http://www.sorryworks.net/about.phtml.

108 *5 Things Every Doctor Should Know About Disclosure!*, SORRYWORKS! (last visited Aug. 10, 2011), http://sorryworks.net/fivethings.phtml [hereinafter *5 Things*].

109 *5 Things*, *supra* note 108.

110 Goffman, *supra* note 5, at 456–57.

111 Boothman et al., *supra* note 10, at 157.

112 Goffman, *supra* note 5, at 455.

113 *See, e.g.*, Boothman et al., *supra* note 10, at 133 (explaining patients file suit when they feel lied to or mislead); Kraman & Hamm, *supra* note 24, at 963 (illustrating reasons patients file suit, including breakdowns in the doctor/patient relationship due to physicians' failure to disclose errors).

literature on apologies is filled with rhetoric about patients and lawyers injured by malpractice seeking "big bucks," presumably for injuries that do not justify it.[114] This language used by apology programs supports Goffman's theory that those involved from the medical perspective seek justifications that allow them to inoculate themselves from the guilt associated with the process.

B. The Psychology of Apology

Not only does Goffman's explanation of cooling the mark out appear consistent with the strategy of medical apology programs, psychologists have also explained how apologies affect individuals' interpretations of an incident that gave rise to their legal claim, as well as their decision to seek legal advice for it.[115] In summary, the findings show that not only is a person less likely to pursue litigation following a doctor's apology, but even if a patient does still pursue money damages, the patient is likely to adopt a more pliant negotiating position.[116] This generalized research squares with the research performed by apology programs themselves. For example, UMHS's research found that of the patients that participate, "71% admitted that they accepted less in settlement than they would have had they litigated the case."[117]

A leading scholar on the role of apology in the law, Professor Jennifer Robbennolt of the University of Illinois, has written a series of works exploring the role of apologies in litigation.[118]

114 *See*, *e.g.*, Quinn & Eichler, *supra* note 46, at 709–10 ("Only one third of dollars actually reach injured parties. At the same time, it seemed truly substandard care was not reliably identified by the legal system. Furthermore, this system was inherently adversarial almost always destroying the physician/patient relationship.").

115 *See* Jennifer K. Robbennolt, *Apologies and Civil Justice*, *in* CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL AND LEGAL PERSPECTIVES 195, 197 (Brian H. Bornstein et al. eds., 2008) [hereinafter Robbenolt, *Civil Justice*]. "A growing body of studies suggests that apologies do influence claimant decision making in a number of ways, including decisions to consult attorneys for advice, decisions about whether or not to file suit, judgments about negotiating positions, and ultimate decisions about settlement." *Id.* at 209.

116 *See* Jennifer K. Robbennolt, *Apologies and Settlement Levers*, 3 J. EMPIRICAL L. STUD. 333, 333 (2006) [hereinafter Robbennolt, *Settlement Levers*].

117 J. Sybil Biermann & Richard Boothman, *There Is Another Approach to Medical Malpractice Disputes*, 4 J. ONCOLOGY PRAC. 148, 148 (2006).

118 *See, e.g.*, Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 460 (2003) [hereinafter Robbennolt, *Legal Settlement*] (examining empirical evidence of the effect of apology on perception and decision-making); Jennifer K. Robbennolt, *Apologies and Medical Error*, 467 CLINICAL ORTHOPAEDICS & RELATED RES. 376, 376 (2009) [hereinafter Robbennolt, *Apologies and Med. Error*]; Jennifer K. Robbennolt, *What We Know and Don't Know About the Role of Apologies in Resolving Health Care Disputes*, 21 GA. ST. U. L. REV. 1009, 1009 (2005) [hereinafter Robbennolt, *What We Know*].

While apology programs do not publish the psychological mechanisms they employ when dealing with patients, Professor Robbennolt's findings about what effectively persuades a person square very well with what the literature indicates happens in apology programs.[119]

First, apologies appear to work when they lessen the degree of anger patients feel toward their physicians.[120] In fact, the "types of injurious actions that are often at issue in civil litigation—violation of the victim's autonomy—have been specifically linked to anger responses."[121] The *way* a physician apologizes influences the patient's attitude toward the physician and the prospects of settlement.[122] In fact, an inadequate or poorly delivered apology may *cause* a person to file suit.[123] This is known by those that create apology protocols, with some programs reminding doctors that although the Joint Disclosure rules do not require an apology, failing to do so will likely make the situation worse because the communication will lack "human touch."[124] Apology advocates also know the medical institution's relationship with the patient is strained after they harm patients, and counsel physicians to "bring the patient and family closer and embrace them" by making the patient "their best friend."[125] This appears to match the finding that there is a correlation between anger and litigation, and plays out in apology programs when programs recommend specific strategies for diffusing that anger:

> Any effective, meaningful apology has four basic elements: (1) Empathy or "sorry"; (2) Admission of fault . . . [;] (3) Explanation of what happened and how it will be prevented from happening again; (4) As necessary, an offer of compensation or some sort of fix to the problem that has been created. These elements, in the right cases, eliminate anger felt by the aggrieved party . . . . It is important to explain what happened and how it will be prevented from happening again. . . . Patients want to know what happened.[126]

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119 *See, e.g.*, Robbennolt, *Legal Settlement*, *supra* note 118, at 487.

120 Robbennolt, *Civil Justice*, *supra* note 115, at 202; Robbennolt, *Legal Settlement*, *supra* note 118, at 488. This, of course, is also consistent with the observation Goffman made about the role of a cooler in allowing a mark to vent. Goffman, *supra* note 4, at 457 ("Another standard method of cooling the mark out—one which is frequently employed in conjunction with other methods—is to allow the mark to explode, to break down, to cause a scene, to give full vent to his reactions and feelings, to 'blow his top.' If this release of emotions does not find a target, then it at least serves a cathartic function.").

121 Robbennolt, *Civil Justice*, *supra* note 115, at 202.

122 Robbennolt, *Settlement Levers*, *supra* note 116, at 363.

123 Robbennolt, *What We Know*, *supra* note 118, at 1024.

124 *CRICO's Perspective*, *supra* note 2.

125 DOUG WOJCIESZAK ET AL., SORRY WORKS! DISCLOSURE, APOLOGY, AND RELATIONSHIPS PREVENT MEDICAL MALPRACTICE CLAIMS 60–61 (2d ed. 2010).

126 *Id.* at 62–63.

In terms of timing, patients are more impacted by apologies delivered soon after the negligence occurred, as opposed to later apologies, which are more easily recognizable as ploys to avoid litigation.[127] To avoid this, apology advocates tell physicians to initiate an apology as soon as possible.[128]

In terms of content of the apology, psychologists have found that patients are most influenced when physicians offer "full" apologies under which they take total responsibility for causing the harm.[129] A "partial" apology—when the physician simply expresses sympathy—has less of an effect on a patient's attitude, but still influences patients to settle for less than if the physician offered no apology at all.[130] Apology advocates have recognized that even these partial measures have benefits: when physicians are unwilling to take responsibility for adverse outcomes (or when, for example, that expression of responsibility might not be covered under the jurisdiction's apology shield law), apology advocates still encourage them to make this partial apology: "Convey compassion and empathy for [the] patient's and family's suffering . . . [Words like] 'I'm sorry that you. . .' [or] 'I am sorry for your,'" etc., can assist in re-building trust between the doctor and patient.

Psychologists have also determined several factors that affect patients' subconscious attitudes towards their physicians.[131] For example, the way a physician dresses has a demonstrable effect upon patients' perceptions, establishing authority and credibility. Anecdotal evidence suggests that those in the medical field are well aware of this. One commentator reported that a doctor told her:

> [L]uckily for us, most patients will accept an apology, but it matters a lot how you give it. If you apologize in the hospital or in your office, you've got it made. It's really important to have the white coat on and a stethoscope around your neck, though. If you go in there dressed as any Joe, it won't work.[132]

Apology experts encourage physicians to carefully control the conditions of the disclosure session. Each possible variable, including the apologizer's manner of dress[133] and the location of

127 MICHAEL S. WOODS, HEALING WORDS: THE POWER OF APOLOGY IN MEDICINE 45 (2004) ("Delays in communication make patients and families suspicious.").

128 *Id.*

129 Robbennolt, *Settlement Levers*, *supra* note 116, at 368.

130 *Id.*

131 John E. Ware & Mary K. Snyder, *Dimensions of Patient Attitudes Regarding Doctors and Medical Care Services*, 13 MED. CARE 669, 670 (1975).

132 Erin Ann O'Hara, *Apology and Thick Trust: What Spouse Abusers and Negligent Doctors Might Have in Common*, 79 CHI.-KENT L. REV. 1055, 1079–80 (2004).

133 Shakaib U. Rehman et al., *What to Wear Today? Effect of Doctor's Attire on the*

the session[134] have been studied by the medical industry and have the ability to influence the patient's reaction to the benefit of the hospital or insurer.

On its own, there is nothing wrong with physicians using psychology to maintain their relationships with patients after adverse effects—in some respects, these strategies are simply good customer service. The problem, however, is when these strategies are used to influence legal decisions as opposed to medical ones.[135]

IV. IF EVERYONE IS HAPPY, WHAT'S WRONG?[136]

The literature on apology programs is replete with anecdotes conveying the happiness of patients who gladly agreed to resolve a case as a result of an apology, even if they did so for little or no compensation.[137] The underlying argument seems to be that if a patient is happy, then it is a good result. The literature, however, never makes clear what percentage of patients are ignorant about what they are giving up when they take a partial payment instead of full compensation. The programs leave open the possibility of short-changing patients on economic damages, and (especially) non-economic damages, which apology programs seem fixated on washing away altogether. The literature also never considers the long-term effect of this partial compensation on the patient and society as a whole. This part addresses that issue.

The tort system addresses the challenge of compensating victims for their damages—making them whole—by calculating values for each type of harm suffered.[138] The value of many types of harm is simple to determine because there are market rates

Trust and Confidence of Patients, 118 AM. J. MED. 1279, 1280 (2005). Research indicates patients overwhelmingly *want* physicians to display that authority, and meeting that expectation builds trust. *Id.* at 1283.

134 *See* TRUOG ET AL., *supra* note 10, at 81 (encouraging physicians to disclose errors at the bedside or a quiet location where everyone can be comfortably seated).

135 *See, e.g.*, Robbennolt, *Settlement Levers, supra* note 116, at 363 (discussing the effect of apologies on the settlement of potential medical malpractice legal claims).

136 I give particular thanks and recognition to my research assistant extraordinaire, Christopher J. Fiorentino, who took the lead in drafting this part of the Article.

137 *See* MASS. COAL. FOR THE PREVENTION OF MED. ERRORS, WHEN THINGS GO WRONG: RESPONDING TO ADVERSE EVENTS 28–29 (2006), *available at* http://www.macoalition.org/documents/respondingToAdverseEvents.pdf (recounting patient's "positive" experience after she received an apology and "token" compensation after negligence in her cancer treatments); Quinn & Eichler, *supra* note 46, at 715 (reporting patient "expressed sincere appreciation" after COPIC reimbursed her $3898 for a damaged ureter that required an extra surgery and extended recovery).

138 1 JEROME H. NATES ET AL., DAMAGES IN TORT ACTIONS § 1.01 (2011).

for the jury to reference.[139] However, non-economic harms are more difficult because:

> There is no direct correspondence between money and harm to the body, feelings or reputation. There is no market price for a scar or for loss of hearing since the damages are not measured by the amount for which one would be willing to suffer the harm. The discretion of the judge or jury determines the amount of recovery, the only standard being such an amount as a reasonable person would estimate as fair compensation.[140]

That pain and suffering can be difficult to calculate, however, is not an appropriate reason to downplay its significance. As Professor Neil Komesar of the University of Wisconsin Law School has noted:

> The importance of these nonpecuniary losses can be seen by asking yourself whether you would be indifferent or even nearly indifferent between an uninjured state and a severely injured state, such as paraplegia, blindness, or severe brain damage, so long as your income and wealth remained constant.[141]

For this reason, the courts have long recognized the importance of compensating plaintiffs for their suffering.[142]

By contrast, apology programs only offer a small portion of the total range of damages. COPIC only compensates victims for a maximum of $30,000 of out-of-pocket expenses, and does not compensate victims for their pain and suffering.[143] It is unclear—because they have not released the data—as to how UMHS tabulates damages. However, in JW's case, the settlement value was tied to the projected cost of her children's college education, as opposed to the value of the damages she sustained.[144] Nothing was paid to her for non-economic damages.[145]

Tort reformers have argued that non-economic damage awards are unfair because juries tend to unreasonably calculate them in favor of a plaintiff.[146] Seizing upon this notion, the

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139 *Id.* at § 1.02.

140 RESTATEMENT (SECOND) OF TORTS § 912 cmt. b (1979).

141 Neil K. Komesar, *Injuries and Institutions: Tort Reform, Tort Theory, and Beyond*, 65 N.Y.U. L. REV. 23, 58 (1990).

142 *See, e.g.*, Random v. N.Y. & Erie R.R. Co., 15 N.Y. 415, 424 (1857) (awarding a negligently injured railroad passenger damages for "bodily pain and suffering, without reference to the time when endured").

143 Quinn & Eichler, *supra* note 46, at 710.

144 Boothman et al., *supra* note 10, at 156.

145 *Id.*

146 *See, e.g.*, Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 164–65 (2004) (arguing that pain and suffering damages are inconsistent with the goals of tort law—to "return the injured person to his pre-injury position"—because the only damages that "can genuinely nullify some of the

insurance industry has waged a lengthy campaign to limit malpractice damages (and thus to limit their own exposure).[147] Their lobbyists have convinced over half of state legislatures to implement tort reforms and place arbitrary caps on how much plaintiffs in medical malpractice suits can recover, regardless of how badly the victim is injured.[148] As a result, legislatures have somewhat skewed tort litigation in favor of the injurers rather than the injured.

Nevertheless, unlike apology programs involving unrepresented injured patients, the traditional litigation system is administered by impartial judges, essentially requiring that each party be represented by legal counsel, and utilizing disinterested juries to calculate damages. By contrast, in apology programs, part of the goal seems to be keeping plaintiffs away from the tort system altogether. The result is that, when patients—particularly unrepresented patients—are compensated, there is no third party considering the itemized damages. Instead, the calculation seems to be based on the smallest figure that will mollify the patient.

By playing on psychology and the dynamic of an injured patients' interaction with a physician coached by an insurance company, those that would otherwise be required to pay the

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pain are economic damages for medical expenses to cover pain management and rehabilitation, not noneconomic damages for pain and suffering"). "The tacit assumption [made by opponents of noneconomic damages] is that pain and suffering damages are frivolous and too often granted for phantom or imaginary pain." Michael L. Rustad, *Neglecting the Neglected: The Impact of Noneconomic Damage Caps on Meritorious Nursing Home Lawsuits*, 14 ELDER L.J. 331, 379–80 (2006).

147 *See* Michael Rustad, *The Jurisprudence of Hope: Preserving Humanism in Tort Law*, 28 SUFFOLK U. L. REV. 1099, 1128 (1994) (noting that in 1994 insurance companies had lobbied for fifteen years to limit medical malpractice liability).

148 *See* Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391, 396 (2005) (noting that a majority of states have imposed some kind of limitation on the amount of damages available to a plaintiff in a medical malpractice claim). For example, in Massachusetts, damages for noneconomic losses are limited to $500,000 unless there are "special circumstances" that justify raising the award above the cap. MASS. GEN. LAWS ANN. ch. 231, § 60H (West 2000). In California, noneconomic losses are capped at $250,000 regardless of extenuating circumstances. CAL. CIV. CODE § 3333.2 (West 1997). In Colorado, home of COPIC insurance, *all* damages in medical malpractice cases are limited to $1,000,000 (of which only $250,000 may be for noneconomic damages) unless the court grants special leave. COLO. REV. STAT. ANN. § 13-64-302(1)(b) (West 2005). The theoretical purpose of capping damages is to lower physicians' insurance premiums, but the data does not support that conclusion. Katherine Baicker & Amitabh Chandra, *The Effect of Malpractice Liability on the Delivery of Health Care*, 8 F. FOR HEALTH ECON. & POL'Y 1, 13 (2005), *available at* http://www.hks.harvard.edu/fs/achandr/FHPR_EffectofMalpracticeHealthCareDelivery_2005.pdf. Further, early advocates of caps contended they had no negative effect on patient care, but these caps may actually make medical care more dangerous. *See* Janet Currie & W. Bentley MacLeod, *First Do No Harm?: Tort Reform and Birth Outcomes* 36 (Nat'l Bureau of Econ. Research, Working Paper No. 12478, 2006) (finding damage caps increase complications of childbirth).

traditional damages have discovered value in disclosure and apology.

While protecting profits is an understandable goal for an insurance company, it comes at a cost: every extra dollar of profit realized by the insurer resulting from a medical apology is a dollar taken from an injured patient. On its own, convincing an individual not to sue is no different than any other "bad" settlement. What makes this different is the appearance of a system of methods designed to dissuade patients from actually considering their rights before settling for short money. It also creates a secondary problem; that plaintiffs who accept settlements for less money than their claim is worth may become a drain on society. With no damages to cover future lost wages or future medical expenses, the taxpayers may be left footing the bill for the negligence of others.

By ignoring the measures of damages applied by American courts and steering patients from a neutral venue to redress innocent victims' injuries, these programs stack the deck in favor of the insurance companies who administer them. The result is that others bear the long-term costs of going uncompensated for their physicians' mistakes.

V. THE CURE: "MALPRACTICE *MIRANDA*" AND OTHER FIXES

Apology programs, if run properly, are worth saving. This is because, despite all of the potential for abuse, they still have positive attributes: insurers and injured patients alike benefit from lower litigation costs (both with respect to attorneys' fees on both sides, as well as reducing the costs of discovery, experts, and other expenses); they promote faster resolutions; they allow for an ongoing doctor-patient relationship (assuming the patient is comfortable with it); and, most importantly, they aid the patient's subjective sense of satisfaction with the resolution and outlook for future treatment. There is no reason that these goals could not still be met while reforming what requires repair. This part of the Article suggests necessary changes to do so.

A. Assuring Injured Patients Understand Their Rights

The primary problem with current apology programs is that injured patients are put in a position in which they might easily confuse the willingness of a provider to communicate with the willingness of a provider to compensate them fully. Therefore, the first and most important step is to require apology programs to allow their patients a real opportunity to educate themselves on their rights before being influenced to settle.

To prevent a patient's potential confusion, apology programs should be required to advise patients in any case that has more than a nominal value that they will not resolve the matter with the patient unless and until the patient is educated on his or her legal rights.[149] This should involve advising patients to speak to an attorney. Patients who, after being so advised, choose not to seek counsel should be given a reasonable period of time thereafter to make a sober decision. This "Malpractice *Miranda*" would help patients understand their rights and give them an opportunity to make a sober, intelligent decision about their needs as a result of the malpractice.

Providing information about the possible need to seek an attorney is a rarity among apology programs, with ninety-six percent not doing so.[150] Involving attorneys is recommended by the *SorryWorks!* organization: "Patients and families should never feel like the hospital/insurer is trying to pull a fast one on them, and by encouraging involvement of [personal injury] attorneys you remove those fears and make your disclosure program credible."[151] Yet, neither COPIC (which expressly forbids it) nor UMHS (which allows attorney involvement, but does not expressly recommend it) accept the view that patients are entitled to know their legal rights before negotiation. One possible reason for this discrepancy is that *SorryWorks!* is an advocacy group that has no financial stake in the resolution of claims. By contrast, self-insured hospitals like UMHS and insurers like COPIC are obligated to pay the cost of a settlement and may believe that educating patients about legal decisions could result in more expenses for their organizations.

Because apology programs influence legal decisions, the ethical rules that require a doctor to recommend to malpractice victims that they seek legal counsel should be parallel to that of a similarly situated attorney who suspects he or she has committed malpractice. When a lawyer abuses a client's trust in order to avoid a malpractice suit, the lawyer is violating his or her

149 Not *every* error that merits an apology, of course, should go down the legal path. Minor errors that could never realistically result in a claim being brought should be handled informally (e.g., an overly-rough phlebotomist causing bruising). However, once risk management becomes involved, it would follow that because the hospital is evaluating the matter from a legal angle, the injured patient should be afforded the same opportunity.

150 *See* Lamb et al., *supra* note 16, at 77 (stating that only four percent of hospitals with disclosure programs provide information about lawyers).

151 *September 13, 2006 Newsletter*, SORRYWORKS! (last visited Sept. 10, 2011, 11:23 PM), http://sorryworks.net/newsletter20060913.phtml.

responsibility to the client.[152] The American Bar Association's ethical rules state:

> A lawyer shall not . . . settle a claim or potential claim for . . . liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.[153]

The legal community has accepted that this is of vital importance. As a result, lawyers failing to disclose this conflict of interest before settling a claim are subject to steep penalties, and may lose their licenses.[154]

The reason given to lawyers for this ethical obligation is as applicable to the doctors that ask their injured patients to make a legally significant decision about settlement: "By seeking to settle his own liability, a lawyer places himself in direct conflict with a client. Requiring lawyers to advise clients to consult independent counsel before settling a malpractice dispute helps ensure that clients are well informed before they give up important rights."[155]

Many of the programs outlining disclosure measures suggest language for doctors to use to show empathy, respect, and understanding of the gravity of the situation. Under the concept of the "Malpractice *Miranda*," this language could be supplemented with language about the legal aspects of the malpractice apology program. The doctor could say:

> My goal is to make you better. In addition to promising to do my best to fix your injuries, I want you to understand that because of this error, you have legal rights. I tell you this because I do not just accept responsibility for what happened to you medically, but because I also accept the consequences of that. Therefore, you have to know that I do not take it personally if you pursue your legal rights. In fact, I buy insurance for just this reason and, although I am sad that it is needed, my goal is to make you whole again, including getting fair compensation. I am not a lawyer, and just like you would not want a lawyer to give medical advice, a physician should not give legal advice—especially when there is potentially a conflict of interest.

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152 MODEL RULES OF PROF'L CONDUCT R. 1.8(h) (2011) (discussing conflicts of interest in client-lawyer relationships).

153 *Id.*

154 *See, e.g.*, *In re* Carson, 991 P.2d 896, 903, 905 (Kan. 1999) (censuring publicly a lawyer who attempted to settle an unrepresented former client's malpractice case); *In re* Henderson, 819 So. 2d 296, 301–02 (La. 2002) (disbarring a lawyer for failing to disclose malpractice and seeking a release from his client without advising him to seek third-party legal advice); *In re* Tallon, 447 N.Y.S.2d 50, 51 (App. Div. 1982) (suspending a lawyer from practice for six months for failure to disclose advisability of independent counsel while negotiating a malpractice release).

155 ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT § 51:1112 (2011).

> Therefore, before we agree to any amount of compensation, or any other way we agree is fair to make you whole, I want you to speak to a lawyer. It is up to you if you choose to do so, but my advice is that you should do so. I will not allow you to sign any release[156] before you have spoken to a lawyer or you have had some time to think about it. This is because I feel badly about this situation and I want the best for you, even if it means that my insurance company has to pay you money for this accident.

The industry's advocates would likely argue that patients who participate in apology programs are satisfied with having done so, thus they are, by definition, successful.[157] That misses the point: blissful ignorance is not something for which the medical community, or society as a whole, should strive. To date, the medical-insurance industry's research does not make clear if apology program participants are ever even aware of what it is that they are giving up when they settle their cases as part of an apology program. If apology programs were willing to provide this education, it would set the stage for a fair result. By contrast, if insurance companies feel obligated to try to pay the minimum possible amount of money to patients who have been the victims of malpractice, they should, at the least, not make the doctors who pay premiums complicit in doing so. Doctors can, and should, be free to tell patients that legal advice is the best route to help them get the compensation they need to care for themselves and their loved ones as a result of an unfortunate medical event.

B. Processing Claims Quickly and Fairly

UMHS and the Lexington VAMC both identify the ability to resolve claims quickly as a benefit to apology programs.[158] It would follow that prompt resolution would also potentially benefit patients, as long as they have an opportunity to fully consider their options before choosing whether to pursue litigation.

To accomplish fast claims-processing, as well as fairness to allow patients to consider their options, one solution is to allow

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156 Of course, some disclosure programs, like COPIC's 3Rs program, do not require a release. In that case, the doctor should tell the patient that they should consider pursuing a claim and that the disclosure program will not offer them any money until they do so.

157 *See* Boothman et al., *supra* note 10, at 158 (publicizing the happiness JW stated she felt after participating in their apology program).

158 *See* Kachalia et al., *supra* note 92, at 220 (attributing a substantial proportion of reduced litigation costs at UMHS to reduced claims processing times); Kraman & Hamm, *supra* note 24, at 966 (explaining how local settlement allows the VA to avoid the "hidden expenses of litigation").

for immediate settlement following an apology, as long as the patient certifies they have spoken with an attorney about their legal rights. If the patient chooses not to seek counsel, they should be required to have a cooling off period of six months before settling any claim. Use of this type of time period has been approved by the UMHS when the six months is a hiatus that prevents a patient from suing.[159] Using the same reasoning as UMHS, it follows that one who wishes to accept a settlement as part of a disclosure program should likewise be given six months to think through their decision before making a permanent decision with potentially lifelong consequences on the patient and family.

Another step to make claims processing faster, cheaper and more efficient would be for hospitals and insurers whose insured have committed a negligent error to provide injured patients with a simple, one page "Stipulation of Liability." This stipulation could be provided as soon as the initial meeting post-incident between doctor and patient (and patient's attorney, if desired by the patient). The effect of the stipulation would be that the medical provider would be admitting to being at fault and having caused the patient's damages. The stipulation would be accompanied by a request for either a jury trial on the limited issue of the patient's damages, or an assessment of damages hearing in which a judge determines the patient's damages.

The stipulation would benefit the medical provider's insurer because it would save the expense of pre-trial litigation (attorney fees, expert opinions on the issue of liability, deposition transcript costs, etc.), and would allow for a more efficient processing of the case, with the only issue requiring determination being the amount of the patient's damages. It would also be ethically sound: it would be a recognition of responsibility and a willingness to participate in our society's mechanism for deciding how to determine the cost to accompany that responsibility.

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159 Among the reasons stated by the UMHS hospital's website for the success of their disclosure program are:

> We're fortunate to be located in Michigan**,** a state that passed sensible medical malpractice reform in the 1990s and is not having some of the same crisis situations as other states. Our state law, among other things, builds a six-month "cooling off" period into the malpractice lawsuit process. If a patient is thinking about bringing suit against a doctor or hospital for medical malpractice, the patient must first alert prospective defendants of their complaints with a "notice of intent," and both parties then have six months to consider their cases before going to court.

Medical Malpractice and Patient Safety at UMHS, U. MICH. HEALTH SYS. (last visited July 25, 2011), http://www.med.umich.edu/news/newsroom/mm.htm [hereinafter U. OF MICH. HEALTH SYS.].

C. Closing COPIC-Style Loopholes

Any time a patient resolves a case as part of an apology/disclosure process, even if it's framed as a "no-fault" program like COPIC's 3Rs program, the provider should still be required to report the act of malpractice. The databases associated with malpractice claims serve a critical public safety purpose to inform patients (and licensing authorities) of whether providers are negligent in their care. That a doctor could escape this because he or she was able to convince a patient not to litigate an otherwise viable malpractice claim not only is a disservice to the public in general, but serves as motivation for the negligent medical provider to inappropriately press the harmed patient into settling.

D. Repealing Apology Shield Laws

Finally, medical apology shield laws should be repealed. Although the anecdotal evidence indicates that for an attorney to actually attempt to use an admission of fault against a physician at trial would be detrimental to a case against that doctor,[160] that does not change the fact that doctors should play by the same set of rules as all other people.[161] This change would mean that a doctor's apology or admission against interest, as a norm, is admissible. This is simply the same default standard as exists for an attorney who admits malpractice to a client or a driver that admits negligent driving to the person he hit.

CONCLUSION

In concluding this Article, it is important to point out three things that it did *not* argue. First, it did not argue that patients must, or even should, pursue a malpractice claim against a doctor that has treated them carelessly and caused them injury. Adults can, and should, be expected to make responsible decisions about the benefits and disadvantages of pursuing a

160 TRUOG ET AL., *supra* note 10, at 46 (citations omitted) ("As the president of the South Carolina Trial Association stated in testimony before the South Carolina Senate, 'I would never introduce a doctor's apology in court. It is my job to make a doctor look bad in front of a jury, and telling the jury the doctor apologized and tried to do the right thing kills my case.'").

161 *See generally* Mark Bennett & Christopher Dewberry, *"I've Said I'm Sorry, Haven't I?" A Study of the Identity Implications and Constraints that Apologies Create for their Recipients*, 13 CURRENT PSYCHOL. 10, 15 (2004) (demonstrating victims who reject apologies are viewed less sympathetically by third parties). Advocates justify tort reforms, such as apology laws, by claiming those laws will reduce the cost of medical malpractice insurance, but the laws have not had that effect; instead, they appear more closely linked to helping insurance companies cover losses sustained in stock market speculation. *See* June Smith Tyler, *Medical Malpractice Statutes: Special Protection for a Privileged Few?*, 12 N. KY. L. REV 295, 299–303 (1985).

legal course of action, just as they should make educated, informed medical decisions. The problem, this Article argues, is that the current model for apology programs is designed to make it harder for patients to reach these reasonable, informed decisions. This need not be the situation; there are simple, fair fixes to the problem created by apology programs to prevent parties responsible to pay for the damages caused by malpractice to victimize patients by convincing them not to pursue claims that their insurers would have to pay. To correct this problem, this Article argued that malpractice victims require simple protections that even the playing field.

Second, this Article did not accept the insurance industry's invented definitions of "fair" and "reasonable" compensation. The medical insurance literature on apology programs is replete with examples of what those who have to pay claims believe to be "fair," followed by language indicating that their definitions simply do not correspond with what our legal system has defined as the appropriate measure of damages, assuming a plaintiff can prove malpractice.[162] Instead, the literature reflects an imagined system of tort damages that delegitimizes the availability of non-economic damages, and perhaps, even more expensive measures of economic damages. This is not an article that argues about whether the legal system currently assesses damages the "right" way. Instead, it accepts that full and fair damages are as defined by courts and applied by juries.[163] Therefore, this article accepts the commonly accepted and current *legal* definition of "fair" and "reasonable" compensation, which requires that tort victims be compensated with all of the economic and non-economic damages sufficient to make the injured plaintiff "whole."

Third, and finally, this Article did not argue that doctors are the "bad guys." Just the opposite: it is intended to expose the actual motivation behind medical disclosure policies—insurers' desire to keep more money for themselves and give less to

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162 *See, e.g.*, Steve S. Kraman, *Proactive Reporting, Investigation, Disclosure, and Remedying of Medical Errors Leads to Similar or Lower than Average Malpractice Claim Costs*, AHRQ HEALTH CARE INNOVATIONS EXCHANGE (last visited July 25, 2011), http://innovations.ahrq.gov/content.aspx?id=2731 ("[After disclosure, Kentucky VA] hospital representatives offer to provide corrective medical or surgical treatment, assist the patient/family in filing for needed services associated with any disability resulting from medical care, and/or present an offer of monetary compensation. The respective attorneys negotiate to reach a fair settlement based on a reasonable calculation of loss."); U. OF MICH. HEALTH SYS., *supra* note 159 ("If we have concluded that our care was unreasonable, we say so—and we apologize. If our care caused an injury, we work with the patient and his/her counsel to reach mutual agreement about a resolution. This doesn't always mean a settlement, but if it does, we compensate quickly and fairly.").

163 *See supra* notes 138–148 and accompanying text (describing full and fair compensation under the tort system).

patients—and to suggest ways to reform the process to meet the needs of improving doctor-patient communication while providing injured patients with an appropriate, compassionate, and fair opportunity to receive compensation in the event of an unwanted outcome. Rather than demonize doctors, it is hoped that medical providers will read this Article, recognize the disservice that their insurers are asking them to commit against their patients, and revolt against it. By allowing the legal process to go forward after an apology, doctors can then know that they are putting patients in the best position possible to recover from a medical error.

Disclosure programs put in place by insurance companies and self-insured hospitals put their own interests in front of both patients and providers alike. For example, consider the guidelines provided to doctors by CRICO/RMF to its physicians when an error occurs:

> In cases that are clear-cut and where an objectively visible error has occurred, apologies should be made. Some institutions refer to these as "The Wrongs": wrong patient; wrong digit/limb/organ; wrong drug/dose/method of administration; wrong procedure, etc. If a doctor, assisted by the institutional risk manager, can clearly determine that the unanticipated outcome has been caused by one of these "wrongs", [*sic*] an immediate apology should be made. However, it should be emphasized that physicians should not make this determination on their own. They should immediately contact their risk manager, lay out every known fact, and then let the risk manager serve as their expert.[164]

The assertions are both remarkable and insulting to the physicians expected to carry them out: it is CRICO/RMF's position that *even if a doctor accidentally cuts off the wrong limb of a patient*, that doctor cannot determine if his or her act was an error. Can one seriously believe that CRICO/RMF's risk managers believe that they know better than a provider if they have made an error? Instead, language like the above suggests what insurers really want when dealing with their physicians: control. When a doctor submits to the insurer's control, in turn, it allows the insurer to instruct the doctor on how to talk to their patients to steer them away from seeking compensation for their injuries. While no doctor wants a malpractice claim on his or her record, it is also hard to imagine any doctor that pays for malpractice insurance would want his or her injured patient to be shortchanged by the insurer to whom they pay premiums (let alone that the doctor that made the error would want to be the

164 *CRICO's Perspective*, *supra* note 2.

insurance company's tool to convince the patient that their injury should not be compensated).

Those that have to pay malpractice claims have a conflict of interest with physicians: the risk manager's obligation is to the insurance company, whereas the physician's obligation is to the patient. Even those who have written strongly in favor of apology programs, like Dr. Steve Kraman and Ginny Hamm, note that this phenomenon is inherent to risk management. By their definition, "risk management usually refers to self-protective activities meant to prevent real or potential threats of financial loss due to accident, injury, or medical malpractice. When a malpractice claim is made against an institution in the private sector, risk managers coordinate the defense against patients, their dependents, and their attorneys."[165]

When insurance companies, or the internal risk managers at a hospital who are in league with the insurers, use their influence over physicians to encourage apology as a means of maximizing their own profits, they taint the physician's responsibility to the patient. Without corporate concerns about compensating patients, insurance companies and risk managers would not publish elaborate guidance to their doctors explaining sophisticated policies about how to apologize.[166] Doctors would not need to seek approval of a risk manager before admitting an error to a patient that has just suffered from a "never event" at their hands.[167] This Article seeks to cut doctors out of the hypocrisy by allowing them to offer a sincere, no-strings-attached apology after an act of malpractice that leaves the legal effects of

165 Kraman & Hamm, *supra* note 24, at 963 (emphasis omitted).

166 *See, e.g.*, *CRICO's Perspective*, *supra* note 2. *See also* MASS. COAL. FOR THE PREVENTION OF MED. ERRORS, WHEN THINGS GO WRONG: RESPONDING TO ADVERSE EVENTS 1 (2006), *available at* http://www.macoalition.org/documents/respondingToAdverseEvents.pdf (providing advice regarding "The Patient and Family Experience"; "The Caregiver Experience"; and "Management of the Event"); Am. Soc'y for Healthcare Risk Mgmt., *Disclosure: What Works Now & What Can Work Even Better*, 24 J. HEALTHCARE RISK MGMT. 19 (2004) ("The next step in better communication with patients"; "Creating an effective patient communication polity"; and "What works now and what can work even better."). Furthermore, a cottage industry of private companies has sprung up offering guidance and seminars to physicians instructing exactly what to say, when to say it, under what circumstances, and in what setting. These programs are designed to minimize the possibility the disclosure might instigate, rather than prevent, litigation. *See, e.g.*, TRUOG ET AL., *supra* note 10; WOJCIESZAK, *supra* note 125; WOODS, *supra* note 127.

167 Doctors deliver apologies, but they are trained to carefully plan their words in concert with their risk manager. *See, e.g.*, *Disclosure*, CRICO/RMF (last visited Sept. 27, 2011), http://www.rmf.harvard.edu/education-interventions/materials-for-instructors/disclosure/disclosure-support-materials.aspx. A "never event" is a term used by the National Quality Forum (NQF) to describe particularly shocking medical errors (such as wrong-site surgery) that should never occur. *Never Events*, U.S. DEP'T HEALTH & HUM. SERVS. (July 13, 2011), http://psnet.ahrq.gov/primer.aspx?primerID=3.

that to the insurance company to whom the doctor pays premiums for just such a purpose.

The shame is that medical apology programs *could be* a positive thing. Saving on psychological stress and anguish of the patient and physician, lowering attorneys' fees and litigation costs, and lightening burdens on already overwhelmed court systems are all laudable goals. Using power differentials and taking advantage of harmed patients to increase profits are not. Some commentators have argued that doctors are fiduciaries of their patients, thus owing them the highest possible duty to protect their interests.[168] Some courts have even ruled as such.[169] We should take seriously the idea that doctors owe their primary allegiance to their patients; not just in making medical decisions, but in any and all decisions relating to their relationship. In their White Paper on disclosing malpractice, the Massachusetts Coalition for the Protection of Medical Errors suggested that, when approaching these issues, it should be done from the patient's point of view.[170] They asked, "What would I want if I were harmed by my treatment?" and "[W]hat is the right thing to do?"[171]

This Article stands for that idea that doing the "right thing" for patients requires something more than convincing them not to seek compensation through litigation for injuries caused by negligent errors. Adults can, and should, be expected to make serious decisions about whether to pursue legal claims that they are entitled to make. If an injured patient, after soberly considering the options, decides not to pursue a claim, then that is a perfectly acceptable result. However, in situations where a

168 *See* Thomas L. Hafemeister & Sarah P. Bryan, *Beware Those Bearing Gifts: Physicians' Fiduciary Duty to Avoid Pharmaceutical Marketing*, 57 U. KAN. L. REV. 491, 526 (2009) (suggesting physicians' fiduciary duties obligate them to avoid effects of medical manufacturers' marketing). *See also* Thomas L. Hafemeister & Richard M. Gulbrandsen, Jr., *The Fiduciary Obligation of Physicians to "Just Say No" if an "Informed" Patient Demands Services that Are Not Medically Indicated*, 39 SETON HALL L. REV. 335, 374 (2009) (suggesting physicians' fiduciary duty includes obligation to deny patients' requests for medically unnecessary services). As one commentator noted, "[s]o long as doctors continue to claim the mantle of professional and not mere business contractor, they are privileged by the trust invested in them by patients, and also burdened by the duty of loyalty and devotion to patient welfare above their own that their status as fiduciaries entails." Charity Scott, *Doctors as Advocates, Lawyers as Healers*, 29 HAMLINE J. PUB. L. & POL'Y 331, 350–51 (2008).

169 S*ee, e.g.*, Emmet v. E. Dispensary and Cas. Hosp., 396 F.2d 931, 937 (D.C. Cir. 1967) (finding a fiduciary relationship exists between physicians and patients); Hahn v. Mirda, 54 Cal. Rptr. 3d 527, 532 (2007) (recognizing California courts have "repeatedly" recognized the physician/patient relationship as a fiduciary one); Nixdorf v. Hicken, 612 P.2d 348, 354 (Utah 1980) (explaining that the doctrine of informed consent springs from the fiduciary relationship between physician and patient).

170 MASS. COAL. FOR THE PREVENTION OF MED. ERRORS, *supra* note 137, at 3.

171 *Id.*

person is injured and scared, the medical industry should find ways to give them an opportunity to make educated decisions and not take advantage of their weakened state.

Courts Don't Follow: Reasonable Compensation Rulings and the *Exacto Spring* Approach

*Beth Stetson, Alexis Downs, Evan Shough and Dana Blake**

INTRODUCTION

The "reasonable compensation" issue is among the most frequently litigated tax issues.[1] Its genesis is the Internal Revenue Service's ("Service") concern that, to avoid double taxation, closely-held corporations may unreasonably increase salaries to shareholder-employees rather than distributing dividends to them.[2] The relevant statute, section 162 of the Internal Revenue Code ("Code"), allows taxpayers to deduct "ordinary and necessary expenses . . . including . . . a reasonable allowance for salaries or other compensation for personal services actually rendered."[3] Regulation 1.162-7(a) provides that deductible compensation payments must be both "reasonable" ("amount" test)[4] and "purely for services" ("intent" test).[5]

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1 Andrew W. Stumpff, *The Reasonable Compensation Rule*, 19 VA. TAX REV. 371, 372 n.4 (1999).

2 Lawrence R. Duthler, *The Independent Investor Test: The Latest Test in the Search for Reasonable Compensation is Blurred in the Second Circuit*, 45 WAYNE L. REV. 1953, 1955–56 (2000). The issue of whether a payment represents deductible compensation (as opposed to, for example, a disguised nondeductible dividend) generally only arises when an employee is also an owner. *Id.* at 1955. Currently, the federal corporate income tax rate varies between 15% and 39%, while the maximum individual rate is 35% for ordinary income and 15% for dividends. If a payment is treated as dividend rather than compensation, the shareholder saving of 20% (35% – 15%) offsets somewhat the corporate loss of 15% to 39%. For corporations with taxable income between $335,000 and $10 million, the marginal rate is 34%. For such corporations in tandem with their officers, the amount at issue is 14% (34% – 20%) of disputed compensation. Thus, even though dividends are tax-favored at the individual level, compensation is still generally advantageous for a corporation and officer in tandem. Melanie G. McCoskey, *Reasonable Compensation: Do You Know Where Your Circuit Stands?*, 109 J. TAX'N 228, 228 (2008).

3 I.R.C. § 162(a)(1) (2006).

4 Anne E. Moran, *Reasonable Compensation*, *in* TAX MANAGEMENT A-1, A-3 (Bureau of National Affairs, Portfolios Ser. No. 390-5th, 2011). Courts rarely focus on the intent

The "amount" test is the usual battleground between taxpayers and the Service.[6] Relevant thereto, Regulation 1.162-7(b)(3) prescribes "[i]n any event the allowance for the compensation paid may not exceed what is reasonable under all the circumstances" and "[i]t is, in general, just to assume that reasonable and true compensation is only such amount as would ordinarily be paid for like services by like enterprises under like circumstances."[7]

Prior to *Exacto Spring*[8] in 1999, courts generally used a "facts and circumstances" test with multiple objective factors to determine the amount of reasonable compensation, an approach consonant with section 162 and its regulations.[9] In *Exacto Spring*, the Seventh Circuit alludes to the section 162 regulations only with respect to the "intent" test; and the court harshly criticizes the multiple objective factors analysis used by the Tax Court with respect to the "amount" test.[10] The Seventh Circuit then turns to economic theory, opining that if a given amount of compensation leaves return on equity sufficient to satisfy an independent investor, then it is presumptively reasonable.[11]

We believe *Exacto Spring* represents a legally improper and practically unwise departure from other reasonable compensation jurisprudence. Below, we first explain that *Exacto Spring* overstates the judicial trend regarding use of an independent investor perspective and return on equity in reasonable compensation cases. We then discuss *Exacto Spring* and other courts' reluctance to follow its approach. We then explicate the opinion's (1) inconsonance with section 162, its regulations, and its other case law, (2) questionable behavioral assumptions, and (3) creation of more fodder for confusion than

test. *Id.*; McCoskey, *supra* note 2, at 228. Recently, courts have explicitly relied on the intent test in only two situations: (1) when a taxpayer attempts to re-characterize a payment as compensation, and (2) when a payment's characterization as compensation does not comport with its substance. Moran, *supra*.

5 Treas. Reg. § 1.162-7(a) (2011); Moran, *supra* note 4, at A-3. Hereafter, unless otherwise indicated, reasonable compensation refers to the *amount* of reasonable compensation.

6 McCoskey, *supra* note 2, at 228–29.

7 Treas. Reg. § 1.162-7(b)(3) (2011). Unlike regulations relating to some factual issues (for example, I.R.C. § 183 regulations), the I.R.C. § 162 regulations do not list specific factors courts should use to determine reasonable compensation. Treas. Reg. §§ 1.183-2(b), 1.162 (2011).

8 Exacto Spring Corp. v. Comm'r, 196 F.3d 833 (7th Cir. 1999). Unless otherwise indicated, references herein to *Exacto Spring* are to the Seventh Circuit opinion. Hereafter, employee-shareholders whose compensation is at issue are referred to as the CEO (Chief Executive Officer) or officers.

9 Treas. Reg. § 1.162-7 (2011); *see, e.g.*, Mayson Mfg. Co. v. Comm'r, 178 F.2d 115, 119 (6th Cir. 1949); Elliotts, Inc. v. Comm'r, 716 F.2d 1241, 1245–48 (9th Cir. 1983).

10 *Exacto Spring*, 196 F.3d at 835–37.

11 *Id.* at 839.

using multiple objective factors. Finally, we offer a few of our own thoughts and suggestions.[12]

Whether courts supplant current reasonable compensation jurisprudence with the *Exacto Spring* approach can be dispositive.[13] *Exacto Spring* thus gives rise to a potentially outcome determinative split in approach between the circuits regarding one of the most frequently litigated tax issues. Supreme Court intervention would not be surprising, and additional discussion remains warranted.

I. *EXACTO SPRING* OVERSTATES THE JUDICIAL TREND REGARDING THE INDEPENDENT INVESTOR PERSPECTIVE AND RETURN ON EQUITY[14]

Except for the Seventh Circuit in *Exacto Spring* and *Menard, Inc. v. Commissioner*,[15] courts have used multiple objective factors to determine reasonable compensation.[16] Although the sets of factors vary from circuit to circuit, they are similar.[17]

12 We are not the first to discuss the reasonable compensation issue recently. *See, e.g.*, Jason L. Behrens, *What Is Reasonable Compensation for Deduction Purposes? Two Tests Exist But Neither Paints a Clear Picture, as Evidenced in* Devine Bros. v. Commissioner, 57 TAX LAW. 793 (2004); Heather L. Hathaway, *Determining the Deductibility of Executive Compensation:* Exacto Spring Corp. v. Commissioner, 53 TAX LAW. 919 (2000); *see generally* Duthler, *supra* note 2.

13 Courts have both held compensation to be unreasonable despite return on equity sufficient to satisfy an independent investor and held compensation to be reasonable despite return on equity insufficient to satisfy an independent investor. In *Owensby & Kritikos, Inc. v. Commissioner*, the Tax Court held the compensation therein unreasonable despite acknowledging the taxpayer's return on equity compared favorably to that of comparable companies. Owensby & Kritikos, Inc. v. Comm'r, 50 T.C.M. (CCH) 29, 43–48 (1985). The Fifth Circuit affirmed. Owensby & Kritikos, Inc. v. Comm'r, 819 F.2d 1315, 1334 (5th Cir. 1987). It viewed the taxpayer's return on equity of 212.5% and 47.6% for the two years at issue as "impressive" and "far in excess of the return on equity of most comparable, publicly traded corporations" but rejected the taxpayer's contention that this raised a "substantial presumption" the compensation was reasonable. *Id.* at 1327. In *John L. Ginger Masonry, Inc. v. Commissioner*, the Tax Court held the compensation therein reasonable despite the taxpayer's return on equity for the three years at issue of 1%, negative 13%, and 2%, for an average of negative 3.33% (return on equity for the previous five years averaged 45.2%). John L. Ginger Masonry, Inc. v. Comm'r, 73 T.C.M. (CCH) 2921, 2928–29 (1997). The Tax Court justified its holding on two points. First, the taxpayer's masonry contracting business was affected by a "precipitous drop in the residential housing market" that began in the first year at issue. *Id.* at 2928. Second, the officer "had foregone compensation in prior years in an attempt to enlarge [the taxpayer's] capital base in order to satisfy the demands of the large developers." *Id.*

14 We are not alone in many of our opinions expressed in this section. *See, e.g.*, Hathaway, *supra* note 12, at 924–26.

15 Menard, Inc. v. Comm'r, 560 F.3d 620 (7th Cir. 2009).

16 Mayson Mfg. Co. v. Comm'r, 178 F.2d 115, 119 (6th Cir. 1949). Unless otherwise indicated, references herein to *Mayson Manufacturing* are to the Sixth Circuit opinion.

17 Duthler, *supra* note 2, at 1953.

Courts view no single factor as dispositive and weigh the totality of facts and circumstances.[18]

The two most commonly used sets of factors are those set forth in *Mayson Manufacturing Company v. Commissioner*[19] and *Elliotts, Inc. v. Commissioner*.[20] *Mayson Manufacturing* set forth nine factors: (1) officer qualifications; (2) nature, extent, and scope of the officer's work; (3) business size and complexity; (4) comparison of officer salary to business gross income and net income; (5) prevailing general economic conditions; (6) comparison of officer salary with distributions to stockholders; (7) prevailing rates of compensation for comparable positions and comparable businesses; (8) taxpayer salary policy for all employees; and (9) prior compensation paid to the officer.[21] *Elliotts* set forth five factors: (1) officer role in the company, including position held, hours worked, and duties performed, as well as general importance of the officer to company success; (2) comparison of the officer's salary with those paid by similar companies for similar services; (3) character and condition of the company, including its sales, net income, and capital value, as well as business complexity and general economic conditions; (4) potential conflicts of interest, including the independent investor standard; and (5) internal inconsistency in a company's treatment of payments to employees.[22]

In the 1949 *Mayson Manufacturing* case, one factor is comparison of officer salary with distributions to stockholders.[23] In the 1950s and 1960s, when addressing both the "intent" and "amount" tests, courts often looked to whether dividends had been paid.[24] In 1970, the Court of Claims decided *Charles McCandless Tile Service v. United States*, which gave rise to the "automatic dividend" rule.[25] Despite being generally profitable, the *McCandless* taxpayer had paid no dividends since its inception. The Court of Claims found that, even though the compensation was reasonable in amount (satisfied the "amount" test), the failure to pay dividends indicated "any return on equity

18 *Mayson*, 178 F.2d at 119.

19 *Id.*

20 Elliotts, Inc. v. Comm'r, 716 F.2d 1241, 1245–46 (9th Cir. 1983). Unless otherwise indicated, references herein to *Elliotts* are to the Ninth Circuit opinion. *See also* McCoskey, *supra* note 2, at 229–30.

21 *Mayson*, 178 F.2d at 119.

22 *Elliotts*, 716 F.2d at 1245–47.

23 *Mayson*, 178 F.2d at 119.

24 *E.g.*, Pac. Grains, Inc. v. Comm'r, 399 F.2d 603, 606–07 (9th Cir. 1968).

25 Charles McCandless Tile Serv. v. United States, 422 F.2d 1336, 1339–40 (Ct. Cl. 1970); Michael Q. Eagan, *Reasonable Compensation and the Close Corporation:* McCandless*, the Automatic Dividend Rule, and the Dual Level Test*, 26 STAN. L. REV. 441, 445 (1974).

capital is so conspicuous by its absence as to indicate . . . the purported compensation payments necessarily contained a distribution of corporate earnings" (failed the "intent" test) and, therefore, disallowed the compensation deduction in the amount needed to leave a fifteen percent return on equity.[26] In essence, *McCandless* imposed a "substance over form" analysis into the "intent" test.

With respect to the "amount" test, in the 1970s courts began to speak occasionally in terms of the independent investor and return on equity, not just in terms of dividend payments. For example, in 1974 in *Edwin's, Inc. v. United States*, the Seventh Circuit noted the taxpayer's profit exceeded twenty percent of invested capital.[27] The previous year, in *Charles Schneider & Company v. Commissioner*[28] and in *Carole Accessories, Inc. v. Commissioner*,[29] and in 1980 in *Cromer v. Commissioner*,[30] the Tax Court viewed failure to pay dividends as evidencing unreasonable compensation because independent investors would demand a return on their capital. In 1981, in *Foos v. Commissioner*, the Tax Court viewed return on equity as one of twenty-one factors to be weighed in the "amount" test.[31]

In *Exacto Spring*, to justify abandoning multiple objective factors, the Seventh Circuit characterized three previous circuit opinions as "moving toward a much simpler and more purposive test, the 'independent investor' test."[32] The first opinion, *Elliott*s, was issued by the Ninth Circuit in 1983.[33] The second and third opinions, *RAPCO, Inc. v. Commissioner*[34] and *Dexsil Corporation v. Commissioner*,[35] were issued by the Second Circuit in the 1990s. All three opinions merely called for an examination as to whether return on equity would satisfy an independent investor as *one* of the "amount" test multiple objective factors.

In *Elliotts,* the Ninth Circuit rejected the *McCandless* "automatic dividend" rule.[36] The Court noted that dividend payment is not legally mandated and it may be in the best

26 *McCandless*, 422 F.2d at 1339–40.

27 Edwin's, Inc. v. United States, 501 F.2d 675, 677 (7th Cir. 1974).

28 Charles Schneider & Co., Inc. v. Comm'r, 32 T.C.M. (CCH) 555, 568 (1973).

29 Carole Accessories, Inc. v. Comm'r, 32 T.C.M. (CCH) 1285, 1290 (1973).

30 Cromer v. Comm'r, 40 T.C.M. (CCH) 701, 705 (1980).

31 Foos v. Comm'r, 41 T.C.M. (CCH) 863, 878–79 (1981).

32 Exacto Spring Corp. v. Comm'r, 196 F.3d 833, 838 (7th Cir. 1999).

33 Elliotts, Inc. v. Comm'r, 716 F.2d 1241 (9th Cir. 1983).

34 RAPCO, Inc. v. Comm'r, 85 F.3d 950 (2d Cir. 1996). Unless otherwise indicated, references herein to *RAPCO* are to the Second Circuit opinion.

35 Dexsil Corp. v. Comm'r, 147 F.3d 96 (2d Cir. 1998). Unless otherwise indicated, references herein to *Dexsil* are to the Second Circuit opinion.

36 *Elliotts*, 716 F.2d at 1244.

interests of the company and shareholders for funds to be retained and reinvested in the company.[37] The Ninth Circuit looked at each of the *Elliotts* factors.[38] With respect to the "independent investor standard," it stated as follows:

> [I]t is appropriate to evaluate the compensation payments from the perspective of a hypothetical independent shareholder. If the bulk of the corporation's earnings are being paid out in the form of compensation, so that the corporate profits, after payment of the compensation, do not represent a reasonable return on the shareholder's equity in the corporation, then an independent shareholder would probably not approve of the compensation arrangement. If, however, that is not the case, and the company's earnings on equity remain at a level that would satisfy an independent investor, there is a strong indication that management is providing compensable services and that profits are not being siphoned out of the company disguised as salary.[39]

The Ninth Circuit viewed the taxpayer's average return on equity of twenty percent for the two years at issue as likely sufficient to satisfy an independent investor and held that the Tax Court erred by limiting its analysis to the taxpayer's failure to pay dividends and remanded the case.[40]

Since *Elliotts*, courts generally look to the viewpoint of the independent investor in reasonable compensation cases, but do so only with respect to the "amount" test.[41] As long as the formalities of calling payments compensation are observed, courts hold the "intent" test to be met.[42] After migration to the "amount" test, the viewpoint of the independent investor became just one of several factors and lost its potential trump power exercised in *McCandless* via the "intent" test.[43]

In *RAPCO*, even though the taxpayer's return on equity for the years at issue compared favorably to that of the Standard & Poor's 500, the Tax Court sustained most of the compensation disallowance.[44] The Second Circuit looked to the *Elliotts* factors

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37 *Id.*

38 *Id.* at 1245–48.

39 *Id.* at 1247.

40 *Id.* at 1247–48. The Tax Court did not change its holding on remand. However, it carefully crafted its explanations for not doing so from the viewpoint of a "hypothetical independent investor." For example, it reconsidered the taxpayer's return on equity, but found it too low in comparison to comparable companies. Elliotts, Inc. v. Comm'r, 48 T.C.M. (CCH) 1245, 1249–50 (1984), *aff'd*, 782 F.2d 1051 (9th Cir. 1986).

41 *See* RAPCO, Inc. v. Comm'r, 85 F.3d 950, 954–55 (2d Cir. 1996).

42 McCoskey, *supra* note 2, at 228; *see, e.g.*, Dexsil Corp. v. Comm'r, 147 F.3d 96, 100–01 (2d Cir. 1998).

43 *Id.*

44 RAPCO, Inc. v. Comm'r, 69 T.C.M. (CCH) 2238, 2241 (1995), *aff'd*, 85 F.3d at 955–56.

and affirmed.[45] In response to the taxpayer's argument that the Tax Court gave too little consideration to the effect its "impressive" return on equity would have on a "disinterested shareholder," the Second Circuit noted that the Tax Court "explicitly conceded that [the taxpayer] had a substantial return on equity" but "correctly acknowledged . . . return on equity is only one factor"; and "the [Tax Court] appropriately discounted this factor, in the absence of evidence comparing [the taxpayer's] return on equity to that of *similar* companies."[46] In *Dexsil*, although the Second Circuit held the Tax Court erroneously failed to consider the compensation at issue "from the perspective of an independent investor,"[47] it clearly viewed all of the *Elliotts* factors as relevant.[48]

After *Elliotts*, but prior to *Exacto Spring*, if reliable evidence regarding return on equity was available, the Tax Court generally viewed such evidence as indicative of reasonable compensation,[49] while in a few cases, it viewed such evidence as indicating compensation was unreasonable.[50] However, no court other than the Seventh Circuit has interpreted *Elliotts*, *RAPCO*,

45 *RAPCO*, 85 F.3d at 955–56.

46 *Id.*

47 *Dexsil*, 147 F.3d at 101, 103. On remand, the Tax Court did not agree that an independent investor would be satisfied with a return on equity equal to that of major stock exchange companies, stating "[i]f that were the law, any amount of compensation would be regarded as reasonable as long as a minimal average return . . . was reflected on the company's balance sheets." Dexsil Corp. v. Comm'r, 77 T.C.M. (CCH) 1973, 1975 (1999).

48 *Dexsil*, 147 F.3d at 100.

49 *See, e.g.*, Webster Tool & Die, Inc. v. Comm'r, 51 T.C.M. (CCH) 86, 91 (1985); M. & E. Shindler, Inc. v. Comm'r, 63 T.C.M (CCH) 3039, 3039–40 (1992); Auto. Inv. Dev., Inc. v. Comm'r, 66 T.C.M. (CCH) 57, 67 (1993); Mortex Mfg. Co., Inc. v. Comm'r, 67 T.C.M. (CCH) 2412, 2419 (1994); L & B Pipe & Supply Co. v. Comm'r, 67 T.C.M. (CCH) 2798, 2805–06 (1994); Universal Mfg. Co., Inc. v. Comm'r, 68 T.C.M. (CCH) 305, 314 (1994); Sunbelt Clothing Co., Inc. v. Comm'r, 74 T.C.M. (CCH) 195, 197 (1997); Tricon Metals & Serv., Inc. v. Comm'r, 74 T.C.M. (CCH) 287, 292 (1997); Choate Constr. Co. v. Comm'r, 74 T.C.M. (CCH) 1092, 1098 (1997). Over this period, federal district courts looked to and used the "independent investor" test in a manner similar to the Tax Court. *See, e.g.*, Trucks, Inc., v. United States, 588 F. Supp. 638, 647 (D. Neb. 1984), *aff'd*, 763 F.2d 339 (8th Cir. 1985); Shaffstall Corp. v. United States, 639 F. Supp. 1041, 1047 (S.D. Ind. 1986).

50 *See, e.g.*, Donald Palmer Co. v. Comm'r, 69 T.C.M. (CCH) 1869, 1872–73 (1995); H & A Int'l Jewelry, Ltd. v. Comm'r, 74 T.C.M. (CCH) 915, 922 (1997); LabelGraphics, Inc. v. Comm'r, 76 T.C.M. (CCH) 518, 527–28 (1998); Escrow Connection, Inc. v. Comm'r, 73 T.C.M. (CCH) 1705, 1711 (1997). In *Alpha Medical, Inc. v. Commissioner*, 74 T.C.M. (CCH) 893, 901 (1997), the Tax Court held part of the claimed compensation unreasonable despite finding equity grew considerably during the CEO's tenure and the year's 98.65% return on equity was impressive. The Sixth Circuit reversed and held the compensation reasonable, opining that the Tax Court placed insufficient emphasis on the favorable growth in equity and return on equity. Alpha Med., Inc. v. Comm'r, 172 F.3d 942, 949, 952 (6th Cir. 1999).

or *Dexsil* as calling for abandoning the use of multiple objective factors.[51]

II. *EXACTO SPRING* AND OTHER COURTS' RELUCTANCE TO FOLLOW ITS APPROACH

A. *Exacto Spring*

In *Exacto Spring*, the taxpayer, a manufacturer of precision springs, paid its chief executive (also cofounder and principal owner) $1.3 million in 1993 and $1 million in 1994.[52] The Service contended that the proper compensation for these years was $381,000 and $400,000, respectively.[53] Using a seven-factor objective test, the Tax Court held the proper compensation for the years at issue was $900,000 and $700,000, respectively.[54] The Seventh Circuit reversed and held that all of the compensation paid to the chief executive was reasonable.[55]

The Seventh Circuit opined that using multiple objective factors "leaves much to be desired—being like many other multi-factor tests, 'redundant, incomplete, and unclear.'"[56] The Seventh Circuit held this based on the following reasons: (1) "it is nondirective . . . [with] no indication . . . of how the factors are to be weighed . . . and many of the factors . . . are vague"; (2) "the factors do not bear a clear relation either to each other or to the primary purpose of section 162(a)(1)"; (3) it "invites the Tax Court to set itself up as a superpersonnel department for closely-held corporations, a role unsuitable for courts"; (4) "it invites the making of arbitrary decisions based on uncanalized discretion or unprincipled rules of thumb"; and (5) "because the reaction of the Tax Court to a challenge to the deduction of executive compensation is unpredictable, corporations run unavoidable legal risks in determining a level of compensation that may be indispensable to the success of their business."[57] The Seventh Circuit used *Exacto Spring* to exemplify its views regarding the use of multiple objective factors,[58] abandoning it in favor of an "indirect market test," which is stated as follows:

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51 Moran, *supra* note 4, at A-18.

52 Heitz v. Comm'r, 75 T.C.M. (CCH) 2522, 2524 (1998), *rev'd*, 196 F.3d 833 (7th Cir. 1999). The trial court action involved two cases, which were consolidated, the other being *Exacto Spring Corp. v. Commissioner*. *Id.* at 2522.

53 *Id.* at 2524.

54 *Id.* at 2528.

55 Exacto Spring Corp. v. Comm'r, 196 F.3d 833, 839 (7th Cir. 1999).

56 *Id.* at 835 (internal citation omitted).

57 *Id.*

58 *Id.* at 836–38.

> A corporation can be conceptualized as a contract in which the owner of assets hires a person to manage them. The owner pays the manager a salary and in exchange the manager works to increase the value of the assets that have been entrusted to his management; that increase can be expressed as a rate of return to the owner's investment. The higher the rate of return (adjusted for risk) that a manager can generate, the greater the salary he can command. If the rate of return is extremely high, it will be difficult to prove that the manager is being overpaid, for it will be implausible that if he quit [because] his salary was cut, and he was replaced by a lower-paid manager, the owner would be better off; it would be killing the goose that lays the golden egg. The Service's expert believed that investors in a firm like Exacto would expect a 13 percent return on their investment. Presumably they would be delighted with more. They would be *overjoyed* to receive a return more than 50 percent greater than they expected—and 20 percent, the return that the Tax Court found that investors in Exacto had obtained, is more than 50 percent greater than the benchmark return of 13 percent.
>
> When, notwithstanding the CEO's "exorbitant" salary (as it might appear to a judge or other modestly paid official), the investors in his company are obtaining a far higher return than they had any reason to expect, his salary is presumptively reasonable. We say "presumptively" because we can imagine cases in which the return, though very high, is not due to the CEO's exertions. Suppose Exacto had been an unprofitable company that suddenly learned that its factory was sitting on an oil field, and when oil revenues started to pour in its owner raised his salary from $50,000 a year to $1.3 million. The presumption of reasonableness would be rebutted. There is no suggestion of anything of that sort here and likewise no suggestion that Mr. Heitz was merely the titular chief executive and the company was actually run by someone else, which would be another basis for rebuttal.[59]

B. Other Circuits and the Tax Court Decline to Follow *Exacto Spring*

Between *Exacto Spring* and *Menard,* the Tax Court decided several reasonable compensation cases. It did not adopt the *Exacto Spring* approach in any of these cases, despite considerable taxpayer prodding to do so.[60] During the period, several circuits also declined to adopt the *Exacto Spring* approach despite considerable taxpayer prodding to do so.[61]

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59 *Id.* at 838–39.

60 *See* McCoskey, *supra* note 2, at 237 (explaining how the Tax Court in *Menard* continued to apply the factors).

61 *See id.* at 230–38 (summarizing the current state of reasonable compensation jurisprudence).

In 2000, in *Normandie Metal Fabricators, Inc. v. Commissioner*, the Tax Court distinguished the case from *Exacto Spring* and looked to the *RAPCO, Inc.* factors from the perspective of an independent investor;[62] the Second Circuit affirmed.[63] In 2001, in *Eberl's Claim Service, Inc. v. Commissioner*, the Tenth Circuit declined to abandon its "traditional multi-factor test of reasonableness outlined in *Pepsi-Cola Bottling*"[64] under which "the situation must be considered as a whole, with no one factor being decisive."[65] In 2003, the Tax Court used the *Owensby & Kritikos*[66] factors to decide *Brewer Quality Homes, Inc. v. Commissioner*; the Fifth Circuit affirmed.[67] In 2003, in *E.J. Harrison & Sons, Inc. v. Commissioner*, the Tax Court rejected the taxpayer's argument grounded in *Exacto Spring* that its favorable return on equity rendered compensation "presumptively reasonable"; the Ninth Circuit affirmed in relevant part.[68] In 2003, in *Haffner's Service Stations, Inc. v. Commissioner*, the First Circuit stated that the section 162 regulations require reasonableness to be based on "all circumstances" and rejected the taxpayer's urging to adopt the *Exacto Spring* approach.[69] In 2004, in *Metro Leasing and Development Corp. v. Commissioner*, the Ninth Circuit again declined to adopt the *Exacto Spring* approach and stated that courts should examine the "nature and quality of the services" an officer provides "as well as the effect of those services on the return the investor is seeing on his investment."[70]

C. *Menard*

Menards is a retailer of hardware, building supplies, paint, garden equipment, and similar items.[71] During the year at issue, the company had approximately 160 stores in nine Midwestern

62 Normandie Metal Fabricators v. Comm'r, 79 T.C.M. (CCH) 1738, 1743 (2000).

63 Normandie Metal Fabricators v. Comm'r, 10 F. App'x 26 (2d Cir. 2001).

64 Pepsi-Cola Bottling Co. of Salina, Inc. v. Comm'r, 528 F.2d 176, 179 (10th Cir. 1975).

65 Eberl's Claim Serv. v. Comm'r, 249 F.3d 994, 999 (10th Cir. 2001) (quoting *Pepsi-Cola*, 528 F.2d at 179).

66 Owensby & Kritikos v. Comm'r, 819 F.2d 1315, 1323 (5th Cir. 1987).

67 Brewer Quality Homes v. Comm'r, 86 T.C.M. (CCH) 29, 35 (2004), *aff'd*, 122 F. App'x 88 (5th Cir. 2004).

68 E.J. Harrison and Sons, Inc. v. Comm'r, 86 T.C.M. (CCH) 240, 252–53 (2003), *aff'd*, 138 F. App'x 994 (9th Cir. 2005). The officer whose compensation was at issue was the mother of three other corporate officers. The Tax Court found the taxpayer's profitability to be attributable to the sons' efforts and viewed this as strong evidence of intent to distribute profits to the mother in the guise of compensation. *Id.* at 253.

69 *See* Haffner's Serv. Stations v. Comm'r, 326 F.3d 1, 3–4 (1st Cir. 2003).

70 Metro Leasing and Dev. Corp. v. Comm'r, 376 F.3d 1015, 1019 (9th Cir. 2004) (quoting Elliotts v. Comm'r, 716 F.2d 1241, 1245 (9th Cir. 1983)).

71 Menard, Inc. v. Comm'r, 88 T.C.M. (CCH) 229, 231 (2004), *aff'd*, 560 F.3d 620 (7th Cir. 2009).

states and was one of the nation's top retail home improvement chains (third only to Home Depot and Lowe's).[72] That year, it paid its CEO $20,642,485.[73] Because the case was appealable to the Seventh Circuit, the Tax Court was obligated to follow *Exacto Spring* or explain why it did not do so.[74]

In its post-trial Tax Court brief, the Service conceded that the taxpayer's return on equity for the year at issue would have satisfied an independent investor, and thus, the compensation passed the *Exacto Spring* "amount" test.[75] The Tax Court refused to accept the concession on its terms, instead treating it as a concession that a presumption of reasonableness arose; a presumption rebuttable by evidence demonstrating the compensation "substantially exceeded . . . [that] paid by comparable publicly traded corporations to their CEO."[76] The Tax Court viewed the ability of such evidence to rebut the presumption of reasonableness as flowing from Regulation 1.162-7(b)(3), which requires courts to consider "evidence of how the marketplace values the services of comparably situated executives"[77] including "evidence of compensation paid to CEOs in comparable companies."[78]

Both parties' experts accepted the Black-Scholes model as appropriate and agreed five publicly traded companies were comparable to the taxpayer: Home Depot, Kohl's, Lowe's, Staples, and Target.[79] Because the taxpayer CEO's compensation was multiple times higher than that of the comparable CEOs (two times the Target CEO, three times the Staples and Lowe's CEO, four times the Kohl's CEO, and seven times the Home Depot CEO), the Tax Court held that any presumption that the taxpayer CEO's compensation was reasonable was rebutted.[80] It then looked to the record as a whole to determine the amount of reasonable compensation.[81]

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72 *Id.*

73 *Id.* at 230.

74 *See* Lardas v. Comm'r, 99 T.C. 490, 494–95 (1992) (explaining that under the *Golsen* doctrine the Tax Court will follow "squarely on point" precedents of the Circuit to which appeal of its decision would lie).

75 *Menard*, 88 T.C.M. (CCH) at 238. The Service relied solely on its "intent" test argument characterizing the disallowed compensation as a disguised dividend.

76 *Id.* at 238.

77 *Id.* at 238 n.34.

78 *Id.* at 239. The Tax Court noted the Seventh Circuit did not discuss or declare the regulation invalid in *Exacto Spring*. *Id.* at 238.

79 *Id.* at 241.

80 *Id.* at 243.

81 *Id.*

The Tax Court viewed Home Depot and Lowe's as most "directly comparable" to the taxpayer.[82] It started with Home Depot CEO's compensation of $2,841,307. It multiplied this amount by 18.8% divided by 16.1%, because the taxpayer's return on equity (18.8%) was higher than Home Depot's (16.1%). This yielded $3,317,799. The Tax Court then multiplied that amount by 213%, because Lowe's CEO's compensation was 2.13 times higher than Home Depot's CEO's. This yielded $7,066,912, which the Tax Court held to be the amount of reasonable compensation.[83]

The Seventh Circuit reversed and held reasonable the entire amount the taxpayer characterized as compensation, $20,642,485.[84] Specifically, the Seventh Circuit held the Tax Court committed clear error by holding that the reasonableness presumption was rebutted by evidence of comparable companies' CEO compensation.[85]

In the one Tax Court reasonable compensation case appealable to the Seventh Circuit since *Menard*, the Tax Court acknowledged that a sufficiently high rate of return could give rise to a rebuttable presumption of reasonableness (although the rate of return therein did not suffice), while in the only other reasonable compensation case decided subsequent to *Menard* the Tax Court did not follow *Exacto Spring* and *Menard*.[86] No circuit has addressed the reasonable compensation issue since *Menard*.

82 *Id.*

83 *Id.* at 244. The Tax Court also held that the CEO's compensation failed the "intent" test and constituted a disguised dividend to the extent it exceeded $7,066,912. It noted the taxpayer had never paid a dividend despite tremendous growth; the compensation was paid in a single five percent bonus lump sum rather than as services were performed; the compensation was profit-based (five percent of net income); the CEO agreed to reimburse the taxpayer if any portion of the compensation was disallowed; and the board of directors (all of whom were employees of the taxpayer or members of the CEO's family or both) made no effort to ascertain the market value of compensation paid to CEOs of comparable companies or to periodically evaluate the taxpayer's compensation formula. *Id.* at 244–45.

84 Menard v. Comm'r, 560 F.3d 620, 628 (7th Cir. 2009).

85 *Id.* at 625–28. In the words of the Seventh Circuit, "[t]here is no suggestion that any of the shareholders were disappointed that the company obtained a rate of return of 'only' 18.8 percent or that the company's success in that year or any year has been due to windfall factors, such as the discovery of oil under the company's headquarters." *Id.* at 624. The Seventh Circuit also overruled the Tax Court's disguised dividend holding. *Id.* at 625.

86 *See* Mulcahy, Pauritsch, Salvador & Co., LTD. v. Comm'r, T.C. Mem. 2011-74 (Mar. 31, 2011); Multi-Pak Corp. v. Comm'r, 99 T.C.M. (CCH) 1567, 1570 (2010) (applying the *Elliotts* factors).

III. *EXACTO SPRING* IS INCONSONANT WITH SECTION 162, ITS REGULATIONS AND ITS OTHER CASE LAW

A. *Exacto Spring* Is Inconsonant with Section 162

Scholars have identified four methods of statutory interpretation used by courts: intentionalism, purposivism, textualism, and the dynamic method.[87] According to intentionalism, even if statutory language appears clear, courts should examine legislative history to discern what the enacting legislature intended the statute to mean.[88] That is, courts should essentially act as agents of the enacting legislature. According to purposivism, courts should discern a statute's original purpose by examining legislative history in the context of enactment circumstances.[89] According to textualism, courts should not look to a statute's legislative history but rather to its text in the context of surrounding law.[90] According to the dynamic method, courts should look not only to a statute's text and historical background but also to society's contemporary needs and goals.[91]

In 1934 in *Gregory v. Helvering*, the Second Circuit refused to give tax recognition to a transaction that literally complied with the Code but in its view was not what the statute intended; the Supreme Court affirmed.[92] Since then, courts construing the Code most often speak in terms of intentionalism and purposivism.[93] However, there are a few cases which best fit into the dynamic method mold,[94] and recently some judges, including Supreme Court Justice Antonin Scalia, have argued for and applied textualism.[95]

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87 Noel B. Cunningham & James R. Repetti, *Textualism and Tax Shelters,* 24 VA. TAX REV. 1, 7 (2004); *see generally* Michael Livingston, *Practical Reason, "Purposivism," and the Interpretation of Tax Statutes*, 51 TAX L. REV. 677 (1996); Deborah A. Geier, *Interpreting Tax Legislation: The Role of Purpose,* 2 FLA. TAX REV. 492 (1995) (discussing how purpose aids in interpreting the Tax Code).

88 Cunningham, *supra* note 87, at 7–8.

89 *Id.* at 8.

90 *Id.* at 8–9.

91 *Id.* at 9–10. *See also* Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 357–58 (1989) ("The new theories of statutory interpretation urge courts to consider, among other factors, a reading of the statute that meets the needs of present day society and best fits society's current moral, social, and legal fabric.").

92 Gregory v. Helvering, 69 F.2d 809, 810–11 (2d Cir. 1934), *aff'd*, 293 U.S. 465, 470 (1935).

93 Cunningham, *supra* note 87, at 12.

94 *C.f.* Livingston, *supra* note 87, at 699 (discussing *Bob Jones University v. United States*, 461 U.S. 574 (1983)).

95 *Id.* at 682.

No matter which method of statutory interpretation courts employ, the starting point is the statute's text.[96] Section 162 provides: "[T]here shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including . . . a reasonable allowance for salaries or other compensation for personal services actually rendered."[97]

i. Intentionalism and Purposivism

Intentionalism and purposivism look to legislative history and historical background. The Revenue Acts of 1913 and 1916 contained only the general "ordinary and necessary" provision of section 162's predecessor.[98] However, underlying regulations warned of the need to analyze carefully purported compensation payments to officers to ensure such payments were not out of proportion to business volume or excessive when compared to similarly situated employees in other companies; the regulations prescribed "the amount so paid in excess of reasonable compensation for the services will not be deductible from gross income, but will be treated as a distribution of profits."[99]

The Revenue Act of 1918 added the "reasonable allowance for salaries or other compensation" provision.[100] Its legislative history is unclear.[101] According to some commentators, the provision "permit[ted] closely held enterprises to deduct an allowance for services rendered by officers and proprietors in computing the World War I excess profits tax even if no salary was actually paid."[102] In any event, after the excess profits tax expired, the provision came to be interpreted as a disallowance of unreasonable amounts if paid, rather than as an allowance for reasonable amounts that were not paid.[103] By 1930, the Supreme Court implicitly acknowledged such a view in *Lucas v. Ox Fibre Brush Co.*,[104] and since then the "reasonable allowance" provision

96 Cunningham, *supra* note 87, at 10.

97 I.R.C. § 162 (1996).

98 Moran, *supra* note 4, at A-1.

99 *Id.* at A-2. *See also* Barbara F. Sikon, *The Recharacterization of Unreasonable Compensation: An Equitable Mandate,* 51 CLEV. ST. L. REV. 301, 306 (2004).

100 Moran, *supra* note 4, at A-1.

101 *Id.* at A-1. *See also* Sikon, *supra* note 99, at 306.

102 BORIS BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 22.2.1 at 22-18 (3d ed. 1999). *See also* Moran, *supra* note 4, at A-1; Sikon, *supra* note 99, at 306.

103 Moran, *supra* note 4, at A-2; BITTKER & LOKKEN, *supra* note 102, at ¶ 22.2.1, 22-18.

104 Lucas v. Ox Fibre Brush Co., 281 U.S. 115, 119 (1930).

has functioned as a limitation rather than an enlargement of compensation deductibility.[105]

While little in the way of intent or purpose can be gleaned from the unusual history of the "reasonable allowance" provision, eighty years of Congressional silence since *Lucas* evidences its assent to the facts and circumstances analysis of Regulation 1.162-7 and multiple objective factors case law. When Congress re-enacts a statute with administrative or judicial interpretative guidance in place, Congress is deemed to give assent to such guidance.[106] The "reasonable allowance" provision with underlying regulations and multiple objective factors case law was in place during the 1954 and 1986 Code re-codifications,[107] and if Congress had been unhappy with these interpretations, presumably it would not have implicitly blessed them by re-enacting the provision verbatim.[108]

In sum, while legislative history and historical background are murky, Congressional re-enactment of section 162 while Regulation 1.162-7 and multiple objective factors case law were in place evidence Congressional approval of these interpretations.

ii. Textualism

Textualism looks to a statute's text and surrounding law.[109] With respect to text, the amorphous phrase "reasonable allowance" evidences Congressional intent to sentence taxpayers, the Service, and courts to messy facts and circumstances analysis in reasonable compensation controversies. Congress imposes many such sentences in the Code: for example, determining whether an activity is engaged in for profit (section 183); determining whether related party transactions are at arm's length (section 482); and computing reasonable capital needs of a business for purposes of the accumulated earnings tax (section 531).[110] When Congress wants to have a characterization

105 Moran, *supra* note 4, at A-1; BITTKER & LOKKEN, *supra* note 102, at ¶ 22.2.1, 22-18.

106 Lorillard, A Div. of Loew's Theatres, Inc. v. Pons, 434 U.S. 575, 580–82 (1978).

107 I.R.C. preface § 1 (2006); BITTKER & LOKKEN, *supra* note 102, at ¶ 22.2.1.

108 Analogously, a recent law review article observes that regarding I.R.C. § 482 "[b]y enacting and repeatedly reenacting section 482 and its predecessors, Congress has affirmed its initial decision to confront the problem of abusive transfer pricing, not with precise statutory formulae or hosts of special accounting rules, but with a generic standard heavily reliant upon the Commissioner's exercise of discretion." Francis M. Allegra, *Section 482: Mapping the Contours of the Abuse of Discretion Standard of Judicial Review*, 13 VA. TAX REV. 423, 444 (1994).

109 William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 621 (1990).

110 I.R.C. §§ 183, 482, 531, and other such sentences abound in areas of the law other than tax law. As noted by Moran, *supra* note 4, at A-3, "[t]he concept [of reasonableness

question settled by a bright line test, it knows how to do so: for example, the material participation test under the passive loss rules (section 469); the definition of alimony (section 71); and the definition of passive gains under subchapter S (section 1375).[111] But in section 162 Congress decided against a bright line for reasonable compensation.

With respect to context, courts have held a "reasonable in amount" limitation inherent in the section 162 "ordinary and necessary" provision,[112] and section 482 grants the Service discretion to reallocate income and deductions among related parties to reflect an arm's length standard.[113] These provisions reflect the recurrent tax law theme of ensuring related party transactions are treated for tax purposes as if they had occurred between unrelated parties.[114] Determining the amount a taxpayer would have paid an unrelated party for the same goods and services entails a facts and circumstances test very akin to the reasonable compensation determination approach of Regulation 1.162-7 and multiple objective factors case law.

In sum, the amorphous language of section 162 coupled with the contextual tax law theme regarding related party transactions evidences that Regulation 1.162-7 and multiple objective factors case law are proper interpretations of section 162.

iii. Dynamic Method

The dynamic interpretative approach looks to society's contemporary needs and goals. According to the Seventh Circuit, a simpler, bright line test is needed to determine reasonable compensation.[115] As discussed below, the *Exacto Spring* approach increases rather than decreases the complexity of reasonable compensation controversies.

Even if the *Exacto Spring* approach did reduce complexity, such simplicity might come at too high a price. To some extent, the "rules" approach of *Exacto Spring* versus the "principles" approach of multiple objective factors reflects the "rules versus principles" debate now ongoing with respect to both tax law and

for compensation] defies simple interpretation by tax experts in the same manner that the hypothetical reasonable man escapes precise definition by negligence lawyers and the concept of reasonable doubt remains an elusive factor in criminal law."

111 I.R.C. § 469(c)(4) (2006); I.R.C. § 71(b)(1) (2006); I.R.C. § 1375(b) (2006).

112 Noyce v. Comm'r, 97 T.C. 670, 687–88 (1991); *see also* Comm'r v. Lincoln Electric Co., 176 F.2d 815, 817–18 (6th Cir. 1949).

113 BITTKER & LOKKEN, *supra* note 102, at ¶ 4.3.3; Allegra, *supra* note 108, at 429–31.

114 ROBERT COLE, PRACTICAL GUIDE TO U.S. TRANSFER PRICING § 24.01 (Matthew Bender ed., 3d ed. 2011).

115 Exacto Spring Corp. v. Comm'r, 196 F.3d 833, 838 (7th Cir. 1999).

financial accounting.[116] It is perhaps overly simple, but not inaccurate, to summarize this debate as revealing there are advantages and disadvantages for both rules and principles for most applications. Policymakers must pick their poison.[117]

To recap, intentionalism, purposivism, textualism, and dynamic statutory interpretation all indicate courts should not abandon using multiple objective factors in favor of the *Exacto Spring* approach in reasonable compensation cases.

Furthermore, in the absence of statutory language to the contrary or a compelling public policy reason, tax statutes should be construed without presumption.[118] In *Exacto Spring*, the Seventh Circuit attempts to coin a presumption that compensation is reasonable if it leaves sufficient return on equity.[119] As is apparent herein, neither the text of section 162 nor its related policy concerns warrant such a presumption.

B. *Exacto Spring* is Inconsonant with Section 162 Regulations

The relevant section 162 regulations were promulgated pursuant to section 7805(a), which authorizes the Treasury Department to promulgate regulations interpreting the Code.[120] In *Mayo Foundation for Medical Education and Research v. United States*, the Supreme Court recently held that such regulations must be followed if they represent a "reasonable interpretation" of the relevant Code section.[121]

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116 *See* Tracy Stetson, *Rules Versus Principles: Accountants' Cognitive Styles and Professional Penalties*, 67:12 J. PSYCHOLOGICAL TYPE 115, 118 (2007).

117 *See generally* Mark W. Nelson, *Behavioral Evidence on the Effects of Principles—and Rules-Based Standards*, 17 ACCT. HORIZONS 91 (2003); *see, e.g.*, John A. Miller, *Indeterminacy, Complexity, and Fairness: Justifying Rule Simplification in the Law of Taxation*, 68 WASH. L. REV. 1, 5 (1993) ("[T]ax law is a system of rules that depends on constant and creative adaptation to meet changing circumstances" and "these themes argue for an approach toward tax rule making that is less concerned with details and more concerned with establishing fair general principles."). When Congress has considered using a mechanical approach for transfer pricing, seasoned members of the tax bar such as Sheldon Cohen (former Service Commissioner) have pointed out that, while the simplicity of such an approach is inviting, "fixed rates or formulas could produce arbitrary and unreasonable results." Sheldon S. Cohen, *How the IRS Intends to Administer the New Regulations Under Section 482*, 28 J. TAX'N 73, 73 (1968).

118 Peter A. Lowy & Juan F. Vasquez, Jr., *Interpreting Tax Statutes: When Are Statutory Presumptions Justified?*, 4 HOUS. BUS. & TAX L.J. 389, 393 (2004).

119 *Exacto Spring*, 196 F.3d at 837–38.

120 28 U.S.C. § 7805(a) (2006).

121 Mayo Found. for Med. Educ. and Research v. United States, 131 S. Ct. 704 (2011). In *Mayo Foundation* the Supreme Court held that generally courts must use the two-step analysis of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984), when evaluating the validity of Treasury Regulations issued under I.R.C. § 7805(a). Simply stated, under this analysis: (1) if the intent of Congress is clear, courts must give effect to this intent, but (2) if a statute is silent or ambiguous, relevant regulations must be upheld unless they are arbitrary, capricious or manifestly contrary to the statute.

Again, Regulation 1.162-7(b)(3) prescribes that "[i]n any event the allowance for the compensation paid may not exceed what is reasonable under all the circumstances" and that "[i]t is, in general, just to assume that reasonable and true compensation is only such amount as would ordinarily be paid for like services by like enterprises under like circumstances."[122] The Seventh Circuit does not mention the regulation in *Exacto Spring*. In *Menard*, it dismisses the regulation as "not an operational standard,"[123] but cites no authority to justify ignoring regulations for such a reason. We are aware of no case in which a party (or a court) challenged Regulation 1.162-7 as not representing reasonable statutory interpretation or as inconsonant with Congressional intent. Even if the *Exacto Spring* approach is a "better" or even the "best" approach to determining reasonable compensation, it is legally improper for the Seventh Circuit to substitute such approach for that of Regulation 1.162-7.[124]

One can view *Exacto Spring* as consonant with Regulation 1.162-7 if one believes company owners actually determine officer compensation by looking solely to return on equity.[125] Empirical studies indicate company owners consider much more than return on equity. For example, one survey of 587 firms indicates that only four percent of firms relied exclusively on return on equity.[126] To reduce the myopic behavior that specific metrics may cause, most firms use multiple metrics, including various ratios, income and revenue targets, and non-financial measures such as quality and innovation.[127] Further, many reputable scholars question the behavioral assumptions of Law and Economics theory, upon which *Exacto Spring* is based.[128]

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122 Treas. Reg. § 1.162-7(b)(3) (1960).

123 Menard, Inc. v. Comm'r, 560 F.3d 620, 622 (7th Cir. 2009).

124 *See* David A. Brennen, *Treasury Regulations and Judicial Deference in the Post-*Chevron *Era,* 13 GA. ST. U. L. REV. 387, 395 (1997). Other law review articles agree with our view that *Exacto Spring* and *Menard* are inconsonant with applicable regulations. *See, e.g.*, Hathaway, *supra* note 12, at 927.

125 The Seventh Circuit cited no empirical evidence to this effect. A recent law review article notes, "[i]n the absence of empirical studies, [Posner] frequently engages in common sense speculation about potential consequences of particular decisions." Linda E. Fisher, *Pragmatism Is as Pragmatism Does: Of Posner, Public Policy and Empirical Reality*, 31 N.M. L. REV. 455, 470 (2001).

126 Linda Amuso & David Knopping, *Incentive Compensation Program Design*, *in* THE COMPENSATION HANDBOOK 205, 211 (5th ed. 2008).

127 *Id.* at 209–10.

128 *See, e.g.*, Grant M. Hayden & Stephen E. Ellis, *Law and Economics After Behavioral Economics*, 55 U. KAN. L. REV. 629 (2007); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551 (1998); Adam Chodorow, *Economic Analysis in Judicial Decision Making—An Assessment Based on Judge Posner's Tax Decisions*, 25 VA. TAX REV. 67 (2005); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality*

In sum, the Seventh Circuit's lack of deference to Regulation 1.162-7 in favor of Law and Economics theory is not legally proper. Because taxpayers' trust in and deference to Treasury Regulations is grounded in the expectation that courts will follow them, such judicial refusal to follow Treasury regulations may have negative consequences.[129]

C. Exacto Spring Is Inconsonant with Other Section 162 Case Law

Judge Posner, author of *Exacto Spring* and *Menard*, has criticized use of multiple factors and reversed trial courts' use of such analysis in a number of legal contexts;[130] he has imposed standards derived from his economic theory in lieu of established legal standards in several cases across varied areas of the law.[131] Discussion of the propriety of this practice by Judge Posner, in general, is beyond the scope of this article. However, in our opinion, even if such practice might be appropriate in some areas of the law, it is not appropriate with respect to reasonable compensation jurisprudence.

Assumption from Law and Economics, 88 CALIF. L. REV. 1051 (2000); Fisher, *supra* note 125. Exploration of Law and Economics theory is beyond the scope of this article. In short, it posits humans as rational creatures seeking to maximize their satisfaction by making choices and weighing costs and benefits of alternative courses of action. For an introductory discussion, we recommend Chapter 5 "Law and Economics" in JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 181 (Revised ed. 1989). *See also* Daniel T. Ostas, *Postmodern Economic Analysis of Law: Extending the Pragmatic Visions of Richard A. Posner*, 36 AM. BUS. L.J. 193 (1998); Chodorow, *supra*. Fisher, *supra* note 125, has many positive things to say about Judge Posner's jurisprudence but argues that "at times, Judge Posner acts like a chancellor in equity, independently adjudicating facts and sometimes ignoring settled law, rather than as an appellate judge reviewing lower court decisions." *Id.* at 458.

129 Brennen, *supra* note 124, at 388–89, notes as follows:

> Without question, the federal tax code is the most technical and complex of all federal statutory schemes. Given this level of complexity, the Treasury Department, as the agency charged with administering the tax laws, must provide seemingly endless guidance to the public on how to comply with these laws. Because they are often regarded as equivalent to statutory law, valid Treasury regulations are the most important form of Treasury guidance. Treasury regulations—both legislative and interpretive—are the most formal type of Treasury guidance and are clothed with congressional delegatory authority. To the extent that these regulations are respected by reviewing courts, the public is assured that compliance with them is the same as complying with the related federal statute. However, if reviewing courts refuse to defer to Treasury regulatory interpretations of tax statutes, public confidence in the Treasury is damaged, as is its ability to administer the tax laws. Conceivably, this increases the likelihood that taxpayers will challenge Treasury regulations in court.

130 Chodorow, *supra* note 128, at 92 n.65.

131 *C.f. id.* at 68 ("Although often promoted as a tool to be used by policy makers, scholars have argued that judges either are or should be guided by economic principles when deciding cases.").

Stare decisis, Latin for "let the decision stand," is a bedrock principle of common law.[132] It provides that, absent powerful justification, courts should follow previous precedent. In *Edwin's, Inc. v. United States*, the Seventh Circuit had previously determined reasonable compensation using multiple objective factors.[133] Thus, *Exacto Spring* deviates from stare decisis.

Stare decisis reflects two key policy concerns.[134] First, judicial decisions only provide guidance to citizens structuring their affairs and to litigants preparing for trial if courts follow them.[135] Second, respecting previous judicial decisions allows law to develop incrementally.[136] Once *Exacto Spring* was on the books, the first policy concern was ameliorated in the Seventh Circuit, but remains germane for other courts.

Regarding the second policy concern, when the Seventh Circuit issued *Exacto Spring*, courts had been wrestling with reasonable compensation for around seventy years.[137] The Tax Court had penned several dozen opinions regarding the issue, and most Circuits had dealt with the issue a number of times.[138] While courts may have differed slightly regarding the factors they applied, they had reached a consensus that (1) section 162 and its underlying regulations give rise to a dual subjective "intent" test and objective "amount" test, and (2) the "amount" test should be implemented using multiple objective factors.[139]

Judge Posner is quite knowledgeable regarding tax law.[140] However, no amount of technical knowledge can replace the collective practical wisdom of Tax Court judges. They typically practice tax law for decades in private practice, government service, or both prior to their court appointment.[141] Upon

132 Kenneth J. Schmier & Michael K. Schmier, *Has Anyone Noticed the Judiciary's Abandonment of Stare Decisis?*, 7 LAW & SOC. CHALLENGES 233, 234–35 (2005).

133 Edwin's, Inc. v. United States, 501 F.2d 675, 677 (7th Cir. 1974).

134 Reasons courts should respect the views of predecessors include: (1) efficiency, (2) humility, (3) equal treatment, and (4) "only by following the reasoning of previous decisions can courts provide guidance for the future . . . ." Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1177–79 (2006); *see also* Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 368–72 (1988).

135 Maltz, *supra* note 134, at 328.

136 *Id.* at 371–72.

137 *See, e.g.*, Tumwater Lumber Mills Co. v. Comm'r, 65 F.2d 675, 677 (9th Cir. 1933).

138 *See, e.g.*, Dexsil Corp. v. Comm'r, 147 F.3d 96, 96 (2d Cir. 1998); Owensby & Kritikos, Inc. v. Comm'r, 819 F.2d 1315, 1315 (5th Cir. 1987); Elliotts, Inc. v. Comm'r, 716 F.2d 1241, 1245 (9th Cir. 1983); Edwin's, Inc. v. Comm'r, 501 F.2d 675, 675 (7th Cir. 1974); Mayson Mfg. Co. v. Comm'r, 178 F.2d 115, 115 (6th Cir. 1949).

139 *Dexsil*, 147 F.3d at 100.

140 Chodorow, *supra* note 128, at 72.

141 David Laro, *The Evolution of the Tax Court as an Independent Tribunal*, 1995 U. ILL. L. REV. 17, 24 (1995).

appointment, they serve fifteen year terms,[142] during which they typically preside over several cases involving reasonable compensation and other valuation issues.[143] Tax Court expertise is so well recognized that many scholars argue its legal tax interpretations should be afforded a heightened standard of review.[144]

In sum, when the Seventh Circuit issued *Exacto Spring*, adequate reasons were not extant to abandon multiple objective factors analysis, which reflected the collective practical wisdom of dozens of Tax Court judges and had been uniformly followed in all circuits (including the Seventh).

IV. *EXACTO SPRING* IS GROUNDED UPON QUESTIONABLE BEHAVIORAL ASSUMPTIONS

Exacto Spring ignores a multitude of social science theories that potentially are as equally applicable as Law and Economics. In *Menard*, Judge Posner focused on the risk inherent in Mr. Menard's compensation,[145] and clearly, an economic theoretical framework informed Posner's perspective.[146] In a recent article in the *Journal of Institutional Economics*, Posner explains this perspective.[147] He states: "[O]rganization economics emphasizes the relation between organizational structure and compensation systems, on the one hand, and innovation, the management of information flows, agency costs, and efficiency in general, on the other hand."[148] The *Journal* article articulates Posner's keen endorsement of organization economics and his support for the Law and Economics interface.

In Posner's view, the law and economics interface is pragmatic. Posner writes:

> [W]hile pragmatist philosophers do not think that scientific theories can be shown to embody final truths about the structure of the

142 I.R.C. § 7443(e) (2011).

143 *See generally* Thomas D. Greenaway, *Choice of Forum in Federal Civil Tax Litigation*, 62 TAX LAW. 311 (2009) (discussing Tax Court operations).

144 *See generally* Andre L. Smith, *Deferential Review of Tax Court Decisions of Law: Promoting Expertise, Uniformity, and Impartiality*, 58 TAX LAW. 361 (2005).

145 Menard, Inc. v. Comm'r, 560 F.3d 620, 626 (7th Cir. 2009) ("Of particular importance to this case is the amount of risk in the compensation structure.").

146 And so, for example, he refers to Easterbrook and Fischel's text on the economic structure of corporate law. *Id.*; *see generally* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991). Easterbrook's and Fischel's text has been critiqued by Kent Greenfield in "The Failure of Corporate Law." *See generally* KENT GREENFIELD, THE FAILURE OF CORPORATE LAW (2006).

147 Richard Posner, *From the New Institutional Economics to Organization Economics: With Applications to Corporate Governance, Government Agencies, and Legal Institutions*, 6 J. INST. ECON. 1 (2010).

148 *Id.* at 2.

> universe, they do not doubt the utility of such theories. It is no more unpragmatic for judges to use economics to help them reach a decision than it is for them to use chemistry, the findings of cognitive psychology, or actuarial computation.[149]

He goes on to say that his support for the Law and Economics interface is pragmatic and empiricist and that economic tools of analysis promote efficiency.[150] Despite Posner's disavowal of final truths and his focus on economics as merely one theory that informs the law, we think that Posner uses organization economics to the exclusion of other available organizational theories. Alternatives to organization economics are available.

What are these alternatives, and where might we find them? As an expert of new institutional economics and transaction cost economics, Oliver Williamson is mentioned in Posner's organization economics article.[151] Williamson himself, a 2009 winner of the Nobel Memorial Prize in economics, provides a survey of organization theory alternatives.[152] Alternatives include resource dependence theory and the anthropological and symbolic perspectives.

The first alternative is resource dependence theory as advocated by Jeffrey Pfeffer.[153] In many ways, the predictions of resource dependence theory are similar to those of transaction cost economics. However, as explained by Pfeffer, resource dependence theory emphasizes that (1) organizations and people within them are interdependent with other organizations and with other people; and (2) due to interdependence, understanding social context is critical.[154] Hence, organizations and the people within them will seek relationships with others and be dependent upon others in order to obtain needed resources. More specifically, a compensation structure results from a social comparison process. According to Pfeffer, seniority has been shown to be more related to compensation than performance.[155] Furthermore, according to Pfeffer, "individuals prefer more equal distributions of wages or other organizational rewards than a principle of equity or proportionality implies, in which

149 RICHARD POSNER, LAW, PRAGMATISM, AND DEMOCRACY 77 (2003).

150 *Id.* at 77–78.

151 *Id.* at 1–2.

152 OLIVER E. WILLIAMSON, ORGANIZATION THEORY: FROM CHESTER BARNARD TO THE PRESENT AND BEYOND 6 (Oliver E. Williamson ed., 1995).

153 Jeffrey Pfeffer, *Incentives in Organizations: The Importance of Social Relations*, *in* ORGANIZATION THEORY: FROM CHESTER BARNARD TO THE PRESENT AND BEYOND 72, 72 (Oliver E. Williamson ed., 1995).

154 *Id.*

155 *Id.* at 79.

individuals are compensated strictly in proportion to their performance . . . ."[156] Resource dependence theory would probably de-emphasize a single test, such as the independent investor test, and instead emphasize the multiple factors of *Mayson Manufacturing*[157] or *Elliotts*[158] because such factors recognize interdependence and context. Moreover, the emphasis upon interdependence and social context points to the importance of stare decisis. As Posner himself explains, "the constraining effect of precedent comes not from the fact that stare decisis is a sound policy but from the fact that a judge's influence is dependent to a significant degree on his decisions being treated as precedent by other judges."[159] In other words, the policy of stare decisis recognizes that organizations or institutions and the people within them are interdependent.

More broadly, resource dependence theory points to the needs of the whole: the whole organization and the whole society. Consideration of the needs of the whole contrasts with "methodological individualism." As described by Mary Douglas, whose work is included among the organization theory alternatives,[160] methodological individualism starts with the rational actor who is "sovereign over his own choices"; this contrasts with an anthropological perspective.[161] As Douglas explains, methodological individualism ignores social influence. Douglas acknowledges Williamson's theory of the firm, which is a "whole," but Douglas points out that Williamson "has the same representative rational individual marching into one kind of contract or refusing to renew it . . . ."[162] As an alternative to methodological individualism, Douglas proposes an anthropological argument: "What the individual is going to want is not entirely his own idea, but consists largely of a set of desires that the social environment inspires in him."[163] Douglas urges that dimensions of culture be included in theories of organizations and their actors. The point is that, as an alternative to organization economics, Douglas' anthropological perspective suggests that a single test, such as the independent

156 *Id.* at 85.

157 Mayson Mfg. Co. v. Comm'r, 178 F.2d 115, 119 (6th Cir. 1949).

158 Elliotts, Inc. v. Comm'r, 716 F.2d 1241, 1244–45 (9th Cir. 1983).

159 Posner, *supra* note 147, at 26–27.

160 Mary Douglas, *Converging on Autonomy: Anthropology and Institutional Economics*, *in* ORGANIZATION THEORY: FROM CHESTER BARNARD TO THE PRESENT AND BEYOND 98, 98 (Oliver E. Williamson ed., 1995).

161 *Id.* at 100.

162 *Id.* at 102.

163 *Id.*

investor test, is inappropriate as it ignores a possible *set* of culturally influenced desires and constraints.

Organization economics can be critiqued from yet another perspective: the non-rational, symbolic perspective. Richard Scott, whose work is included in Williamson's text, recognizes the "importance of economic incentives," but he argues that stronger incentives are symbolic incentives.[164] Briefly, he means that leadership is its own reward and that leaders manipulate symbols.[165] Referring to the work of Chester Barnard, Scott says that symbols elicit commitment of organizational actors; organizational leaders, such as Mr. Menard, are rewarded by the commitment of the organizational actors.[166] In addition, from Scott's perspective, the independent investor test could be considered symbolic in this sense: "[S]ymbols also function in organizations to provide an externally devised cognitive framework, allowing conforming organizations to constitute themselves as rational actors, borrowing meaning and garnering legitimacy and support from their environment."[167] In the sense of an "externally devised cognitive framework," return on equity becomes symbolic because a return on equity *legitimizes* compensation, even though return on equity would not necessarily *justify* compensation.[168]

In sum, the preceding paragraphs have provided some examples of alternative organization theories. More examples are possible. The point is this: organization economics is merely one organization theory.

V. *EXACTO SPRING* CREATES MORE FODDER FOR CONFUSION THAN USING MULTIPLE OBJECTIVE FACTORS[169]

The general formula for return on equity is income divided by equity.[170] While application of return on equity may have

164 Richard Scott, *Symbols & Organizations: From Barnard to the Institutionalists*, *in* ORGANIZATIONAL THEORY: FROM CHESTER BARNARD TO THE PRESENT AND BEYOND 38, 39–41 (Oliver E. Williamson ed., 1995).

165 *Id.* at 40–42.

166 *Id.*

167 *Id.* at 51.

168 *Id.* at 49.

169 We are not alone in many of our opinions expressed in this section. *See, e.g.*, Hathaway, *supra* note 12, at 924; Moran, *supra* note 4, at A-17–A-18. Chodorow, *supra* note 128, notes that "any purported efficiency gains associated with using economics-based tests may be illusory, especially where the test creates an overbroad and rebuttable presumption." Chodorow, *supra* note 128, at 71. Chodorow provides an excellent discussion of the conceptual fallacies (for example, assumption of bilateral monopoly) and practical difficulties (for example, future parties will likely manipulatively alter future behavior) inherent in the *Exacto Spring* approach. *Id.* at 89–102.

170 JOHN HUGHES, FRANCES AYRES & ROBERT HOSKIN, FINANCIAL ACCOUNTING: A

appeared straightforward in *Exacto Spring*, in actuality the formula is laden with questions ripe for argument. Several cases have wrestled with these questions and arrived at no settled answers.[171]

After *Exacto Spring*, parties in the Seventh Circuit have apparently perceived that their case will hinge upon return on equity. In other circuits, parties have apparently perceived a material possibility their court will adopt the *Exacto Spring* approach and their case will hinge upon return on equity.[172] Consequently, cases have often veered into arcane economic questions with extensive, highly technical, and quite partisan expert testimony. For example, in *Brewer Quality Homes* the Tax Court and the Fifth Circuit wrestled with the merits of the Capital Asset Pricing Model and weighted average cost of capital; the Tax Court also grappled with whether an equity risk adjustment, size adjustment, and company-specific risk adjustment should be made to the risk-free rate of return.[173] In *Wechsler & Co., Inc. v. Commissioner*, the Tax Court considered adjusting cost of common stock equity using a beta (measure of risk comparing a stock's volatility to that of the general market) representing the median beta for six "smaller" publicly traded broker-dealers.[174] In *Menard*, the Tax Court waded into issues of comparative proxy statement compensation, periodicity, transfer restrictions, vesting periods, risk of forfeiture, discount for aversion risk, Financial Accounting Standard 123, etc.[175]

Among the issues that commonly arise when applying return on equity are the following:

VALUATION EMPHASIS 174 (Mark Bonadeo et al. eds., 2005). In practice, parties often modify the definition of income and equity to suit their purposes. *Id.*

171 *Compare* Metro Leasing & Dev. Corp. v. Comm'r., 376 F.3d 1015, 1019 (9th Cir. 2004) (applying the multi-factors cited in prior cases), *with* Menard, Inc. v. Comm'r., 560 F.3d 620 (7th Cir. 2009) (applying the Tax Court's "independent investor" test).

172 *See, e.g.*, Dexsil Corp. v. Comm'r., 147 F.3d 96, 101 (2d Cir. 1998) (remanding decision for Tax Court's failure to make a finding as to whether an independent investor would have approved the salary payments at issue); Labelgraphics, Inc. v. Comm'r., 221 F.3d 1091, 1100 (9th Cir. 2000) ("benchmarking an independent investor's expectations" while applying five-factor analysis).

173 Brewer Quality Homes, Inc. v. Comm'r, 86 T.C.M. (CCH) 29, 34–44 (2003), *aff'd*, 122 F. App'x 88 (5th Cir. 2004). For example, for company-specific risk adjustment, the taxpayer's expert argued for a negative 2.5% risk adjustment due to minimal business and financial risk, while the Service's expert argued for a positive 5% risk adjustment due to the taxpayer's size (as measured by annual sales), industry risks, lack of management depth, and the competitive nature of the taxpayer's business. *Id.* at 34–38.

174 Wechsler & Co., Inc. v. Comm'r, 92 T.C.M. (CCH) 138, 154 (2006).

175 Menard, Inc. v. Comm'r, 88 T.C.M. (CCH) 229, 239–43 (2004), *rev'd*, 560 F.3d 620 (7th Cir. 2009). The Tax Court also wrestled with several of these issues in *Miller & Sons Drywall, Inc. v. Commissioner*, 89 T.C.M. (CCH) 1279, 1283–88 (2005), and *Wechsler & Co., Inc. v. Commissioner*, 92 T.C.M. (CCH) 138, 144–53 (2006).

First, which year(s)' return on equity is relevant? Return on equity for the year(s) at issue, the recent past, the officer's tenure, or the corporation's entire life?[176] The answer is not clear and may differ among cases.[177] A related question is whether to examine return on equity for each year separately or in the aggregate?[178]

Second, what is "income?" Should the parties use financial income per Generally Accepted Accounting Principles, taxable income, or income adjusted to better reflect economic reality?[179] Subtract taxes, interest cost, or cost of equity? Use consolidated or unconsolidated income? Use income per se or dividends plus stock appreciation?[180]

Third, what is "equity?" Should the parties use accounting book equity? If yes, use initial capital contribution, beginning equity, ending equity, average equity, or equity otherwise determined?[181] Include funds in form "borrowed" from the officer that are in substance capital contributions?[182] What should be done if equity is negative?

176 For example, the Tax Court struggled with this issue in *Miller & Sons Drywall*, 89 T.C.M. (CCH) at 1286–88.

177 Courts have focused primarily upon return on equity for the years at issue. *See, e.g.*, B & D Found., Inc. v. Comm'r, 82 T.C.M. (CCH) 692, 707–10 (2001); Labelgraphics, Inc. v. Comm'r, 76 T.C.M. (CCH) 518, 520–22 (1998), *aff'd*, 221 F.3d 1091 (9th Cir. 2000). In *H & A Int'l Jewelry, Ltd. v. Commissioner*, 74 T.C.M. (CCH) 915, 922 (1997), the Tax Court noted: "Since a board makes its bonus decisions from year to year, return on equity may also be examined from year to year. Thus, a strong return in 1 year does not guarantee board approval of bonuses in the next year, especially if there are financial reverses the second year." In *B & D Foundation*, 82 T.C.M. (CCH) at 709, the Tax Court noted that including a corporation's initial years may skew average return on equity if the initial investment was relatively small. The Ninth Circuit noted similarly in *Labelgraphics, Inc. v. Commissioner*, 221 F.3d 1091, 1099–1100 (9th Cir. 2000).

178 This issue arose in *Brewer Quality Homes v. Commissioner*, 86 T.C.M. (CCH) 29, 39–41 (2003), *aff'd*, 122 F. App'x 88 (5th Cir. 2004). The most common practice is to use moving averages over a period of time. Bruce R. Ellig, *Board Critical Issues in Executive Pay*, *in* THE COMPENSATION HANDBOOK 433, 439–40 (5th ed. 2008).

179 This issue arose in *Wechsler & Co.*, 92 T.C.M. (CCH) at 144–45.

180 Measuring stock appreciation entails valuing it at the beginning and end of the relevant period. This imports into reasonable compensation cases all the valuation problems encountered when closely-held companies are valued for estate tax purposes. Chodorow, *supra* note 128, at 100.

181 Because return on equity pertains to a *period* of time (not an instant in time), using average equity over the period is conceptually most correct. However, courts have not always followed this practice. In *Elliotts, Inc. v. Commissioner*, 716 F.2d 1241, 1247–48 (9th Cir. 1983), the Ninth Circuit used end of year equity. Whether beginning, ending or average equity is used can make a material difference. In *E.J. Harrison & Sons, Inc. v. Commissioner*, 86 T.C.M. (CCH) 240, 253 n.6 (2003), the Tax Court noted that using beginning, ending, and average book equity yielded 22%, 12.3% and 7.4% return on equity, respectively.

182 In *M. & E. Shindler, Inc. v. Commissioner*, 63 T.C.M (CCH) 3039, 3039-7 (1992), the Tax Court included funds "borrowed" from officers in equity. In *PMT, Inc. v. Commissioner*, 72 T.C.M. (CCH) 5, 13 (1996), the court noted the question of whether loans from officers should be included in equity.

Or should the parties use fair market value of company stock (beginning, ending, or average)?[183] This value would better represent the opportunity cost of investment.[184] However, it would render relevant everything from the macroeconomic environment to office furniture value, and would import an abundance of technical finance and economic questions. For example, in *Brewer Quality Homes*, the Tax Court valued equity using fair market value; it wrestled for pages and pages with (1) whether to use three times "owners' discretionary cash flow . . ." or five times "earnings before interest (net of interest income and interest expense) and taxes (Federal income taxes), or EBIT [Earnings Before Interest and Taxes]," and (2) how to determine the "cost of capital."[185]

Fourth, what is an *acceptable* return on equity? In *Brewer Quality Homes*, the Tax Court looked to the "rate of return that an investor would expect to realize from an investment in a company such as the taxpayer, taking into account the appropriate risk and performance characteristics of the taxpayer."[186] This definition makes relevant everything about the taxpayer and its operational environment. It also requires identification of comparable companies[187] and raises many technical questions.

Fifth, do the parties adjust for the taxpayer's leverage?[188] Companies with high debt-to-equity ratios will experience heightened return on equity *vis à vis* companies with lower debt-

183 *E.J. Harrison*, 86 T.C.M. (CCH) at 253 n.6.

184 In *Metro Leasing & Dev. Corp. v. Commissioner*, 81 T.C.M. (CCH) 1644, 1650 (2001), *aff'd*, 376 F.3d 1015 (9th Cir. 2004), the taxpayer argued return on equity should focus on appreciation of assets, including unrealized appreciation of marketable securities and real estate. The Tax Court noted both the difficulties of measuring appreciation and the questionable assumption of attributing appreciation to officer abilities and efforts. *Id.*

185 Brewer Quality Homes, Inc. v. Comm'r, 86 T.C.M. (CCH) 29, 43–46 (2003), *aff'd*, 122 F. App'x 88 (5th Cir. 2004). *See generally* William F. Sharpe, *Capital Asset Prices: A Theory of Market Equilibrium Under Conditions of Risk*, 19(3) J. FIN. 425 (1964) (providing a model for calculating cost of capital (for example, discount rate) to use in firm valuation. Its parameters are firm and market specific, which makes accurate estimation difficult and consensus regarding appropriate inputs unlikely); David W. Mullins, Jr., *Does the Capital Asset Pricing Model Work?*, 60 HARV. BUS. REV. 105, 105–13 (Jan.–Feb. 1982).

186 Brewer Quality Homes, Inc. v. Comm'r., 86 T.C.M. 29, 44 (2003), *aff'd*, 122 F. App'x 88 (5th Cir. 2004).

187 *See, e.g.*, Labelgraphics v. Comm'r, 76 T.C.M. (CCH) 518, 526–27 (1998), *aff'd*, 221 F.3d 1091 (9th Cir. 2000). *See also* Ted Buyniski & Marvin A. Mazer, *Executive Compensation Strategy*, *in* THE COMPENSATION HANDBOOK 311, 316–17 (5th ed. 2008) (offering guidance for peer group selection based on size, performance, business industry, and economics. The authors acknowledge that for many firms discovering a peer group of reasonable size will be very difficult and *ad hoc* adjustments may be necessary.).

188 The Tax Court noted this issue in *Foos v. Commissioner*, 41 T.C.M. (CCH) 863, 875–83 (1981).

to-equity ratios when times are good, but the reverse is also true.[189]

Sixth, is it valid to assume that a satisfactory return on equity is primarily attributable to officer performance?[190]

Seventh, if return on equity is unsatisfactory, do key officers receive no compensation?[191]

Eighth, if a corporation has more than one key officer, does return on equity reveal the reasonableness of compensation among officers?[192]

Finally, is return on equity the best measure of firm performance?[193] Today, it is not necessarily viewed as the most conceptually sound measure of firm performance.[194]

Although return on equity often enters into multiple objective factors analysis and so these issues could arise anyway, the *Exacto Spring* approach transmutes the issues into the crux of the case. This transmutation makes parties more likely to bring out the heavy artillery of partisan experts who render highly technical and arcane testimony. While parties often introduce expert testimony regarding multiple objective factors analysis, such testimony is typically less technical and is related to matters more within the typical judge's realm of knowledge.

Currently, parties have to address both approaches. In circuits other than the Seventh, in the event the court follows *Exacto Spring*, parties must address return on equity. In the Seventh Circuit, parties must address multiple objective factors

189 K. R. SUBRAMANYAM & JOHN J. WILD, FINANCIAL STATEMENT ANALYSIS 463–65 (10th ed. 2009).

190 Haffner's Serv. Stations, Inc. v. Comm'r, 83 T.C.M. (CCH) 1211, 1223 n.15 (2002), *aff'd*, 326 F.3d 1 (1st Cir. 2003). In the one case we located in which the taxpayer argued it *overpaid* its officers (and hence part of what it originally characterized as compensation was unreasonable), the taxpayer was quick to argue that its excellent financial performance was mostly attributable to a fortuitous regional boom in its industry (construction) and the hard work of other employees. Summit Sheet Metal Co. v. Comm'r, 72 T.C.M. (CCH) 1606, 1610–12 (1996).

191 The Ninth Circuit in *Elliotts, Inc. v. Commissioner*, 716 F.2d 1241, 1247 n.5 (9th Cir. 1983), notes that occasionally compensation may be reasonable even if return on equity is unsatisfactory or even negative.

192 The Tax Court noted this issue on remand in *E.J. Harrison & Sons, Inc. v. Commissioner*, 91 T.C.M. (CCH) 1301, 1303 (2006), *aff'd*, 270 F. App'x 667 (9th Cir. 2009).

193 In *E.J. Harrison*, 86 T.C.M. (CCH) 240, 253 n.6 (2003), the Tax Court noted that, because the taxpayer's equity had remained essentially constant while its sales and assets increased, return on assets or return on sales would likely be a superior measure of performance in that case.

194 The most contemporary measure of investment performance is Economic Value Added. Economic value added = after-tax operating profit – [(total assets – current liabilities) * weighted average cost of capital]. STEVEN R. JACKSON, ROBY B. SAWYERS & J. GREGORY JENKINS, MANAGERIAL ACCOUNTING: A FOCUS ON ETHICAL DECISION MAKING 417–18 (Rob Dewey ed., 5th ed. 2009).

analysis in case the court holds the taxpayer's return on equity was unsatisfactory or was not attributable solely to officer(s).

Finally, the Service has other weapons available to disallow unreasonable compensation. For example, the Service could use the section 162 "ordinary and necessary" provision, section 482, or the substance over form doctrine.[195] All of these generate messy facts and circumstances battles. What is to prevent the Service from using these weapons if courts adopt the *Exacto Spring* approach?

VI. OUR THOUGHTS AND SUGGESTIONS

A. Appellate Courts Should Review Trial Courts' Selection of Relevant Reasonable Compensation Factors Using a Clearly Erroneous Standard

At the appellate level, trial courts' factual findings are properly overturned only if "clearly erroneous"; their legal conclusions are properly reviewed without deference (that is, *de novo*).[196] However, there is not simply a continuum of issues ranging from purely factual to purely legal. For example, "evaluative determinations" have no home in such a continuum.[197]

"Reasonable" issues, including the reasonable compensation issue, are evaluative determinations; such issues are not properly

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195 Although cases have held I.R.C. § 482 does not apply in the context of a corporation and an employee working solely for that corporation, *Foglesong v. Commissioner*, 691 F.2d 848 (7th Cir. 1982), the I.R.C. § 482 regulations were subsequently amended to provide "[e]mployment for compensation will constitute a separate trade or business from the employing trade or business." Treas. Reg. § 1.482-1(i)(2) (2011). *See also* COLE, *supra* note 114, at § 2.04, n.12.

196 Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985).

197 Randall H. Warner, *All Mixed up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 104–09 (2005). The article provides the following examples of evaluative determinations.

> For example, in a negligence case involving stipulated historical facts—that is, the parties agree about what happened, but disagree about whether the defendant's conduct was reasonable—the jury's reasonableness determination is neither factual nor legal. It is not deciding what happened, since that is stipulated. And it is not deciding rules that apply for all similarly situated people. It is just deciding whether one person's conduct was reasonable in a specific circumstance.
>
> Similarly, a jury's decision to award $1 million in damages for pain and suffering is neither fact nor law, nor anything in between. It is a different kind of decision altogether, one in which the jury is neither determining what happened (a question of fact) nor fixing a generally applicable rule (a question of law), but is prescribing the appropriate result in one specific case.

Id. at 108. As noted by the article, evaluative determinations are found everywhere in the law (for example, negligence in tort law and probable cause in criminal procedure).

always reviewed deferentially or *de novo*.[198] Rather, their standard of review is based on a policy choice concerning the judicial actor better positioned to decide the particular issue.[199]

Appellate courts have treated composition of the factors used to determine reasonable compensation as a legal question reviewable *de novo*.[200] Nevertheless, they have treated determination of the ultimate fact of the amount of reasonable compensation as a factual question reviewable only for clear error.[201] This disparate treatment seems logically inconsistent. By deferring to trial courts' determination of the amount of reasonable compensation, appellate courts implicitly acknowledge that trial courts are better positioned to make this evaluative determination. If trial courts are better positioned to determine the amount of reasonable compensation, surely they are also better positioned to select the factors relevant to such determination.

Further, appellate courts already show deference to trial courts' *weighting* of reasonable compensation factors differently in different cases, but there is no logical distinction between determining that a given factor will receive a very high or very low weight in different cases and determining that the factor is relevant in some cases and irrelevant in other cases.[202]

In sum, trial courts are better positioned to select relevant reasonable compensation factors. Such selection is integral to determining the amount of reasonable compensation, an inherently factual determination that appellate courts concede is properly the province of trial courts. Thus, appellate courts should overrule trial courts' selection of relevant reasonable compensation factors only if it leads to clearly erroneous determination of ultimate fact (the amount of reasonable compensation).

B. A Few Additional Thoughts

We believe it unlikely that an independent company owner would agree to a contract embodying the *Exacto Spring* approach. Such a contract would allow the officer to draw out any amount

198 Warner, *supra* note 197, at 130.

199 *Id.*

200 Dexsil Corp. v. Comm'r, 147 F.3d 96, 100 (2d Cir. 1998).

201 Labelgraphics, Inc. v. Comm'r, 221 F.3d 1091, 1094 (9th Cir. 2000).

202 *See, e.g.*, Leonard Pipeline Contractors, Ltd. v. Comm'r, 142 F.3d 1133, 1135 (9th Cir. 1998) ("Despite the difficulties of determining what is reasonable compensation, it is the obligation of the Tax Court to spell out its reasoning and to do more than enumerate the factors and leap to a figure intermediate between petitioner's and the Commissioner's.").

of compensation, no matter how high, as long as return on equity is left at a certain minimal level.

More likely, an officer and independent company owner would agree as follows.[203] First, the officer will receive minimal fixed compensation, even if pre-compensation net income is negative. Next, if net income (after officer minimal fixed compensation) is positive, the company owner will receive a minimal return on their invested capital. If net income exceeds that needed to provide the minimal return on owner invested capital, the officer and company owner will share the "bounty."[204] Under the *Exacto Spring* approach, *all* the bounty would be allocated to the officer. While profit sharing plans entitling management to a share of the bounty are common, we are aware of no independent company owner agreeing to a compensation plan granting management most, much less all, of it.[205]

Allocating all the bounty to the officer implicitly presumes that *only* the officer could have steered the taxpayer to a bountiful performance.[206] We believe this is an erroneous presumption of bilateral monopoly.[207] Occasionally, the officer

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203 To accord with real world business practice, contingent compensation formulas must be agreed to before the period in question. Likewise, Treas. Reg. § 1.162-7(b)(2) provides that to be reasonable contingent compensation it must represent a "free bargain between the employer and the individual made *before* the services are rendered" Treas. Reg. § 1.162-7(b)(2) (2011) (emphasis added). However, *Exacto Spring* does not appear to limit its attempted coinage of the return on equity approach to *ex ante* compensation formulas.

204 CEO cash bonus compensation is on average seventy-five percent of base salary. Lower executive bonus compensation is significantly less than fifty percent and declines as one moves down the organization chart. Amuso & Knopping, *supra* note 126, at 212.

205 *See generally* Robert Masternak, *Gainsharing or Profit Sharing*, *in* THE COMPENSATION HANDBOOK 277 (5th ed. 2008).

206 The Tax Court noted in *PMT, Inc. v. Commissioner*, 72 T.C.M. (CCH) 5, 28 (1996), that this assumption is likely not valid.

207 Chodorow, *supra* note 128, at 97, notes the Seventh Circuit may have erroneously grounded *Exacto Spring* upon the assumption of a bilateral monopoly and states as follows:

> While it might theoretically be reasonable for an investor to pay 100 percent of profits above his expected return to an executive if he has no other means of obtaining his expected return, the market drives down the price an investor has to pay. It would be unreasonable for an investor seeking to maximize his wealth to pay 100 percent of those excess profits to one executive, if another would agree to take only fifty percent. Even if this second executive were to generate a smaller gross return than the first, if his share of the profits is small enough, the investor will still be better off by hiring the second executive. Thus, the premise that a hypothetical reasonable investor would agree to pay an above-market salary may be faulty, and the conclusion that an employee/owner's salary was reasonable because it fell within the range predicted by a model that eliminates the market may not be warranted.

The Tax Court noted in *Guy Schoenecker, Inc. v. Commissioner*, 70 T.C.M. (CCH) 1303, 1312 (1995), that while "it is difficult to determine what an independent investor would expect from the risk of his funds in a business such as [the taxpayer's] . . . it is reasonable to assume that an independent investor would be unwilling for an officer to realize

may have technical expertise, supplier and customer relationships, or the like, without which the taxpayer simply could not function. But usually the taxpayer could function without the officer. Pre-compensation net income might be lower without the officer, but such diminution could potentially be more than offset by reduced salary cost.[208]

If the bounty is attributable to intangibles (on or off the balance sheet), its division would depend upon who owns or controls the intangibles. For example, if certain customers would cease purchasing from the company if the officer left, this "customer list" intangible would provide the officer with bargaining leverage to obtain a larger share of the bounty.

Courts have occasionally allowed compensation to be increased for the value of intangibles such as customer lists, unique processes, etc.[209] Issues frequently skipped include: (1) who owns or controls the intangibles,[210] and (2) whether the intangibles would have value if the officer left the corporation. In our view, if a corporation uses intangibles owned or controlled by an officer, the officer should receive more of the bounty. However, if the corporation owns or controls intangibles that would remain valuable if the officer were absent, the corporation should receive more of the bounty.[211]

C. A Few Suggestions

Additional regulatory guidance would better protect closely-held corporations from uncertainty regarding reasonable compensation than would adoption of the *Exacto Spring* approach. Such regulations could prescribe, *inter alia*, methodological guidance similar to the section 482 regulations,[212]

compensation out of line with compensation paid by similar businesses, thus unnecessarily reducing the income produced by the business in which he had invested."

208 The section 162 regulations implicitly acknowledge the ability of market competition to drive down compensation stating "[i]t is, in general, just to assume that reasonable and true compensation is only such amount as would ordinarily be paid for like services by like enterprises under like circumstances." 26 C.F.R. § 1.162-7(b)(3) (2011).

209 *See*, *e.g.*, Beiner, Inc. v. Comm'r, 88 T.C.M. (CCH) 297, 307–08 (2004); Mortex Mfg. Co., Inc. v. Comm'r, 67 T.C.M. (CCH) 2412, 2422 (1994).

210 If an officer previously developed intangibles but was not adequately compensated therefore, this raises a pay for past services issue. Compensation intended to compensate an officer for previous under-compensation can be "reasonable." Lucas v. Ox Fibre Brush Co., 281 U.S. 115, 119–20 (1930). However, the taxpayer must establish (1) the insufficiency of the officer's compensation in the previous year(s), and (2) the amount of the current year's compensation intended as compensation for that underpayment. Pacific Grains, Inc. v. Comm'r, 399 F.2d 603, 606 (9th Cir. 1968).

211 Regardless of who owns or controls intangibles, if they increase corporate earnings then compensation tied to earnings will also increase.

212 The arm's length transaction standard of I.R.C. § 482 has a "close analytic

mandatory documentation regarding the taxpayer's method of determining compensation,[213] and procedures for pre-filing agreements regarding reasonable compensation.[214]

The impact of intangibles on reasonable compensation also warrants additional regulatory guidance.[215] We believe courts should more deliberately identify and address the impact of intangibles on reasonable compensation. However, valuing intangibles entails thorny measurement questions. For example, many intangibles are inextricably tied to other intangible or tangible assets, making disaggregated valuation exceedingly difficult.[216] This valuation issue is likely one reason firms with high amounts of intangibles are more likely to use bonus structures with earnings rather than return based benchmarks.[217] However, crafting of useful intangible valuation guidance is possible.[218]

CONCLUSION

Courts have been reluctant to follow *Exacto Spring*'s return on equity approach in reasonable compensation cases.[219] We agree with their reluctance. Multiple objective factors analysis better accords with section 162, better implements applicable regulations, is more consonant with collective judicial wisdom,

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kinship" to the reasonable compensation issue. Stumpff, *supra* note 1, at 398 n.80. In *Miller & Sons Drywall, Inc. v. Comm'r*, 89 T.C.M. (CCH) 1279, 1282 (2005), a reasonable compensation case, the Tax Court characterized its task as deciding "whether the amount of compensation paid to petitioner's shareholder-employees would have been the same had they engaged in an arm's-length negotiation." The I.R.C. § 482 regulations look to comparable transactions rather than economic theory to determine whether transactions between related parties satisfy the arm's length standard. Treas. Reg. § 1.482-2 (2011).

213 *See* COLE, *supra* note 114, at ch. 20 for a discussion of transfer pricing documentation requirements.

214 *See* COLE, *supra* note 114, at ch. 19 for a discussion of transfer pricing Advance Pricing Agreements.

215 In *Normandie Metal Fabricators v. Commissioner*, 79 T.C.M. (CCH) 1738, 1747 (2000), the Service's expert testified "it is misleading to measure return on equity based on a shareholder's nominal investment in the company because the shareholder may have invested capital or sweat equity and the company may have contributed patents, intellectual property, or other intangibles that do not appear on the balance sheet." Thus, he testified, "the rate of return on equity is best measured by comparing the company's operating return to the fair market value of its operating assets [including intangibles not appearing on the taxpayer's balance sheet]." *Id.*

216 For example, Coca-Cola's brand name and secret formula are seemingly inseparable as distinct assets. When the company tried to use the same brand name with a different formula in the 1980s, sales plummeted and brand value was damaged until the company resumed with the "Classic" formula and eventually cancelled production of "New Coke."

217 Debra L. Krolick, *The Relevance of Financial Statement Information for Executive Performance Evaluation: Evidence from Choice of Bonus Plan Accounting Performance Measures*, 40 INT'L J. ACCT. 115, 125–30 (2005).

218 *See* ALFRED M. KING, FAIR VALUE FOR FINANCIAL REPORTING ch. 6 (2006).

219 Behrens, *supra* note12, at 801–02.

and is more attuned to the manner in which unrelated parties actually determine compensation. A likely more efficacious approach to lessening taxpayer uncertainty regarding reasonable compensation would be issuance of additional regulatory guidance, including methodological guidance (especially regarding intangibles), documentation guidance, and pre-filing agreement procedures.

Twombly, *Iqbal*, and Rule 8(c): Assessing the Proper Standard to Apply to Affirmative Defenses

*James V. Bilek**

"The history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms."[1]

INTRODUCTION

For almost fifty years, the Federal Rules of Civil Procedure[2] have required parties simply to provide each other with fair notice of their claims or defenses.[3] However, in 2007, the Supreme Court interpreted Rule 8 to mean something quite different.[4] In *Bell Atlantic Corp. v. Twombly*[5] and *Ashcroft v. Iqbal*,[6] the Supreme Court changed the pleading standard from one requiring the complaint to provide the defendant with "fair notice" of the claim,[7] to one requiring the complaint to contain

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1 Judith Resnick, *Precluding Appeals*, 70 CORNELL L. REV. 603, 624 (1985).

2 Hereinafter, unless stated in full, the Federal Rules of Civil Procedure will be referred to simply as "the Rules."

3 *See* Conley v. Gibson, 355 U.S. 41, 47 (1957) ("[A]ll the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." (quoting FED. R. CIV. P. 8(a)(2))), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). *See also* Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999) ("An affirmative defense is subject to the same pleading requirements as is the complaint.").

4 Rule 8 governs complaints and affirmative defenses in federal courts. *See* FED. R. CIV. P. 8(a) (governing complaints); FED. R. CIV. P. 8(c) (governing affirmative defenses).

5 Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

6 Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

7 This "fair notice" standard was fairly simple for a plaintiff to meet. *See* Green Country Food Mkt., Inc. v. Bottling Grp., LLC, 371 F.3d 1275, 1279 (10th Cir. 2004) (holding that a complaint must give the defendant "'fair notice of what the plaintiff's claim is and the grounds upon which it rests' . . . [but that a] plaintiff should not be prevented from pursuing a claim simply because of a failure to set forth in the complaint

"enough facts to state a claim to relief that is plausible on its face."[8] Yet, while the Court may have announced the standard for *complaints*, it was silent as to what to do with affirmative defenses pled in an answer.[9] Must a defendant continue to simply provide the plaintiff with fair notice of the affirmative defense?[10] Or, must the defendant's answer now "contain sufficient factual matter, accepted as true, to 'state a[n affirmative defense] that is plausible on its face[?]'"[11] Without an answer to these questions, defendants seeking to assert an affirmative defense will have little guidance as to what they must now include in their answers. These questions and issues have inspired this Comment, which will examine how *Twombly* and *Iqbal* apply to affirmative defenses. Ultimately, this Comment proposes that a defendant must "plead an adequate factual basis for [his or her] affirmative defense[],"[12] without having to give rise to an affirmative defense which is 'plausible on its face.'"[13] To require a defendant to make a plausibility assessment prior to pleading an affirmative defense would discourage defendants from pleading otherwise legitimate defenses out of fear that they may lack sufficient support to prove their plausibility.[14]

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a theory on which the plaintiff could recover . . . ." (quoting *Conley*, 355 U.S. at 47, *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007))). Thus, under this "notice" standard, facts were not necessarily required to be pled, and a plaintiff's mere allegations may be enough. *See, e.g.*, Comet Enters. Ltd. v. Air-A-Plane Corp., 128 F.3d 855, 860 (4th Cir. 1997) (upholding a complaint against a motion to dismiss despite failing to plead "that its claims are authorized by license" because even on a motion to dismiss, "a plaintiff need not come forward with all of the facts supporting its claim for relief"); Atchinson v. District of Columbia, 73 F.3d 418, 421 (D.C. Cir. 1996) (holding that under a notice standard, complaints do "not [need] to state in detail the facts underlying a complaint"); Christine L. Childers, Note, *Keep on Pleading: The Co-Existence of Notice Pleading and the New Scope of Discovery Standard of Federal Rule of Civil Procedure 26(b)(1)*, 36 VAL. U. L. REV. 677, 686–87 (2002) (noting that after *Conley*, pleadings were no longer used to develop the facts of a case).

8 *Twombly*, 550 U.S. at 570. *See also Iqbal*, 129 S. Ct. at 1953 ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions . . . .'" (quoting FED. R. CIV. P. 1)).

9 *See infra* Part III (noting the multitude of standards on which district courts have relied out of an uncertainty as to what the correct standard is to apply to an affirmative defense).

10 Prior to *Twombly* and *Iqbal*, this was the standard required of affirmative defenses. *See, e.g.*, Davis v. Sun Oil Corp., 148 F.3d 606, 614 (6th Cir. 1998) (Boggs, J., dissenting) ("An affirmative defense may be pleaded in general terms and will be held to be sufficient . . . 'as long as it gives plaintiff fair notice of the nature of the defense.'" (emphasis omitted) (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1381 (3d ed. 2010))).

11 *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570).

12 Equal Emp't Opportunity Comm'n v. Hibbing Taconite Co., 266 F.R.D. 260, 268 (D. Minn. 2009). This would be the standard that a judge would apply on a Rule 12(f) motion to strike. *See* FED. R. CIV. P. 12(f).

13 *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570).

14 An insufficiently pled affirmative defense is subject to being stricken under Rule 12(f), which allows a plaintiff to move the court to strike an affirmative defense from the pleadings and the case. *See* FED. R. CIV. P. 12(f) ("The court may strike from a pleading an

Part I will discuss how common law and code pleading gave way to the Federal Rules of Civil Procedure.[15] Part II will trace the Court's interpretation of Rule 8 from *Conley v. Gibson*[16] to the *Twombly* and *Iqbal* decisions, as well as their effects on complaints and affirmative defenses.[17] Part III will examine the standards that district courts are currently applying to affirmative defenses under Rule 8(c) in light of *Twombly* and *Iqbal*.[18] Lastly, Part IV will propose how district courts should assess affirmative defenses today, taking into account such factors as the textual differences between Rule 8(a) and 8(c), the policies behind the *Twombly* and *Iqbal* decisions, as well as the overall fairness to a defendant and a plaintiff.[19]

I. FROM THE COMMON LAW TO THE CODES TO THE RULES

Pleading regimes in the United States are largely derived as a reaction to the archaic and overly technical pleading standards of the common law.[20] At common law, the pleadings were used as a mechanism to narrow the issues in dispute into one issue that could be decided by a judge or a jury.[21] Each cause of action had

insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act . . . on motion made by a party either before responding to the pleading or, if a response is not allowed, within 20 days after being served with the pleading."). Thus, determining what exactly must be included in a responsive pleading by the defendant is an important topic for both litigators and defendants.

15 *See infra* Part I (describing common law and code pleading standards).

16 Conley v. Gibson, 355 U.S. 41 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

17 *See infra* Part II (discussing the *Twombly* and *Iqbal* decisions).

18 *See infra* Part III (describing the different standards courts have adopted to assess the sufficiency of affirmative defenses pled in the answer).

19 *See infra* Part IV (discussing that an approach requiring facts to be pled is not only most fair to a defendant, but is most in line with the policies underlying the *Twombly* and *Iqbal* decisions).

20 *See* Linda S. Mullenix, *Some Joy in Whoville: Rule 23(f), A Good Rulemaking*, 69 TENN. L. REV. 97, 98 (2001) (noting that the Rules were a "reaction to arcane common law pleading in England"); Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of* Twombly *and* Iqbal, 33 HARV. J.L. & PUB. POL'Y 1107, 1109 (2010) ("[N]otice pleading developed in the 1930s as a reaction to arcane common law pleading rules and rigid code pleading."). As will be discussed, code pleading was meant to replace the "technical common law," and federal notice pleading was meant to replace "cumbersome" code pleading. Doug Rendleman, *Simplification—A Civil Procedure Perspective*, 105 DICK. L. REV. 241, 243 (2001). *See also* John Hasnas, *What's Wrong With a Little Tort Reform?*, 32 IDAHO L. REV. 557, 567 (1996) (describing code pleading as "arcane," which is why it was replaced "in favor of more liberalized notice pleading.").

21 *See* Thomas P. Gressette, Jr., *The Heightened Pleading Standard of* Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal*: A New Phase in American Legal History Begins*, 58 DRAKE L. REV. 401, 404 (2009) ("The . . . pleading scheme was premised on the assumption that by proceeding through numerous stages of denial, avoidance, or demurrer, a case eventually would be reduced to a single dispositive issue of fact or law." (quoting Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 554 (2002))). *See also* ROY L. BROOKS, CRITICAL PROCEDURE 80 (Carolina Academic Press 1998) ("Issue formulation was the centerpiece of common law pleading."); WILLIAM F. WALSH, OUTLINES

its own separate pleading requirements.[22] If the pleader failed to plead the cause of action properly, the pleader had to start all over again.[23] Although there may have been benefits to such single issue pleading,[24] a pleading regime which "stake[s] the outcome of litigation on the accuracy of a forecast that its merits will properly turn on the resolution of a single issue specifically

OF THE HISTORY OF ENGLISH AND AMERICAN LAW 494 (New York University Press 1995) (describing how pleading at common law required parties to plead back and forth until one "precise issue" essential to the case was determined); Clinton W. Francis, *The Structure of Judicial Administration and the Development of Contract Law in Seventeenth-Century England*, 83 COLUM. L. REV. 35, 56 (1983) (noting that at common law, the pleadings were used as a mechanism to narrow the "litigation to a single issue"); Howard T. Markey, *Real-World Rules: Easing the Life of Litigation*, 62 ST. JOHN'S L. REV. 421, 423 n.4 (1987–1988) ("At common law, pleadings served several purposes: giving notice of the nature of the claim, stating the facts, narrowing the issues to be litigated, and providing a means of quickly disposing of frivolous claims and meritless defenses.").

22 *See* A.M. WILSHIRE, M.A., LL.B., PRINCIPLES OF THE COMMON LAW 10 (Sweet & Maxwell, Ltd. 1944). A party wishing to file a complaint (or a declaration as it was known) had to follow the desired cause of action's particular writ. *See* FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE 10–11 (Little, Brown and Co. 1977). Each writ contained different requirements, which must be accurately pleaded or else the pleader failed and would be unable to proceed further with the writ. *See* Koan Mercer, *"Even in These Days of Notice Pleadings": Factual Pleading Requirements in the Fourth Circuit*, 82 N.C. L. REV. 1167, 1168 (2004) ("The common law pleading practice that developed in England between the thirteenth and sixteenth centuries required plaintiffs to choose a single writ under which to bring their claims. Each writ triggered a different form of action with distinct procedural, evidentiary, and jurisdictional requirements."). Much of the displeasure stemming from common law pleading was a result of the technical requirements of these writs. *See, e.g.*, Paul R. Sugarman & Marc G. Perlin, *Proposed Changes to Discovery Rules in Aid of "Tort Reform": Has the Case Been Made?*, 42 AM. U. L. REV. 1465, 1487 (1993) ("Common law pleading was prefigured and technical, shaped by the twelfth-century system of writs and formalistic pleading requirements.").

23 JAMES & HAZARD, *supra* note 22, at 11. Once a plaintiff and attorney decided on the proper cause of action, a myriad of pleading exchanges with the defendant followed. *See* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 437 (1986). Upon receiving the declaration, the defendant could demur, that is, admit the factual allegations, but deny that any legal basis existed for the claim, or plead to the declaration. *See* C. H. S. FIFOOT, M.A., ENGLISH LAW AND ITS BACKGROUND 153 (WM. W. Gaunt & Sons, Inc. 1993). By doing this, if the defendant raised a new fact not originally brought forth, the plaintiff would now have to proceed as the defendant first did by admitting, denying, demurring, or pleading to it. *See* HERBERT BROOM, M. A., COMMENTARIES ON THE COMMON LAW, DESIGNED AS INTRODUCTORY TO ITS STUDY 177–78 (Fred B. Rothman & Co. 1997). This would proceed anew if the plaintiff now raised a fact not raised by the declaration or by the defendant's response. *Id.* The pleadings would only cease if a fact raised by one is denied by the other, or an issue of law is asserted by one, but denied by the other. *Id. See also* Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 454–55 (2003) ("The system required an intricate network of highly technical rules designed to aid or force the parties' dispute to converge upon a single issue of law or fact.").

24 For example, such single issue pleading allowed a lay juror easily to resolve the main issue in the dispute, because instead of having to focus on multiple complex issues, the juror was left with one single issue which one party asserted and the other denied. *See* THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 413 (Little, Brown and Co. 1956) (explaining that if the single issue left is one of fact, "then the parties will have ascertained a material fact which one asserts and the other denies in terms so precise that a jury will have no difficulty in hearing evidence on the matter and finding the truth of it").

designated in advance, will be bound to cause many a miscarriage of justice."[25]

To break from this approach, many states adopted code pleading, which has its beginnings in the New York Code, known distinctly as the "Field Code."[26] Code pleading required parties to plead factual support for their claims or defenses,[27] and necessarily focused on using the pleadings as a mechanism in which to develop facts.[28] This assisted litigants greatly when it came to discovery as each side already had the factual basis for the other's claims or defenses.[29] Thus, code pleading, through factual development, focused on narrowing the issues for discovery and trial, without necessarily requiring that there be only one issue of law or fact left, as was required at common law.[30]

Although code pleading narrowed the scope of discovery, oftentimes it was simply a difficult hurdle for litigators to overcome.[31] "[T]he pleader faced the problem of distinguishing

25 Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 981 (1998) (quoting Fleming James, Jr., *The Objective and Function of the Complaint: Common Law—Codes—Federal Rules*, 14 VAND. L. REV. 899, 903 (1961)). For a discussion of the difficulties of common law pleading, see CHARLES M. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND 33 (2002) (describing pleading at common law as "a system of rigid formalism").

26 *See* 4 B. E. WITKIN, CALIFORNIA PROCEDURE, PLEADING § 1 (5th ed. 2008).

27 *See* Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C. L. REV. 1024, 1026 n.25 (1989) ("Code states adopted the infamous requirement that pleaders set forth the 'ultimate facts,' rather than 'conclusions of law' or 'evidentiary facts.'").

28 *See* Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 100 (1994). *See also* Harry Emmanuel Scozzaro, Jr., Note, *Notice Pleading Under the Federal Rules of Civil Procedure Following* Swierkiewicz v. Sorema N.A.*: Standing on the Shoulders of* Conley *and* Leatherman, 26 AM. J. TRIAL ADVOC. 385, 411 (2002) ("Code pleading replaced the common law writ with facts and the form of action with the cause of action." (emphasis omitted)).

29 *See* Mark D. Robins, *The Resurgence and Limits of the Demurrer*, 27 SUFFOLK U. L. REV. 637, 642 (1993). Thus, code pleading largely assisted parties in determining the legitimacy of the other party's claims or defenses. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 939 (1987) (describing the purpose of code pleading as redressing the "legal rights subsisting between man and man in general") (internal quotation marks omitted).

30 Amelia F. Burroughs, Comment, *Mythed It Again: The Myth of Discovery Abuse and Federal Rule of Civil Procedure 26(b)(1)*, 33 MCGEORGE L. REV. 75, 78 (2001–2002). Compared with common law pleading, which was not as concerned with factual development as it was with issue formulation, code pleading marked a significant break from the common law. Molot, *supra* note 25, at 982–83 (explaining how at common law, issue formulation did not also necessarily entail factual development).

31 *See* Tony L. Wilcox, Schmidt v. McIlroy Bank & Trust*: An Old Twist to a New Rule*, 46 ARK. L. REV. 433, 437 (1993) ("The drafters of the code believed that code pleading would allow the pleader more freedom in bringing his action and would rid the court of the technical form and repetition of the common law system. Yet, even though code pleading was much simpler, pleading problems persisted. While the rigid forms of

facts from evidence and conclusions of law. Many statements fit into both categories, and often it was impossible to make the distinction."[32] In 1938, however, the Federal Rules of Civil Procedure were enacted and took a drastic turn from the technical common law and the fact pleading requirements of the code regimes.[33]

II. THE EVOLVING STANDARDS OF FEDERAL PLEADING: FROM A "NOTICE" STANDARD TO A "PLAUSIBILITY" STANDARD

At the heart of pleading under the Federal Rules of Civil Procedure is Rule 8(a), which requires all complaints to contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."[34] In *Conley v. Gibson*,[35] the Supreme Court interpreted Rule 8 to require that a complaint "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[36] Affirmative defenses, on the

action were abolished, there was no change in the substantive rights of the parties."). *See also* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 990 (2003) (noting that code pleading, like common law pleading, concerned itself with technicalities such as differentiating between facts and conclusions of law). A pleading was insufficient if it merely pled conclusions, and was devoid of any factual basis. *See* Wilcox, *supra* at 437–38 (explaining how under a code pleading regime, parties must only plead facts). In an abundance of caution, parties often would plead too many facts in an attempt to avoid a demurrer. *Id.* This "overpleading" led to high costs and delays and, thus, instead of providing the actual factual support for a claim or defense, a party was simply left with a myriad of facts, but little direction as to which actually applied. *Id.*

32 Wilcox, *supra* note 31, at 437. Despite these concerns, twenty-eight states currently maintain a code pleading system in one form or another. HEPBURN, *supra* note 25, at 92–113. Specifically, the states are: Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Washington, Wisconsin, and Wyoming. *Id.*

33 *See* Sanjuan v. Am. Bd. of Psychiatry & Neurology Inc., 40 F.3d 247, 251 (7th Cir. 1994) (holding that the Federal Rules of Civil Procedure eliminated any need to plead facts in the complaint), *amended by* No. 94-1585, 1995 U.S. App. LEXIS 565 (7th Cir. Jan. 11, 1995). As code and common law pleading were often criticized for focusing on the technical requirements of the pleadings, rather than the substantive merits of the claim, the Rules were a notable response to these criticisms, and emphasized simple pleading with broad and easy access to discovery, which is much more adept at uncovering the facts and issues of a case. *See* JAMES & HAZARD, *supra* note 22, at 22 (noting that an important function under the Rules is its "simplicity and liberal amendment in pleading and motion practice"); Morgan Cloud, *The 2000 Amendments to the Federal Discovery Rules and the Future of Adversarial Pretrial Litigation*, 74 TEMP. L. REV. 27, 52 (2001) ("One of the central reforms of the . . . Rules was to abandon the lengthy and technical requirements of earlier common law and code pleading. Because the Rules' drafters believed that those forms of pleading had been a primary cause of litigation delay, expense, inconvenience, and emphasized procedural games over the substantive merits of the disputes, they embraced notice pleading, with its bare bones and easy to satisfy requirements for stating a claim.").

34 FED. R. CIV. P. 8(a)(2).

35 Conley v. Gibson, 355 U.S. 41 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

36 *Conley*, 355 U.S. at 47. Furthermore, according to *Conley*, complaints are sufficient "unless it appears beyond doubt that the plaintiff can prove no set of facts in

other hand, are governed by Rule 8(c), which requires a defendant to "affirmatively state any avoidance or affirmative defense . . . ."[37] Under the pre-*Twombly* standards, affirmative defenses were held to the same *Conley* notice requirements as was the complaint.[38] Thus, raising an affirmative defense in the answer was meant simply to provide the opposing party with notice and allow that party to use the tools of discovery to further develop the basis of the defense.[39] Despite subsequent Supreme Court decisions affirming this notice standard,[40] in 2007, the

support of his claim which would entitle him to relief." *Id.* at 45–46. *See also* Walter W. Heiser, *A Critical Review of the Local Rules of the United States District Court for the Southern District of California*, 33 SAN DIEGO L. REV. 555, 568 n.64 (1996) (noting that *Conley* rejected a requirement that the pleadings contain all the necessary facts of the claim or defense). The purpose of this lax standard was to allow parties an easy means of access to discovery and thereby give the parties control over which facts and issues are uncovered. *See* Sherman J. Clark, *To Thine Own Self Be True: Enforcing Candor in Pleading Through the Party Admissions Doctrine*, 49 HASTINGS L.J. 565, 584 (1998) (explaining that under the *Conley* notice standard, parties did not have to concern themselves with setting forth facts and establishing their claims or defenses prior to discovery). Thus, contrary to common law and code pleading concerns about narrowing the issues for trial, federal pleading, prior to *Twombly* and *Iqbal*, was much more concerned with preventing a party from forgoing a legitimate claim on the doubt that that party lacked factual specificity at the time of filing the complaint. *Id.* Pleading under the Rules was not meant to trap or trick a party, but was only meant to act as a means to achieve an end to the litigation which was decided on the truth of the issues. *See* Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2207 (1989).

37 FED. R. CIV. P. 8(c)(1).

38 *See* Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999). *See also* Instituto Nacional De Comercializacion Agricola (Indeca) v. Cont'l Il. Nat'l Bank and Trust Co., 576 F. Supp. 985, 988 (N.D. Ill. 1983) (holding that affirmative defenses are "subject to the general pleading requirements of Rules 8(a), 8(e) and 9(b), generally requiring only a short and plain statement of the facts but demanding particularity as to the circumstances constituting fraud and mistake").

39 *See* Fed. Election Comm'n v. Nat'l Rifle Ass'n of Am., 254 F.3d 173, 189 (D.C. Cir. 2001). *See also* FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE 250 (5th ed. 2001) (explaining that Rule 8(c) is only meant to give the plaintiff fair notice of the affirmative defense planned to be asserted at trial).

40 *See, e.g.*, Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511 (2002) (holding that, in an employment discrimination suit brought "under a notice pleading system," the facts establishing plaintiff's claim are not required to be pled); Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (holding that a heightened pleading requirement in a civil rights action is inconsistent "with the liberal system of 'notice pleading' set up by the Federal Rules"). For a discussion on the relationship between *Swierkiewicz*, *Leatherman*, and *Conley*, see Scozzaro, *supra* note 28, at 432 ("In light of *Conley*, *Leatherman*, and now *Swierkiewicz*, a full scale amending of Rule 8 seems unlikely"). There are also a host of lower federal appellate courts affirming and applying this notice standard. *See, e.g.*, Miller v. Am. Heavy Lift Shipping, 231 F.3d 242, 247 (6th Cir. 2000) ("There can be no dispute that our modern rules of civil procedure are based on the concept of 'simplified notice pleading . . . .'" (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)) (internal quotations omitted)); C.H. v. Oliva, 226 F.3d 198, 206 (3d Cir. 2000) (holding that complaints only need to provide the defendant with "fair notice of . . . the plaintiff's claim . . . ." (quoting *Conley*, 355 U.S. at 47, *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007))); Monahan v. N.Y.C. Dep't of Corr., 214 F.3d 275, 283 (2d Cir. 2000) (holding that under the Rules, the opposing party is only required to be provided with "notice of the claim or defense to be litigated . . . ." (citing *Conley*, 355 U.S. at 47–48,

Supreme Court interpreted Rule 8 to require a plausibility standard, not a notice requirement.[41] In *Twombly*, while ruling on the sufficiency of an antitrust complaint, the Court held that "[t]he need at the pleading stage for allegations plausibly suggesting . . . agreement reflects Rule 8(a)(2)'s threshold requirement that the 'plain statement' possess enough heft to 'show that the pleader is entitled to relief.'"[42] The Court cited concerns over the cost of litigation and reasoned that such a heightened pleading requirement is necessary to prevent excessive and unnecessarily expensive discovery in cases with no "reasonably founded hope that the discovery process will reveal relevant [information] . . . ."[43]

Following *Twombly*, there was uncertainty in lower federal courts as to the exact standard to apply to *all* complaints, not simply those involving an antitrust claim.[44] Then, in *Ashcroft v. Iqbal*,[45] the Court definitively closed the door on *Conley*, at least

abrogated by Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007))).

41 *See infra* notes 47–50 and accompanying text (describing *Twombly*'s and *Iqbal*'s plausibility requirement).

42 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545 (2007).

43 *Id.* at 559. This reasoning is a drastic departure from *Conley*, which concerned itself not with controlling the scope of discovery, but with providing litigants with a means to access discovery. *See Conley*, 355 U.S. at 47–48 (holding that the ease of access to discovery under the Rules is meant to provide parties with the ability to uncover the factual basis for the other's claims or defenses and it is because of this that the Rules adopt notice pleading), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). Thus, *Conley* and its progeny believed that the pleadings should not be used for factual and issue development, but rather, that the litigants, with the tools of discovery, would do this themselves. *See* Taylor v. Belger Cartage Serv., Inc., 102 F.R.D. 172, 180–81 (W.D. Mo. 1984) (discussing that attorneys need the liberal discovery processes of the Rules "to explore and develop facts to support established or reasonable extensions of established legal theories"); James E. Brown, Note, *Civil Procedure—Standing and Direct Review in Appellate Court*—Center for Auto Safety v. National Highway Traffic Safety Administration, 793 F.2d 1322 (D.C. Cir. 1986), 60 TEMP. L.Q. 1045, 1056 n.97 (1987) (describing *Conley*'s intentions to use discovery, not pleadings, for factual development). However, with the *Twombly* and *Iqbal* decisions, the complaint will now be used as a form of factual development, in lieu of discovery. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (holding that a complaint must now contain some factual basis).

44 *See, e.g.*, TalentBurst, Inc. v. Collabera, Inc., 567 F. Supp. 2d 261, 269–70 (D. Mass. 2008) (applying *Twombly* to a tortious interference complaint); Dahl v. Bain Capital Partners, L.L.C., 589 F. Supp. 2d 112, 117 (D. Mass. 2008) (holding that *Twombly* only applies to "a claim under § 1 of the Sherman Act."). Considering some of the language used in the *Twombly* decision, it is difficult to fault the courts for their uncertainty. *See Twombly*, 550 U.S. at 556 ("In applying these general standards to a *§ 1 claim*, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." (emphasis added)); *Id.* at 554–55 ("This case presents the antecedent question of what a plaintiff must plead in order to state a *claim under § 1 of the Sherman Act*." (emphasis added)). *See also* Ettie Ward, *The After-Shocks of* Twombly*: Will We "Notice" Pleading Changes?*, 82 ST. JOHN'S L. REV. 893, 906–10 (2008) (discussing the problems that lower federal courts will have to grapple with in a post-*Twombly* world).

45 *Iqbal*, 129 S. Ct. at 1944.

as applied to complaints.[46] In *Iqbal*, the Court clarified that "*Twombly* expounded the pleading standard for 'all civil actions . . . .'"[47] The Court further explained that Rule 8(a) requires complaints to "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[48] This is a two-part analysis, which first requires the court to determine the statements that are factual support for the complaint, which are treated as true, and the statements that are merely conclusory allegations, which the court will not treat as true.[49] Having identified those statements that are afforded the benefit of truth, the reviewing court must determine whether the factual allegations state "a plausible claim for relief," which will require the "court to draw on its judicial experience and common sense."[50] Although the Court in *Iqbal* clarified that the heightened pleading requirement of *Twombly* applies to all complaints, the decision was silent as to whether this standard applies to affirmative defenses.[51] With this uncertainty, defendants and lower federal courts have been left to determine

46 *Id.* at 1953 (holding that *Twombly*'s plausibility standard applies to all complaints); *Twombly*, 550 U.S. at 563 (holding that *Conley*'s notice standard did not set forth the "minimum standard of adequate pleading" for complaints). As will be discussed though, many courts are still adhering to *Conley*'s notice pleading standard when assessing an affirmative defense. *See infra* Parts III(B)–(C)(i).

47 *Iqbal*, 129 S. Ct. at 1953 (quoting FED. R. CIV. P. 1).

48 *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 570).

49 *Id.* Although legal conclusions may be necessary to frame a complaint, "they must be supported by factual allegations." *Id.* at 1950.

50 *Id.* Whatever precisely this plausibility standard will require of a district court judge is an issue beyond the scope of this Comment. This Comment does not focus on what the plausibility test actually *means*, but rather, what test should apply to an affirmative defense. For a discussion of what the test does or should mean, see Charles B. Campbell, *A "Plausible" Showing After* Bell Atlantic Corp. v. Twombly, 9 NEV. L.J. 1, 29 (2008) (describing the plausibility standard as one that will necessarily fluctuate depending on the type of case presented); Schwartz & Appel, *supra* note 20, at 1127 (arguing that a plausibility standard is not a concrete standard on which to assess a complaint); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1293 (2010) (arguing that the plausibility standard is inconsistent with the Rules and prior Supreme Court decisions); Nicholas Tymoczko, Note, *Between the Possible and the Probable: Defining the Plausibility Standard After* Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal, 94 MINN. L. REV. 505, 530 (2009) ("The plausibility standard is best understood as an inferential standard unrelated to notice that is used to assess the substantive sufficiency of a complaint.").

51 *See infra* notes 144–45 and accompanying text (noting the lack of language in *Twombly* and *Iqbal* that would indicate that those decisions were meant to apply to affirmative defenses). *See also* Manuel John Dominguez, William B. Lewis & Anne F. O'Berry, *The Plausibility Standard as a Double-Edged Sword: The Application of* Twombly *and* Iqbal *to Affirmative Defenses*, 84 FLA. B.J. 77, 77 (2010) ("*Twombly*'s application to affirmative defenses has not been widely discussed."); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal: *A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 101 (2010) ("Somewhat uncertain, however, are Twombly's and Iqbal's applicability to denials and affirmative defenses."); Ryan Mize, *From Plausibility to Clarity: An Analysis of the Implications of* Ashcroft v. Iqbal *and Possible Remedies*, 58 U. KAN. L. REV. 1245, 1260–61 (2010) (noting that courts after *Iqbal* have to determine what standard applies to affirmative defenses).

what must be pled in an affirmative defense. Without clear guidance though, the lower courts have split and are not applying one clear uniform standard, thus leaving the affirmative defense in a current state of disarray.[52]

III. IN LIGHT OF *TWOMBLY* AND *IQBAL*, DISTRICT COURTS ARE APPLYING A MULTITUDE OF STANDARDS TO AFFIRMATIVE DEFENSES

Although over sixty district courts have ruled on the applicability of *Twombly* and *Iqbal* to affirmative defenses,[53] as of this publication, no Court of Appeals has directly ruled on the issue.[54] District courts, however, have developed a multitude of standards to assess an affirmative defense in light of *Twombly* and *Iqbal*.[55] Due to this lack of uniformity, the majority of courts do not apply the plausibility standard. Rather, the courts' decisions can be parsed into one of the following categories: (1) district courts which apply *Twombly* and *Iqbal*'s plausibility and fact pleading requirements;[56] (2) district courts which reject *Twombly* and *Iqbal* because Rule 8(a) and 8(c) do not have

52 Despite the uncertain state of the affirmative defense, there is little scholarly work on the issue. Two articles argue for the extension of the plausibility standard to affirmative defenses. *See* Melanie A. Goff & Richard A. Bales, *A "Plausible" Defense: Applying* Twombly *and* Iqbal *to Affirmative Defenses*, 34 AM. J. TRIAL ADVOC. (forthcoming Spring 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1846918; Joseph Seiner, *Plausibility Beyond the Complaint*, 53 WM & MARY L. REV. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1721062. One article argues that the plausibility standard should not be extended to affirmative defenses. *See* Anthony Gambol, *The* Twombly *Standard and Affirmative Defenses: What is Good for the Goose is Not Good for the Gander*, 79 FORD. L. REV. 2173, 2205 (2011). However, Gambol differs from this Comment as Gambol argues that the affirmative defense standard should not be modified at all, and should remain as the *Conley* notice standard. This Comment, however, argues that such a standard is unfair to the plaintiff, and thus, the affirmative defense pleading standard must be modified.

53 *See infra* Part III (describing the different approaches courts have taken in assessing the sufficiency of an affirmative defense pled in an answer).

54 *See* Falley v. Friends Univ., No. 10-1423-CM, 2011 WL 1429956, at *1 (D. Kan. Apr. 14, 2011) (noting that no appellate court has decided the issue of whether the pleading standards of *Twombly* and *Iqbal* apply to affirmative defenses); FTC v. Hope Now Modifications, LLC, No. 09-1204, 2011 U.S. Dist LEXIS 24657, at *5 (D.N.J. Mar. 10, 2011) ("[T]he Court's research confirms, that no Federal Circuit Court has yet considered whether to extend the pleading requirements of *Twombly* and *Iqbal* to affirmative defenses."); Racick v. Dominion Law Assocs., No. 5:10-CV-66-F, 2010 U.S. Dist LEXIS 107105, at *10 (E.D.N.C. Oct. 6, 2010) ("Neither the Fourth Circuit Court of Appeals, nor any other circuit court of appeals, has addressed whether *Twombly* and *Iqbal* should be interpreted as applying to affirmative defenses."); Del-Nat Tire Corp. v. A To Z Tire & Battery, Inc., No. 2:09-cv-02457-JPM-tmp., 2009 WL 4884435, at *2 (W.D. Tenn. Dec. 8, 2009) ("Neither the Sixth Circuit Court of Appeals nor any of the other Court of Appeals have addressed this issue . . . .").

55 *See infra* Part III.

56 *See infra* Part III(A) (describing various courts' applications of the plausibility standard to affirmative defenses).

identical language;[57] and (3) district courts which do not explicitly accept or reject *Twombly* and *Iqbal*, but rather adopt a standard inconsistent with those decisions.[58]

A. District Courts That Explicitly Adopt *Twombly* and *Iqbal* Are Holding Affirmative Defenses to a Plausibility Standard

A number of district courts interpreted *Twombly* and *Iqbal* as announcing a universal pleading standard and, thus, apply the two-part plausibility standard to affirmative defenses.

In *Grovernor House, L.L.C., v. E.I. Du Pont De Nemours and Co.*,[59] the plaintiff filed a motion to strike an affirmative defense pled by the defendant which simply alleged: "[Plaintiff] assumed the risk associated with the design of the canopy."[60] In holding that *Twombly*'s and *Iqbal*'s plausibility standard applies to affirmative defenses, the court reasoned that affirmative defenses, like complaints, are subject to Rule 8(a) and its pleading requirements.[61] Thus, the court was adopting the reasoning of pre-*Twombly* courts that affirmative defenses and complaints are subject to the same requirements,[62] despite the fact that different rules govern each pleading.[63] In assessing the particular affirmative defense at issue in this case, the court granted the motion to strike because the defense was a "bare legal conclusion."[64] By failing to plead any facts, the pleading failed "to suggest that a defense is plausible on its face."[65]

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57 *See infra* Part III(B) (describing how certain courts have rejected the *Twombly* and *Iqbal* requirements as the Rules do not set forth the same standard for an affirmative defense as they do for a complaint).

58 *See infra* Part III(C). This category can be further sub-divided into courts which adopt: (i) a notice pleading standard; (ii) a fact pleading standard; or (iii) a standard which makes the factual particularity required depend on the defense pled. For a discussion arguing that the majority of district courts are adopting a plausibility standard, while a minority are rejecting the plausibility standard, or applying a hybrid of both, see Dominguez et al., *supra* note 51, at 77.

59 Grovernor House, L.L.C., v. E.I. Du Pont De Nemours and Co., No. 09-21698-Civ-COOKE/BANDSTRA, 2010 U.S. Dist LEXIS 91905 (S.D. Fla. Aug. 12, 2010).

60 *Id.* at *11.

61 *Id.* at *4.

62 *See* Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999).

63 *Compare* FED. R. CIV. P. 8(a)(2) ("A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."), *with* FED. R. CIV. P. 8(c)(1) ("In responding to a pleading, a party must *affirmatively state* any avoidance or affirmative defense . . . ." (emphasis added)).

64 *Grovernor House*, *L.L.C.*, 2010 U.S. Dist LEXIS 91905 at *11.

65 *Id.* at *12. This is certainly a *Twombly* and *Iqbal* analysis as it required the court to "draw on its judicial experience and common sense" in making its plausibility determination. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009). Furthermore, this analysis mirrors one that a judge would perform on a Rule 12(b)(6) motion to dismiss a complaint. *See, e.g.*, Wilson v. Price, 624 F.3d 389, 391–92 (7th Cir. 2010) (holding that when faced with a 12(b)(6) motion to dismiss, if the complaint does not state a plausible claim for relief, "the plaintiff pleads itself out of court" (quoting Tamayo v. Blagojevich, 526 F.3d 1074, 1084 (7th Cir. 2008))); Hinton v. Dennis, 362 F. App'x 904, 906 (10th Cir.

Furthermore, in *Safeco Insurance Co. of America v. O'Hara Corp.*,[66] the court expounded on some of the policy reasons behind adopting the *Twombly* and *Iqbal* requirements for affirmative defenses.[67] In applying the *Twombly* and *Iqbal* standard,[68] the court reasoned that by simply allowing the defendant to list any affirmative defense without providing factual support, the defendant was creating "unnecessary work" for the court and the plaintiff.[69] As such defenses require discovery, allowing any legal conclusion to be sufficient will require every plaintiff to determine "which defenses are truly at issue and which are merely asserted without factual basis but in an abundance of caution."[70]

Perhaps the most illustrative example of this concern over discovery issues occurred in the following decision. In *Palmer v. Oakland Farms, Inc.*,[71] the defendant pled *eighteen* affirmative defenses, and the court struck eleven for being conclusory.[72] In applying the *Twombly* and *Iqbal* rule, the court reasoned that discovery should not be used to determine the legitimacy of a defense, but instead should be used to uncover additional facts supporting the defense.[73]

A number of cases expressed unease in having separate pleading standards for plaintiffs and defendants as it would not only be unfair, but would make it difficult for the court to determine the sufficiency of an affirmative defense on a motion to strike.[74] In *Castillo v. Roche Laboratories, Inc.*,[75] the court struck

2010) (holding that when ruling on a 12(b)(6) motion to dismiss, the complaint must contain "specific factual allegations that support a plausible legal claim for relief"); Kay v. Bemis, 500 F.3d 1214, 1218 (10th Cir. 2007) (holding that when faced with a 12(b)(6) motion to dismiss, the complaint must contain "specific allegations" supporting a plausible claim for relief (quoting Alvarado v. KOB-TV, L.L.C., 493 F.3d 1210, 1215 (10th Cir. 2007))), *appeal dismissed*, 500 F.3d 1214 (10th Cir. 2007); Ridge at Red Hawk, L.L.C. v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007) ("[T]he mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims.").

66 Safeco Ins. Co. of Am. v. O'Hara Corp., No. 08-CV-10545, 2008 WL 2558015 (E.D. Mich. June 25, 2008).

67 *Id.* at *1.

68 *Id.* (affirmative defense "must state 'enough facts to state a claim to relief that is plausible on its face'" (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547 (2007))).

69 *Id.*

70 *Id.*

71 Palmer v. Oakland Farms, Inc., No. 5:10cv00029, 2010 WL 2605179 (W.D. Va. June 24, 2010).

72 *Id.* at *1, *6.

73 *Id.* at *5. Furthermore, in *Barnes v. AT&T Pension Benefit Plan-Nonbargained Program*, the defendant pled *twenty-four* affirmative defenses consisting largely of "conclusory statements." 718 F. Supp. 2d 1167, 1172 (N.D. Cal. 2010). The court held these to the *Twombly* and *Iqbal* standard and struck thirteen of them. *Id.* at 1173.

74 *See* United States v. Quadrini, No. 2:07-CV-132227, 2007 WL 4303213, at *4 (E.D.

the defendant's affirmative defense for failing to meet the plausibility requirements of *Twombly* and *Iqbal*.[76] One defense simply stated: "Plaintiff's [c]omplaint fails, in whole or in part, to state a claim upon which relief may be granted,"[77] and was struck for being a "bare-bones, conclusory statement[] without any factual allegations."[78] The court dismissed the argument that it is unfair to hold a defendant, who has only days to answer, to the same standard as a plaintiff, who may have prepared his or her case for years.[79] As "boilerplate defenses . . . require significant unnecessary discovery,"[80] the court has to hold a high amount of pretrial conferences and respond to ill-founded summary judgment motions.[81] With a basis of the underlying facts needed to support the affirmative defenses, the court has much greater control over the discovery process.[82]

Mich. Dec. 6, 2007). *See also* Racick v. Dominion Law Assocs., 270 F.R.D. 228, 234 (E.D.N.C. 2010) ("'[T]he considerations of fairness, common sense and litigation efficiency' underlying *Twombly* and *Iqbal*' mandate that the same pleading requirements apply equally to complaints and affirmative defenses." (quoting Francisco v. Verizon S. Inc., No. 3:09cv737, 2010 U.S. Dist LEXIS 77083, at *7 (E.D. Va. July 29, 2010))); Topline Solutions, Inc. v. Sandler Sys., Inc., No. L-09-3102, 2010 WL 2998836, at *1 (D. Md. July 27, 2010) ("[I]t would be incongruous and unfair to require a plaintiff to operate under one standard and to permit the defendant to operate under a different, less stringent standard."); Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647, 650 (D. Kan. 2009) ("It makes no sense to find that a heightened pleading standard applies to claims but not to affirmative defenses.").

75 Castillo v. Roche Labs., No. 10-20876-CIV, 2010 WL 3027726 (S.D. Fla. Aug. 2, 2010).

76 *Id.* at *1.

77 *Id.*

78 *Id.* at *3 (emphasis omitted).

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.* For courts employing similar reasoning, see HCRI TRS Acquirer, L.L.C. v. Iwer, III, 708 F. Supp. 2d 687, 691 (N.D. Ohio 2010) ("Boilerplate affirmative defenses that provide little or no factual support can have the same detrimental effect on the cost of litigation as poorly worded complaints."); Francisco v. Verizon S., Inc., No. 3:09cv737, 2010 WL 2990159, at *7 (E.D. Va. July 29, 2010) ("An even-handed standard as related to pleadings ensures that the affirmative defenses supply enough information to explain the parameters of and basis for an affirmative defense such that the adverse party can reasonably tailor discovery."); Bradshaw v. Hilco Receivables, L.L.C., 725 F. Supp. 2d 532, 536 (D. Md. 2010) ("The application of the *Twombly* and *Iqbal* standard to defenses will . . . discourage defendants from asserting boilerplate affirmative defenses that are based upon nothing more than 'some conjecture that [they] may somehow apply.'" (quoting Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647, 650 (2009))); Carretta v. May Trucking Co., No. 09-158-MJR, 2010 WL 1139099, at *1 (S.D. Ill. Mar. 19, 2010) (holding that affirmative defenses "must be 'plausible,' raising 'a reasonable expectation that discovery will reveal evidence' supporting the allegations" (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007))); Burget v. Capital W. Sec., Inc., No. CIV-09-1015-M, 2009 WL 4807619, at *2 (W.D. Okla. Dec. 8, 2009) ("An even-handed standard as related to pleadings ensures that the affirmative defenses supply enough information to explain the parameters of and basis for an affirmative defense such that the adverse party can reasonably tailor discovery.").

The courts adopting this standard are focused on judicial economy through narrowing the scope of discovery at the pleading phase.[83] This clearly mirrors the Court's concerns in *Twombly* and *Iqbal* as applied to a plaintiff, because to have to sort through a host of affirmative defenses to determine which actually have validity is costly and burdensome to a plaintiff.[84]

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83 Instead of allowing parties to simply list affirmative defenses, as was allowed prior to *Twombly*, these decisions in an effort to narrow the scope of discovery are requiring enough factual support to state a plausible affirmative defense. *See, e.g.*, Teirstein v. AGA Med. Corp., No. 6:08cv14, 2009 WL 704138, at *2 (E.D. Tex. Mar. 16, 2009) (noting that "in some cases, merely pleading the name of the affirmative defense . . . may be sufficient"). However, as will be discussed, this standard has not been uniformly accepted.

84 *See* Palmer v. Oakland Farms, Inc., No. 5:10cv00029, 2010 WL 2605179, at *5 (W.D. Va. June 24, 2010) ("[A] plaintiff [should] not be left to the formal discovery process to find-out whether the defense exists [but should], instead, use the discovery process for its intended purpose of ascertaining the additional facts which support a well-pleaded claim or defense."). In addition to *Palmer*, for additional district court decisions which hold that *Twombly* and *Iqbal* apply to affirmative defenses, see Groupon Inc. v. MobGob L.L.C., No. 10 C 7456, 2011 WL 2111986, at *2 (N.D. Ill. May 25, 2011) ("[D]espite potentially valid policy arguments for holding affirmative defenses to a lower pleading standard than complaints . . . the Court must apply the same standards, including those expressed recently by the Supreme Court in *Twombly* and *Ashcroft v. Iqbal* . . . ." (citations omitted)); Sanders v. Cont'l Collection Agency, Ltd., No. 11-cv-00448-CMA-MJW, 2011 WL 1706911, at *1 (D. Co. May 5, 2011) (holding that *Iqbal* and *Twombly* apply to affirmative defenses); Shaw v. Prudential Ins. Co. of America, No. 10-03355-CV-W-DGK, 2011 WL 1050004, at *2 (W.D. Mo. Mar. 21, 2011) (holding *Iqbal* and *Twombly* apply to affirmative defenses); United States S.E.C. v. Sachdeva, No. 10-C-747, 2011 WL 933967, at *1 (E.D. Wis. Mar. 16, 2011) (holding *Twombly* and *Iqbal* apply to affirmative defenses); Lucas v. Jerusalem Café, LLC, No. 4:10-cv-00582-DGK, 2011 WL 1364075 (W.D. Mo. Apr. 11, 2011) (holding that *Iqbal*'s and *Twombly*'s plausibility standard applies to affirmative defenses); School of the Ozarks, Inc. v. Greatest Generations Found., No. 10-3499-CV-S-ODS, 2011 WL 1337406, at *1 (W.D. Mo. Apr. 7, 2011) (applying the plausibility standard to affirmative defenses); U.S. v. Brink, No. C-10-243, 2011 WL 835828, at *3 (S.D. Tex. Mar. 4, 2011) (holding that *Twombly* and *Iqbal* apply to affirmative defenses); Burns v. Dodeka, L.L.C., No. 4:09-CV-19-BJ, 2010 WL 1903987, at *1 (N.D. Tex. May 11, 2010) (striking affirmative defenses that "are wholly conclusory and fail to plead any facts that demonstrate the plausibility of such defenses as required by *Bell Atlantic Corp. v. Twombly* . . . "); OSF Healthcare Sys. v. Banno, No. 08-1096, 2010 WL 431963, at *2 (C.D. Ill. Jan. 29, 2010) (holding that *Twombly* and *Iqbal* "dealt with whether a complaint's allegations satisfied pleading requirements, but their statements seem equally applicable to affirmative defenses, given that affirmative defenses are subject to those same pleading requirements"); AET Rail Grp., L.L.C. v. Siemens Transp. Sys., Inc., No. 08-CV-6442, 2009 WL 5216960, at *4 (W.D.N.Y. Dec. 30, 2009) ("*Twombly* does not require that the complaint (or here, the Answer with affirmative defenses) provide 'detailed factual allegations,' . . . however, it must 'amplify a claim with some factual allegations . . . to render the claim plausible.'" (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)) (quoting Iqbal v. Hasty, 490 F.3d 143, 157–58 (2d Cir. 2007), *rev'd sub nom.* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009))); Premium Standard Farms, L.L.C. v. Travelers Prop. & Cas. Co. of Am., No. 09-0699-CV-W-GAF, 2009 WL 4907063, at *1 (W.D. Mo. Dec. 14, 2009) (holding defendant "has stated plausible affirmative defenses . . . "); Bank of Montreal v. SK Foods, L.L.C., No. 09 C 3479, 2009 WL 3824668, at *3 (N.D. Ill. Nov. 13, 2009) (striking affirmative defenses for being implausible); Tracy v. NVR, Inc., No. 04-CV-6541L, 2009 WL 3153150, at *7 (W.D.N.Y. Sept. 30, 2009) ("[T]he *Twombly* plausibility standard applies with equal force to a motion to strike an affirmative defense under Rule 12(f)."); *In re* Mission Bay Ski & Bike, Inc., Nos. 07 B 20870, 08 A 55, 2009 WL 2913438, at *6 (Bankr. N.D. Ill. Sept. 9, 2009) ("Affirmative

B. District Courts That Explicitly Reject *Twombly*'s and *Iqbal*'s Plausibility Standard Are Applying *Conley*'s Notice Pleading Standard

Focusing on the textual differences between Rule 8(a) and Rule 8(c), the following decisions explicitly rejected the *Twombly* and *Iqbal* standard.

In *FTC v. Hope Now Modifications*, the court rejected an argument that an affirmative defense must be pled with plausible support because "the Federal Rules of Civil Procedure distinguish the level of pleading required between a plaintiff asserting a claim for relief under Rule 8(a) and a defendant asserting an affirmative defense under Rule 8(c)."[85] When a defendant pleads an affirmative defense, the defendant does not seek a "claim for relief" within Rule 8(a).[86] Thus, the simple Rule 8(c) standard should apply, and a defendant need only "state" the affirmative defense.[87]

In *McLemore v. Regions Bank*,[88] the court allowed an affirmative defense to stand despite the fact that it only stated that: "Plaintiffs' fault is comparatively greater than any fault of [defendant's]."[89] The court held that the *Twombly* and *Iqbal* decisions did not affect the pleading standard for affirmative defenses.[90] The court reasoned that the Supreme Court in *Twombly* and *Iqbal* was not interpreting Rule 8(c), but rather was only interpreting Rule 8(a)(2)'s requirement that a complaint be stated with "a short and plain statement of the claim showing that the pleader is entitled to relief."[91] Although Rule 8(b) and Rule 8(a) both require an answer or a complaint to be stated in "short and plain terms," Rule 8(c) is the applicable standard

defenses are pleadings and so are subject to all pleading requirements under the Federal Rules. . . . [Thus,] [t]he facts alleged must be sufficient not only to give notice of the nature of the claim but to show the claim 'is plausible on its face.'" (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (citing Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009))); Magicon, L.L.C. v. Weatherford Int'l, Inc., Nos. 4:08-cv-03639, 4:08-cv-03636, 2009 U.S. Dist LEXIS 126500, at *6 (S.D. Tex. Aug. 10, 2009) (holding affirmative defenses "must contain sufficient factual matter, accepted as true" to state a plausible defense); JPMorgan Chase Bank, N.A. v. Mal Corp., No. 07 C 2034, 2009 U.S. Dist LEXIS 23540, at *5 (N.D. Ill. Mar. 26, 2009) ("[A]n affirmative defense need only articulate 'a plausible set of underlying facts.'" (quoting SEG Liquidation Co., L.L.C. v. Stevenson, No. 07 C 3456, 2008 WL 623626, at *2 (N.D. Ill. Mar. 6, 2008))).

85 FTC v. Hope Now Modifications, L.L.C., No. 09-1204 (JBS/JS), 2011 WL 883202, at *3 (D.N.J. Mar. 10, 2011).

86 *Id.*

87 *Id.* at *2.

88 McLemore v. Regions Bank, Nos. 3:08-cv-0021, 3:08-cv-1003, 2010 WL 1010092 (M.D. Tenn. Mar. 18, 2010).

89 *Id.* at *12.

90 *Id.* at *13.

91 *Id.* (quoting FED. R. CIV. P. 8(a)(2) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007))).

when assessing an affirmative defense, not Rule 8(b).[92] Thus, the above-pled affirmative defense was sufficient because it only needs to be pled in "'general terms.'"[93]

Furthermore, in *Charleswell v. Chase Manhattan Bank, N.A.*,[94] the court upheld an affirmative defense, which only alleged that "Plaintiffs' claims are barred in whole or in part by Plaintiffs' contributory and/or comparative negligence."[95] As in *McLemore*, the court reasoned that *Twombly* was interpreting the word "showing" in Rule 8(a), and under Rule 8(c) the defendant does not have to "show" anything.[96] Thus, the plausibility standard does not apply to a defendant's affirmative defenses pled under Rule 8(c).[97]

A number of courts were troubled by the inherent unfairness in requiring a defendant to plead enough facts to prove an affirmative defense plausible on its face.[98] Specifically, in *Holdbrook v. SAIA Motor Freight Line, L.L.C.*,[99] the court upheld an affirmative defense which merely alleged: "Plaintiff has been the cause of his own damages . . . ."[100] The court reasoned that affirmative defenses are not held to a heightened pleading standard as it is entirely reasonable to hold a plaintiff who may

92 *Id.* This decision is focusing not on the underlying policies of the *Twombly* and *Iqbal* decisions, but rather on a simple textual analysis of the Rules. Strictly speaking, the court is correct in this regard as the text of Rule 8(a) and 8(c) clearly differ. *Compare* FED. R. CIV. P. 8(a)(2) ("A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."), *with* FED. R. CIV. P. 8(c)(1) ("In responding to a pleading, a party must *affirmatively state* any avoidance or affirmative defense." (emphasis added)). In applying the same pre-*Twombly* standard to affirmative defenses though, the court is taking an approach inconsistent with the new direction of the Supreme Court. As will be discussed further below, this Comment's proposed standard takes into account the textual differences between Rule 8(a) and 8(c), as well as the underlying policies of the *Twombly* and *Iqbal* decisions. In so doing, the correct medium is attained, and the concerns of these district court decisions and those of the *Twombly* and *Iqbal* decisions are effectively harmonized.

93 *McLemore*, 2010 WL 1010092, at *13 (quoting Lawrence v. Chabot, 182 F. App'x 442, 456 (6th Cir. 2006), *aff'd sub nom.* Lawrence v. Welch, 531 F.3d 364 (6th Cir. 2008)).

94 Charleswell v. Chase Manhattan Bank, N.A, No. 01-119, 2009 WL 4981730, at *4 (D. Va. Dec. 8, 2009).

95 *Id.* at *6.

96 *Id.* at *4. Similarly, in *Henson v. Supplemental Health Care Staffing Specialists*, the court upheld an affirmative defense which only alleged: "[t]he doctrines of waiver and/or estoppel preclude the Plaintiff's right to recover in whole or in part." No. CIV-09-0397-HE, 2009 U.S. Dist LEXIS 127642, at *2 (W.D. Okla. July 30, 2009). When the complaint and the defense are examined together, the defense provides the plaintiff with enough to be informed "of the nature of the defense . . . ." *Id.* at *4.

97 *Chase Manhattan Bank*, 2009 WL 4981730, at *4. *See also* Romantine v. CH2M Hill Eng'rs, Inc., No. 09-973, 2009 WL 3417469, at *1 (W.D. Pa. Oct. 23, 2009) ("This court does not believe that *Twombly* is appropriately applied to either affirmative defenses under 8(c), or general defenses under Rule 8(b) . . . .").

98 *See infra* notes 99–101 and accompanying text.

99 Holdbrook v. SAIA Motor Freight Line, L.L.C., No. 09-cv-02870-LTB-BNB, 2010 WL 865380 (D. Colo. Mar. 8, 2010).

100 *Id.* at *1.

have years to investigate his or her claims to a higher standard than a defendant who has only twenty-one days to respond to the complaint.[101]

Thus, these decisions explicitly rejected the policy rationales underlying the *Twombly* and *Iqbal* decisions.[102] Instead, they focused on the textual differences between Rule 8(a) and 8(c), as well as fairness concerns, and held that the plausibility standard is not applicable to affirmative defenses.[103]

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101 *Id.* at *2. Consider also, the court in *Baum v. Faith Technologies*, which held that it is unfair to "expect defendants to be aware of all the necessary facts" required to make up an affirmative defense, as the defendant has not yet had an opportunity to conduct discovery. No.10-CV-0144-CVE-TLW, 2010 WL 2365451, at *3 (N.D. Okla. June 9, 2010). Besides, when taken together, a complaint and an answer provide a plaintiff with sufficient notice of the defense. *Id.* Thus, a court should look at both the answer and the complaint because "[i]t would be absurd to require a defendant to re-plead every fact relevant to an affirmative defense." *Id.*

102 *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007).

103 Thus, at least to these decisions, *Conley* is not entirely irrelevant as a pleading standard; rather, it only applies to an affirmative defense. Therefore, *Conley* is truly not "bad law" as these decisions are clearly adopting this standard. If *Conley* is to somehow remain applicable after the *Twombly* and *Iqbal* decisions, it would most likely have to be through an affirmative defense. For additional decisions which reject the plausibility standard, see Bowers v. Mortgage Electronic Registration Systems, No. 10–4141–JTM–DJW, 2011 WL 2149423, at *4 (D. Kan. June 1, 2011) (holding that affirmative defenses "are not subject to the rationale and holdings of *Iqbal* and *Twombly*."); Schlief v. Nu-Source, Inc., No. 10-4477 (DWF/SER), 2011 WL 1560672, at *9 (D. Minn. Apr. 25, 2011) ("The Court concludes that the pleading standard set forth in *Twombly* and *Iqbal* does not apply to affirmative defenses."); Falley v. Friends University, No. 10-1423-CM, 2011 WL 1429956, at *4 (D. Kan. Apr. 14, 2011) ("[T]he pleading standards of *Twombly* and *Iqbal* should be limited to complaints—not extended to affirmative defenses."); Tyco Fire Products LP v. Victaulic Co., No.10-4645, 2011 WL 1399847, at *1 (E.D. Pa. Apr. 12, 2011) ("*Twombly* and *Iqbal* do not apply to affirmative defenses."); *In re* Washington Mutual, Inc. Securities, Derivative & ERISA Litigation, No. 08-md-1919 MJP, 2011 WL 1158387, at *1 (W.D. Wa. Mar. 25, 2011) (holding *Twombly* and *Iqbal* do not apply to affirmative defenses); Jeeper's of Auburn, Inc. v. KWJB Enterprise, L.L.C., No. 10-13682, 2011 WL 1899195, at *2 (E.D. Mich. Mar. 16, 2011) (holding that since *Iqbal* and *Twombly* do not expressly apply to affirmative defenses, then they should not be extended as such); Sewell v. Allied Interstate, Inc., No. 3:10-CV-113, 2011 WL 32209, at *7 (E.D. Tenn. Jan. 5, 2011) (holding that since *Twombly* and *Iqbal* do not expressly apply to affirmative defenses, then they should not be extended as such); Ameristar Fence Products., Inc. v. Phoenix Fence Co., No.CV-10-299-PHX-DGC, 2010 WL 2803907, at *1 (D. Ariz. July 15, 2010) ("[T]he pleading standards enunciated in *Twombly* and *Ashcroft v. Iqbal* . . . have no application to affirmative defenses pled under Rule 8(c)."); Jackson v. City of Centreville, 269 F.R.D. 661, 662 (N.D. Ala. 2010) ("The Supreme Court desired to prevent plaintiffs with groundless claims from wasting judicial and other legal resources . . . . Neither *Twombly* nor *Iqbal* address Rules 8(b)(1)(A) and 8(c) which pertain to affirmative defenses." (citations omitted)); First National Insurance Co. of America v. Camps Services, Ltd., No.08-cv-12805, 2009 U.S. Dist LEXIS 149, at *5 (E.D. Mich. Jan. 5, 2009) ("*Twombly*'s analysis of the 'short and plain statement' requirement of *Rule 8(a)* is inapplicable to this motion under *Rule 8(c)*."); Westbrook v. Paragon Systems, Inc., No. 07-0714-WS-C, 2007 U.S. Dist LEXIS 88490, at *2 (S.D. Ala. Nov. 29, 2007) ("*Twombly* was decided under *Rule 8(a)*, . . . and plaintiff has identified no case extending it to *Rule 8(b)* or *(c)*." (citation omitted)). In addition to the above, a number of decisions implicitly rejected *Twombly*'s and *Iqbal*'s pleading requirements. *See* Chatelaine, Inc. v. Twin Modal, Inc., No. 3:10-CV-676, 2010 U.S. Dist LEXIS 89348, at *5 (N.D. Tex. Aug. 27,

C. District Courts That Do Not Explicitly Adopt or Reject *Twombly* and *Iqbal* Are Applying Standards Inconsistent with Those Decisions

A number of district courts have explicitly neglected to decide the *Twombly* and *Iqbal* issue, but rather simply adopt a different standard or revert to *Conley*'s notice standard. Thus, these decisions, although not explicit, are rejecting the *Twombly* and *Iqbal* rule as they are applying standards inconsistent with the plausibility test.

i. District Courts That Apply a Notice Pleading Standard

These decisions simply cite *Twombly* or *Iqbal* and then conclude that the proper standard is one of only providing the plaintiff with "fair notice" of the defense, not of providing the plaintiff with any factual basis for the defense.[104]

In *BJ Energy, L.L.C. v. PJM Interconnection, L.L.C.*,[105] the court declined to strike an affirmative defense which simply stated: "[Plaintiff] has failed to mitigate any damages it purports to have suffered."[106] Despite failing to allege any factual basis for why or how the plaintiff failed to mitigate damages, "fair notice of the nature of the defense" is all that is required as the discovery process, not the pleadings, are the proper mechanism in which to uncover the factual basis for the defenses.[107] This is

2010) (holding affirmative defenses were sufficiently pled and that "any facts supporting these [affirmative defenses] can and should be fleshed out through discovery"); Pezzuto v. Premier Hosp. Mgmt., Inc., No. 10-CV-068-JHP, 2010 WL 2788163, at *1 (E.D. Okla. July 14, 2010) (holding that affirmative defenses should be read in conjunction with the complaint because "an answer . . . will contain fewer factual assertions than a complaint and still be sufficient"); Kaufmann v. Prudential Ins. Co., No.09-10239-RGS, 2009 WL 2449872, at *1 n.1 (D. Ma. Aug. 6, 2009) (holding that Rule 8(c)(1) defenses need only be pled as *listed* because the "plaintiff, as the instigator of the litigation, has the initial good faith burden to investigate and verify the validity of her claims").

104 *See, e.g.*, Local 165 v. DEM/EX Grp. Inc., No. 09-1356, 2010 WL 971811, at *2 (C.D. Ill. Mar. 11, 2010) ("[T]here must be enough to give the opposing party notice of the basis for the claim or defense." (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007))).

105 BJ Energy, L.L.C. v. PJM Interconnection, L.L.C., Nos. 08-3649, 09-2864, 2010 WL 1491900 (E.D. Pa. Apr. 13, 2010).

106 *Id.* at *4.

107 *Id.* at *2, *5. A true *Twombly* and *Iqbal* analysis would most certainly have struck this. For starters, there are literally no factual allegations in the defense. *See Iqbal*, 129 S. Ct. at 1949 ("[A] complaint *must* contain sufficient *factual* matter, accepted as true, to 'state claim to relief that is plausible on its face.'" (emphasis added) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007))). A plaintiff trying to focus the scope of discovery would have to broadly determine the defendant's reasons, if any, for asserting the defense. This would require ascertaining what the defendant thinks, which necessarily can be a wide range of topics. *See* Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998) ("Since discovery extends under Rule 26 to anything 'relevant to the subject matter,' relevance must be ascertained by some other mechanism. The only effective alternative is discovery itself."). This will only protract

clearly antithetical to *Twombly*'s and *Iqbal*'s intentions of denying a party access to discovery by merely pleading legal conclusions, which may provide notice of the claim, but are devoid of any factual basis.[108] Thus, this decision and others cited, revert to notice pleading, a much lower bar for a defendant to surpass, which accomplishes little in reducing the costs of discovery.[109]

litigation and add to its costs. *See* Andrew P. Morriss & Jason Korosec, *Private Dispute Resolution in the Card Context: Structure, Reputation, and Incentives*, 1 J.L. ECON. & POL'Y 393, 403 (2005) (explaining that under a notice pleading regime limitations on the parties' abilities to conduct lengthy discovery is not very limited as the parties must attempt to determine what can be relevant to the vaguely stated claim or defense); Ettie Ward, *Will the Proposed Amendments to the Federal Rules of Civil Procedure Improve the Pretrial Process?*, 72 N.Y. ST. B.A. J. 18, 24 (2000) (discussing the effect of depositions on discovery costs); Michael G. Dailey, Comment, *Preemption of State Court Class Action Claims for Securities Fraud: Should Federal Law Trump?*, 67 U. CIN. L. REV. 587, 595 (1998–1999) (explaining how the expensive costs of discovery can cause a defendant to settle instead of attempting to bear these costs).

108 *See Iqbal*, 129 S. Ct. at 1950 ("Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007) ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before even reaching [pretrial] proceedings."). For the remaining decisions which apply this standard, see Local 165 v. DEM/EX Grp. Inc., No. 09-1356, 2010 WL 971811, at *2 (C.D. Ill. Mar. 11, 2010) ("[T]here must be enough to give the opposing party notice of the basis for the claim or defense." (citing *Twombly*, 550 U.S. at 555)); Tara Prods., Inc. v. Hollywood Gadgets, Inc., No. 09-61436-CIV-COHN/SELTZER, 2009 U.S. Dist LEXIS 121709, at *3 (S.D. Fla. Dec. 11, 2009) ("Although Rule 8 does not obligate a defendant to set forth detailed factual allegations, a defendant must give the plaintiff 'fair notice' of the nature of the defense and the grounds upon which it rests."); Darnell v. Hoelscher, Inc., No. 09-204-JPG, 2009 WL 4675884, at *1 (S.D. Ill. Dec. 4, 2009) ("[T]he [defense] need only give fair notice of what the claim is and the grounds upon which it rests." (citing *Twombly*, 550 U.S. at 555)); CTF Dev., Inc. v. Penta Hospitality, L.L.C., No. C 09-02429 WHA, 2009 WL 3517617, at *8 (N.D. Cal. Oct. 26, 2009) (holding that *Iqbal* only requires the defendant to provide the plaintiff with "fair notice" of the affirmative defense); FDIC v. Bristol Home Mortg. Lending, L.L.C., No. 08-81536-CIV, 2009 WL 2488302, at *2 (S.D. Fla. Aug. 13, 2009) ("Although Rule 8 does not obligate a defendant to set forth detailed factual allegations, a defendant must give the plaintiff 'fair notice' of the nature of the defense and the grounds upon which it rests."); New York v. Micron Tech., Inc., No. C 06-6436, 2009 U.S. Dist LEXIS 1624, at *12 (N.D. Cal. Jan. 5, 2009) ("The 'fair notice' pleading requirement is met if the defendant 'sufficiently articulated the defense so that the plaintiff was not a victim of unfair surprise.'" (quoting Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999))); Greenheck Fan Corp. v. Loren Cook Co., No. 08-cv-335-jps, 2008 WL 4443805, at *1 (W.D. Wis. Sept. 25, 2008) ("The issue is . . . whether [the] plaintiff has been placed on notice of defendant's grounds for raising the defense.").

109 *See* Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794, 1804 (2002) (discussing how discovery under notice pleading "can entail pretrial practice out of any sensible relationship to the stakes or needs of relatively simple litigation"); Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 639 (1989) (describing how notice pleading often entails discovery costs which are ultimately irrelevant to the merits of the case); Michael F. Urbanski & James R. Creekmore, *Antitrust and Trade Regulation Law*, 32 U. RICH. L. REV. 973, 986 (1998) (discussing how discovery under a notice regime "can often be extensive, expensive and burdensome" (quoting DEE-K Enterprises, Inc. v. Heveafil Sdn. Bhd., 982 F. Supp. 1138, 1150 (E.D. Va. 1997)).

ii. District Courts That Require an Adequate Factual Basis or Factual Particularity to Be Pled Are Not Adopting the Plausibility Standard

These decisions were fractured from Part III(A) because the cases in this category do not apply both the factual *and* plausibility elements of the *Twombly* and *Iqbal* decisions.[110] Rather, these cases require facts to be pled, but not necessarily enough to give rise to a defense "that is plausible on its face."[111] Notably, in *Holtzman v. B/E Aerospace, Inc.*,[112] the court held that nine of the defendant's seventeen affirmative defenses pled "insufficient allegations of fact."[113] Citing *Twombly*, the court reasoned that factual support must be pled in an affirmative defense because a plaintiff should not simply have to guess as to what the basis is for the defendant's assertions.[114] However, the court stopped short of requiring the defense to be plausible, but rather only required that factual support be provided.[115]

Thus, this decision and others cited were not assessing the sufficiency of factual support provided under a plausibility standard, but were simply assessing whether or not *any* facts were pled.[116]

110 *Iqbal*, 129 S. Ct. at 1949 ("[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" (quoting *Twombly*, 550 U.S. at 570)).

111 *Id. See also infra* notes 112–12 and accompanying text.

112 Holtzman v. B/E Aerospace, Inc, No. 07-80551-CIV, 2008 WL 2225668 (S.D. Fla. May 29, 2008).

113 *Id.* at *2.

114 *Id.* (quoting Stoner v. Walsh, 772 F. Supp. 790, 800 (S.D.N.Y. 1991)).

115 *Id.*

116 Therefore, this did not encompass the two part plausibility requirement, but rather only required some factual basis. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). For the remaining decisions applying this standard, see Luvata Buffalo, Inc. v. Lombard General Insurance Co. of Canada, No. 08-CV-00034(A)(M), 2010 WL 826583, at *8 (W.D.N.Y. Mar. 4, 2010) ("Affirmative defenses which amount to nothing more than mere conclusions of law and are not warranted by any asserted facts have no efficacy." (quoting Shechter v. Comptroller of N.Y.C., 79 F.3d 265, 270 (2d Cir. 1996))); Cosmetic Warriors, Ltd. v. Lush Boutique, L.L.C., No. 09-6381, 2010 U.S. Dist LEXIS 16392, at *4 (E.D. La. Feb. 1, 2010) ("[A] defendant must plead an affirmative defense with . . . factual particularity."); IndyMac Venture, L.L.C. v. Silver Creek Crossing, L.L.C., C09-1069Z, 2010 U.S. Dist LEXIS 34275, at *11 (W.D. Wash. Mar. 18, 2010) ("Courts have stricken defenses that were unsupported by facts entitling defendants to relief . . . and when defenses rely on facts that, even if true, would not provide a valid defense to the claims asserted" (citations omitted)); EEOC v. Hibbing Taconite Co., 266 F.R.D 260, 268 (D. Minn. 2009) ("[T]he defendant [must] plead an adequate factual basis for affirmative defenses, where the basis is not apparent by the defense's bare assertion."); Solis v. Zenith Capital, L.L.C., No. C 08-4854 PJH, 2009 U.S. Dist LEXIS 43350, at *6 (N.D. Cal. May 8, 2009) ("Where an affirmative defense simply states a legal conclusion or theory without the support of facts explaining how it connects to the instant case, it is insufficient and will not withstand a motion to strike."); Stoffels v. SBC Communications, No. 05-CV-0233-WWJ, 2008 WL 4391396, at *1 (W.D. Tex. Sept. 22, 2008) (holding that affirmative defenses must "provide the grounds for entitlement to relief and requires 'more than labels and conclusions'" and must be pled with "factual particularity" (quoting Bell Atl.

iii. One District Court Applied Both the Plausibility Standard and the Fair Notice Standard to Affirmative Defenses

The parties in *Voeks v. Wal-Mart Stores, Inc.*,[117] debated over whether the *Twombly* standard should apply or if the fair notice standard outlined in *Woodfield v. Bowman* should apply.[118] The court held that in fact *both* should apply because "*Twombly* and *Woodfield* are not materially different."[119] The proper test is not that "specific facts are [] necessary; [but, that] the statement need only 'give . . . fair notice of what the . . . claim is and the grounds upon which it rests."[120] The amount and specificity of facts which are required to be pled turn on the defense pled, and the specific case in which it is pled.[121] Although this decision was not adopting a plausibility standard,[122] it did require the answer at least to provide the grounds on which the defense rests, which may include certain facts depending on the particular defense pled.[123]

Corp. v. Twombly, 550 U.S. 544, 570 (2007))); Home Mgmt. Solutions, Inc. v. Prescient, Inc., No. 07-20608-CIV, 2007 WL 2412834, at *3 (S.D. Fla. Aug. 21, 2007) (holding that because "a defendant must . . . plead an affirmative defense with enough specificity or factual support to give the plaintiff 'fair notice' of the defense," by failing to plead the elements of the defense or any facts to support those elements, the defendant failed to provide the plaintiff with fair notice).

117 Voeks v. Wal-Mart Stores, Inc., No. 07-C-0030, 2008 WL 89434 (E.D. Wis. Jan. 7, 2008).

118 Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999) (holding that a defendant "must plead an affirmative defense with enough specificity or factual particularity to give the plaintiff 'fair notice' of the defense that is being advanced").

119 *Voeks*, 2008 WL 89434, at *6.

120 *Id.* (quoting Erickson v. Pardus, 551 U.S. 89, 93 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007))).

121 *Id.* The court upheld a statute of limitations defense because although "not pled with much detail," it is essentially "self-explanatory." *Id.*

122 *Id.* ("*Twombly* and *Woodfield* are not materially different"). The court also required the elements of equitable defenses to be pled. *Id.* Other courts take a similar approach to equitable defenses. *See, e.g.*, Bartashnik v. Bridgeview Bancorp, Inc., No. 05 C 2731, 2005 WL 3470315, at *4 (N.D. Ill. Dec. 15, 2005) ("[E]quitable defenses . . . must be pled with the specific elements required to establish the defense." (quoting Yash Raj Films Inc. v. Atl. Video, No. 03 C 7069, 2004 WL 1200184, at *3 (N.D. Ill. May 28, 2004))).

123 *Voeks*, 2008 WL 89434, at *6. There were also a number of decisions that applied a "cannot succeed under any circumstances test." *See* United States v. The Boeing Co., No. 05-1073-WEB, 2009 U.S. Dist LEXIS 71625, at *8 (D. Kan. Aug. 13, 2009) ("A defense is considered insufficient if it cannot succeed, as a matter of law, under any circumstances."); Champion Bank v. Reg'l Dev., L.L.C., No. 4:08CV1807 CDP, 2009 WL 1351122, at *4 (E.D. Mo. May 13, 2009) (Motions to strike "should not be granted 'unless as a matter of law, the defense cannot succeed under any circumstances'" (quoting FDIC v. Coble, 720 F. Supp. 748, 750 (E.D. Mo. 1989))); Wilhelm v. TLC Lawn Care, Inc., No. 07-2465-KHV, 2008 U.S. Dist LEXIS 13221, at *4 (D. Kan. Feb. 19, 2008) ("A defense is insufficient if it cannot succeed, as a matter of law, under any circumstances."); Robertson v. LTS Mgmt. Servs. L.L.C., 642 F. Supp. 2d 922, 933 (W.D. Mo. 2008) ("[T]he Court is unable to state definitely that this defense could not succeed under any circumstances."); Mark v. Gov't Props. Trust, Inc., No. 8:06CV769, 2007 WL 1319712, at *3 (D. Neb. Apr. 5, 2007) (holding that a court "must be convinced . . . that under no set of circumstances can

D. Summary of the Current State of the Affirmative Defense

Overall, the *Twombly* and *Iqbal* standard has not been uniformly applied to affirmative defenses, and the majority of courts dealing with the issue have not applied the plausibility standard.[124] Some may explicitly adopt or reject the standard, while many simply dodge the issue and apply a different standard.[125] As the current state of the affirmative defense is marred with a multitude of varying rules and rationales, the true question becomes: What standard should ultimately be adopted? In order to answer this question properly, a reconciliation must be had between the *Twombly* and *Iqbal* decisions, the textual language of the Rules, and the practical implications of adopting a certain standard.

IV. ADOPTING THE PROPER STANDARD REQUIRES STRIKING THE APPROPRIATE BALANCE BETWEEN THE *TWOMBLY* AND *IQBAL* DECISIONS, THE TEXT OF THE RULES, AND FAIRNESS CONCERNS TO A DEFENDANT AND PLAINTIFF

To reiterate, when ruling on how properly to assess an affirmative defense, district courts today are essentially left with three standards: (1) apply the *Twombly* and *Iqbal* plausibility

the defense succeed" (quoting Puckett v. United States, 82 F. Supp. 2d 660, 663 (S.D. Tex. 1999))). This standard is clearly inconsistent with the *Twombly* and *Iqbal* plausibility standard, as allowing a defense to survive a motion to strike simply because it can succeed under some conceivable circumstance certainly does not mean that the defense is necessarily plausible.

124 In addition to the above categories, a number of decisions assumed, but did not hold, that *Twombly* or *Iqbal* did or did not apply. *See* Ahle v. Veracity Research Co., 738 F. Supp. 2d 896, 925 (D. Minn. 2010) ("Even if the heightened pleading standards are not applicable to affirmative defenses, Plaintiffs have not been given adequate notice [of the affirmative defense]."); Lapic v. MTD Prods., Inc., No. 09-760, 2009 WL 3030305, at *3 (W.D. Pa. Sept. 17, 2009) ("[E]ven if the new standards of *Twombly* apply to affirmative defenses, Plaintiff has not demonstrated that Defendant's affirmative defenses fail to give him 'fair notice' of the nature of the defenses . . . .").

125 This conclusion differs from that of other commentators and courts that have concluded that the majority of courts actually do adopt the plausibility standard. *See* Barnes v. AT&T Pension Benefit Plan-Nonbargained Program, 718 F. Supp. 2d 1167, 1171 (N.D. Cal. 2010) (holding that most courts "have extended *Twombly*'s heightened pleading standard to affirmative defenses"); Dominguez et al., *supra* note 51, at 77 ("The vast majority of district courts that have considered the issue . . . hold that *Twombly*'s plausibility standard applies to [the pleading of] affirmative defenses"); Mize, *supra* note 51, at 1260 (arguing that the majority of courts have applied the plausibility standard to affirmative defenses). This Comment's conclusion is based upon the fact that only the decisions discussed and cited in Part III(A) apply the two part plausibility test. It is not enough that a decision simply cites *Twombly* or *Iqbal*, but then goes on to apply a different standard. The plausibility standard is a two part standard requiring facts and a plausible defense. *See supra* notes 48–50 and accompanying text. Anything less is not a true *Twombly* and *Iqbal* analysis. Thus, this Comment concludes that based on the totality of the decisions not listed in Part III(A), the majority of district courts are not actually applying the *Twombly* and *Iqbal* standard to affirmative defenses.

standard;[126] (2) apply the *Conley* notice pleading standard;[127] or (3) apply the adequate factual basis standard.[128] This Comment proposes that the proper standard to be applied to an affirmative defense is one that requires "the defendant to plead an adequate factual basis for [his or her] affirmative defense[]."[129] This would not assess the plausibility of the defense, but only whether there is a factual basis for the defense.[130]

One may argue that such a standard is inconsistent with the Supreme Court's decision of *Swierkiewicz v. Sorema, N.A.*,[131] where the Court held that Rule 8's notice pleading standard is "inextricably linked" amongst the Rules.[132] However, even if *Swierkiewicz* is the Court's newest "notice pleading decision," *Twombly* and *Iqbal* are the Court's only plausibility pleading decisions.[133] The *Twombly* and *Iqbal* decisions explicitly overruled *Conley*'s notice pleading standard[134] and in so doing, broke any link a notice pleading regime may have had between Rule 8 and the other Rules.[135] Thus, to argue that *Swierkiewicz*

126 *See supra* Part III(A).

127 This encompasses those courts that explicitly rejected the plausibility standard and applied a notice standard and those which did not explicitly reject the plausibility standard, but applied a notice standard regardless. *See supra* Parts III(B)–(C)(i).

128 *See supra* Part III(C)(ii). To a lesser extent, this would encompass *Voeks v. Wal-Mart Stores, Inc*, as that decision required factual particularity to the extent the particular case and defense called for it. 2008 WL 89434, at *6.

129 Equal Emp't Opportunity Comm'n v. Hibbing Taconite Co., 266 F.R.D 260, 268 (D. Minn. 2009).

130 A fact-pleading standard would not assess the ability of the pleader to prove the defense pled. *See, e.g.*, 49A WILLIAM LINDSLEY, J.D. ET AL., CALIFORNIA JURISPRUDENCE 3D PLEADING § 77 (2010) ("A [pleader] need only plead facts showing that he or she may be entitled to some relief; a court is not concerned with the [pleader's] possible inability or difficulty in proving the allegations of the [pleading]."). Rather, a standard requiring facts to be pled, as this Comment's proposed standard would, only focuses on the defendant's ability to plead a factual basis for the affirmative defense. This does not require the reviewing judge to assess the plausibility of the defense, but it would still require the defendant to comply with Rule 11, and thus, the defendant could not simply conjure up some factual basis, which in reality never had any relevance to the defense. *See* FED. R. CIV. P. 11(b)(3) ("By presenting to the court a pleading, written motion, or other paper . . . an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery . . . .").

131 Swierkiewicz v. Sorema, N.A., 534 U.S. 506 (2002).

132 *Id.* at 513.

133 *See* Scozzaro, *supra* note 28, at 429–30 ("Where *Conley* addressed the pleading issue as an aside, *Swierkiewicz* took it head on and met it in the 'center ring.' . . . *Swierkiewicz* will supplant *Conley* as 'the' notice pleading decision."). *See also supra* Part II (discussing *Twombly*'s and *Iqbal*'s plausibility standard).

134 *See infra* notes 143–46 and accompanying text (noting that *Twombly* and *Iqbal* only interpreted Rule 8(a)).

135 *See* Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 LEWIS & CLARK L. REV. 15, 36 (2010) (noting that although not explicit, the *Twombly* and *Iqbal* decisions essentially overruled *Swierkiewicz*).

is anything more than a reminder that *Conley* was the proper standard for a complaint is to overlook the *Twombly* and *Iqbal* decisions' language and purpose.[136] When *Iqbal* explicitly announced that "Rule 8 . . . does not unlock the doors of discovery for a *plaintiff* armed with nothing more than conclusions," it not only defeated *Swierkiewicz*'s notice mandate, but it announced that the plaintiff *and* defendant are not inextricably linked to the same pleading standard.[137]

Thus, in light of *Twombly* and *Iqbal*, the issue becomes whether affirmative defenses should remain untouched or if a change is necessary. This Comment's proposed adequate factual basis standard is the proper solution to this issue due to: (1) the textual language of Rule 8; (2) the policies expressed in *Twombly* and *Iqbal*; and (3) overall fairness concerns to not only the defendant, but the plaintiff as well.

A. Rule 8 Does Not Set Forth the Same Standard for Complaints and Affirmative Defenses

Based on a simple textual reading of Rule 8(c) and Rule 8(a), it is clear that the rules do not set forth identical standards for affirmative defenses and complaints.[138] According to Rule 8(c) the defendant need only "*affirmatively state* any avoidance or affirmative defense."[139] In contrast, Rule 8(a)(2) provides that a

136 *See* Michael R. Huston, Note, *Pleading With Congress to Resist the Urge to Overrule* Twombly *and* Iqbal, 109 MICH. L. REV. 415, 437 (2010) (discussing why *Twombly* and *Iqbal* show that the Court's attention has now turned to addressing "the costs and burdens of discovery in modern federal litigation").

137 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009) (emphasis added). In so holding, the Court was making it clear that its focus was now on controlling discovery, not allowing discovery. *See* Sybil Dunlop & Elizabeth Cowan Wright, *Plausible Deniability: How the Supreme Court Created a Heightened Pleading Standard Without Admitting They Did So*, 33 HAMLINE L. REV. 205, 241 (2010) (noting that the *Twombly* and *Iqbal* decisions display that the Court has now recognized that the costs of discovery may force parties to settle). This is clearly a break from the *Swierkiewicz* and *Conley* Court's rationale and focus on "liberal discovery." Thomas, *supra* note 135 at 36 (explaining that the *Iqbal* Court's focus on controlling the scope and costs of discovery is clearly inconsistent with the *Swierkiewicz* Court's emphasis on "liberal discovery" (quoting Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002))). *See also infra* notes 143–46 and accompanying text (discussing how *Twombly* and *Iqbal* were only meant to apply to complaints).

138 *See, e.g.*, FTC v. Hope Now Modifications, No. 09-1204, 2011 WL 883202, at *3 (D. N.J. Mar. 10, 2011) ("[T]he Federal Rules of Civil Procedure distinguish the level of pleading required between a plaintiff asserting a claim for relief under Rule 8(a) and a defendant asserting an affirmative defense under Rule 8(c)."); McLemore v. Regions Bank, Nos. 3:08-cv-0021, 3:08-cv-1003, 2010 WL 1010092, at *13 (M.D. Tenn. Mar. 18, 2010) (noting that although Rule 8(b) and Rule 8(a) both require an answer or a complaint, respectively, to be stated "'in short and plain terms' . . . . 'Rule 8(b) does not apply when a defendant asserts an affirmative defense."); First Nat'l Ins. Co. of Am. v. Camps Servs., LTD, No. 08-cv-12805, 2009 U.S. Dist LEXIS 149, at *4–5 (E.D. Mich. Jan. 5, 2009) (holding that *Twombly* was interpreting Rule 8(a), not 8(c)).

139 FED. R. CIV. P. 8(c) (emphasis added).

complaint "must contain . . . a short and plain statement of the claim *showing* that the pleader is entitled to relief."[140] Thus, a defendant must only "affirmatively state"[141] an affirmative defense, while a plaintiff must "show" that he or she "is entitled to relief."[142] The Rules necessarily require *less* of a defendant pleading an affirmative defense than of a plaintiff pleading a claim for relief. Most instructive of this lack of commonality is that nowhere in *Twombly* or *Iqbal* does the Court mention either answers or affirmative defenses.[143] To be precise, *Iqbal* is strewn with language, which, at a bare minimum, heavily implies that it was only meant to apply to complaints:

> Where a *complaint* pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of '*entitlement to relief* . . . .'"
>
> . . . .
>
> [T]he tenet that a court must accept as true all of the allegations contained in a *complaint* is inapplicable to legal conclusions . . . . [O]nly a *complaint* that states a plausible *claim for relief* survives . . . . Determining whether a *complaint* states a plausible *claim for relief* will . . . be a context-specific task . . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the *complaint* has alleged—but it has not "*shown*"[144]—"that the pleader is entitled to relief."[145]

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140 FED. R. CIV. P. 8(a)(2) (emphasis added).

141 FED. R. CIV. P. 8(c).

142 FED. R. CIV. P. 8(a)(2).

143 A number of district courts explicitly recognized this lack of language in *Twombly* and *Iqbal*. Ameristar Fence Prods., Inc. v. Phoenix Fence Co., No. CV-10-299-PHX-DGC, 2010 WL 2803907, at *1 (D. Ariz. July 15, 2010) ("[T]he pleading standards enunciated in *Twombly* and *Ashcroft v. Iqbal* . . . have no application to affirmative defenses pled under Rule 8(c)."); McLemore v. Regions Bank, Nos. 3:08-cv-0021, 3:08-cv-1003, 2010 WL 1010092, at *13 (M.D. Tenn. Mar. 18, 2010) ("[*Twombly*] does not mention affirmative defenses or any other subsection of Rule 8. *Iqbal* also focused exclusively on the pleading burden that applies to plaintiffs' complaints."). The Court was not interpreting what a defendant must affirmatively state under Rule 8(c), but rather was only interpreting the word "showing" which exclusively appears in Rule 8(a) governing complaints. *See* Kevin M. Clermont, *Three Myths About* Twombly-Iqbal, 45 WAKE FOREST L. REV. 1337, 1359 (2010). Thus, as *Iqbal* held that only "a *complaint*" must be plausible, the Court was making it clear that it was only assessing the pleading requirements for complaints. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (emphasis added). *See also* Roger M. Michalski, *Assessing Iqbal*, HARV. L. & POL'Y REV. ONLINE (Dec. 8, 2010), http://hlpronline.com/2010/12/assessing-iqbal/ (discussing how *Twombly* and *Iqbal* are only concerned with Rule 8(a)); Sean Warjert, *Does the Twombly-Iqbal Pleading Standard Apply to Defenses Too?*, MASSTORTDEFENSE (Jan. 12, 2010), http://www.masstortdefense.com/2010/01/articles/does-the-twomblyiqbal-pleading-standard-apply-to-defenses-too/ ("The Supreme Court addressed in *Twombly* the requirements for a well-pled complaint under Fed.R.Civ.P. 8(a)'s 'short and plain statement' requirement. No such language, however, appears within Rule 8(c), the applicable rule for affirmative defenses. As such, *Twombly*'s analysis of the 'short and plain statement' requirement of Rule 8(a) is inapplicable to a motion under Rule 8(c)." (quoting FED. R. CIV. P. 8(a))).

144 Recall that Rule 8(a)(2) requires that "[a] pleading that states a claim for relief

Furthermore, consider the language used in *Twombly* to expound its holding:

> [S]tating such a *claim* requires a *complaint* with enough factual matter . . . to suggest that an agreement was made . . . . And, of course, a well-pleaded *complaint* may proceed even if it strikes a savvy judge that actual proof of those facts is improbable . . . .
>
> . . . .
>
> The need . . . for allegations plausibly suggesting . . . agreement reflects the threshold requirement of *Rule 8(a)(2)* that the "*plain statement*" possess enough heft to "*sho[w] that the pleader is entitled to relief*."[146] . . . An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 *complaint*: it gets the *complaint* close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of "*entitle[ment] to relief*."[147]

Contrast this language with that of *Conley*, which is much more susceptible to a universal pleading interpretation:[148]

> Such simplified "notice *pleading*" is made possible by the liberal opportunity for discovery and the other pretrial procedures

must contain . . . a short and plain statement of the claim *showing* that the pleader is entitled to relief . . . ." FED. R. CIV. P. 8(a)(2) (emphasis added). However, Rule 8(c)(1) requires only that "a party . . . affirmatively *state* any avoidance or affirmative defense . . . ." FED. R. CIV. P. 8(c)(1) (emphasis added).

145 *Iqbal*, 129 S. Ct. at 1949–50 (emphasis added) (citations omitted) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (quoting Iqbal v. Hasty, 490 F.3d 143, 157–58 (2d Cir. 2007), *rev'd sub nom.* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009))). Furthermore, during oral arguments, the Court was exclusively discussing whether the *Twombly* standard applies outside the context of an antitrust claim. *See* Oral Argument, Ashcroft v. Iqbal 129 S. Ct. 1937 (2009), No. 07-1015, 2008 WL 5168391, at *21 (at oral arguments in *Iqbal*, Justice Stevens noted that if the Court in *Twombly* felt the claim was not plausible, then "this *claim* is implausible because it's got exactly the same problems . . . . It seems to me these cases are very similar" (emphasis added)).

146 *See supra* note 144 (noting the similarity of language used by the Court and Rule 8(a)).

147 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556–57 (2007) (emphasis added) (quoting FED. R. CIV. P. 8(a)(2)).
Additionally, *Twombly* went to extra bounds to only overrule that part of *Conley* which applies to complaints:

> We could go on, but there is no need to pile up further citations to show that *Conley*'s "no set of facts" language has been questioned, criticized, and explained away long enough. To be fair to the *Conley* Court, the passage should be understood *in light of the opinion's preceding summary of the complaint's concrete allegations*, which the Court quite reasonably understood as amply stating a *claim for relief* . . . . The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a *claim* has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the *complaint*.

Twombly, 550 U.S. at 562–63 (emphasis added).

148 *See* Wyshak v. City Nat'l Bank, 607 F.2d 824, 827 (9th Cir. 1979) (holding that affirmative defenses, like complaints, are subject to *Conley*'s fair notice standard (citing Conley v. Gibson, 355 U.S. 41, 47–48 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007))).

> established by the *Rules* to disclose more precisely the basis of both claim *and* defense . . . . Following the simple guide of Rule 8(f) that "all *pleadings* shall be so construed as to do substantial justice," . . . "*[t]he Federal Rules* reject the approach that *pleading* is a game of skill . . . and accept the principle that the purpose of *pleading* is to facilitate a proper decision on the merits.[149]

When taken together, the Court in *Twombly* and *Iqbal* solely intended to determine what a complaint under Rule 8(a) needs to contain to survive a Rule 12(b)(6) motion to dismiss,[150] not what an affirmative defense under Rule 8(c) must contain to survive a Rule 12(f) motion to strike.[151] Nonetheless, this break from *Conley*'s notice standard necessarily raises the question of whether the policies and effects of *Twombly* and *Iqbal* will require a change to the standard applied to an affirmative defense.[152]

B. A Standard That Requires Facts to Be Pled Will Combat the *Twombly* and *Iqbal* Courts' Concerns Regarding the Cost and Broad Scope of Discovery

Although *Twombly* and *Iqbal* only raised the pleading standard for a complaint, the Court did set forth a principle that should apply to an affirmative defense.[153] An affirmative defense is not simply a denial, it is an assertion by the defendant bringing with it new facts and allegations, which, if true, will defeat the plaintiff's claim, regardless of the complaint's legitimacy.[154] As plaintiffs must investigate these assertions,

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149 Conley v. Gibson, 355 U.S. at 47–48 (1957) (emphasis added), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

150 *See Twombly*, 550 U.S. at 555 (holding that when faced with a Rule 12(b)(6) motion to dismiss, a complaint must contain "more than labels and conclusions"); *Iqbal*, 129 S. Ct. at 1949 (holding that a complaint will only survive a Rule 12(b)(6) motion to dismiss if the complaint "is plausible on its face") (quoting *Twombly*, 550 U.S. at 570).

151 *See supra* notes 144–44 and accompanying text. *See also* Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 829 n.34 (2010) (noting that the *Twombly* and *Iqbal* Courts were interpreting the word "showing" which is inapplicable under Rule 8(c)); Miller, *supra* note 51, at 101 ("Neither Rule 8(b) nor Rule 8(c) contains the magic word 'showing,' and both modes of defensive pleading typically are alleged in a formulary, conclusory, and uninformative fashion . . . .").

152 As stated, it is this Comment's proposal that, in light of *Twombly* and *Iqbal*, the correct standard should require "the defendant to plead an adequate factual basis for [his or her] affirmative defenses . . . ." Equal Emp't Opportunity Comm'n v. Hibbing Taconite Co., 266 F.R.D. 260, 268 (D. Minn. 2009).

153 *See infra* notes 154–54 and accompanying text.

154 Saks v. Franklin Covey Co., 316 F.3d 337, 350 (2d Cir. 2003). An affirmative defense is comparable to a complaint in that where the plaintiff has the burden to prove the allegations in the complaint, the defendant has the burden to prove an affirmative defense. *See* James River Ins. Co. v. Kemper Cas. Ins. Co., 585 F.3d 382, 385 (7th Cir. 2009) (holding that defendants have the burden of proof regarding an affirmative defense); Moore v. Kulicke & Soffa Indus., Inc., 318 F.3d 561, 566 (3d Cir. 2003) (holding that the defendant also has "the burden of production and the burden of persuasion for [an] affirmative defense"). This, however, does not render their pleading standard to be

affirmative defenses affect the scope of discovery as well.[155] Thus, the Court's intentions in *Twombly* and *Iqbal* to combat discovery costs through a heightened pleading requirement should apply, to some degree, to affirmative defenses.[156]

The *Twombly* Court was first to pronounce the Court's concern over discovery costs when it explained that the purpose of adopting a heightened pleading requirement is to relieve the parties of the high costs of discovery wasted on claims or defenses which are not actually grounded in a factual basis.[157] As *Iqbal* confirmed, the focus of the pleadings now is to ensure that Rule 8 is not simply the means to discovery for a party "armed with nothing more than conclusions."[158]

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the same. As noted above, the rules do not set forth the same standard, but rather, set forth a lower standard for an affirmative defense. *See supra* note 144.

155 Although raising the pleading standard for a plaintiff will narrow the scope of discovery, raising the standard for a defendant will narrow its scope even more, thereby reducing costs to both parties. Thus, simply put, the broader the scope of discovery, the more expensive discovery is; while the narrower the scope, the less expensive it becomes. *Compare* Justice Scott Brister, *The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 S. TEX. L. REV. 191, 209–10 (2005) (noting that when discovery's scope is broad, "pretrial costs normally far exceed those incurred at trial"), *with* Dwayne J. Hermes, Jeffrey W. Kemp & Paul B. Moore, *Leveling the Legal Malpractice Playing Field: Reverse Bifurcation of Trials*, 36 ST. MARY'S L.J. 879, 920 (2005) (noting that when the scope of discovery is limited, it "will often enable the dispute to reach trial sooner than otherwise possible, while reducing the discovery costs to the litigants . . . .").

156 *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1954 (2009) (holding that where a "complaint is deficient under Rule 8, [the complainant] is not entitled to discovery . . . ."); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007) (holding that high discovery costs create problems in litigation as they may force parties to settle in lieu of facing these costs). Although it is true that this Comment concludes that the pleading standard should be lower for affirmative defenses, it does not follow that it should not be raised. As plaintiffs must seek discovery on affirmative defenses, in order to truly fulfill the Court's concern regarding the scope of discovery, the defendant should not simply be allowed to assert a host of affirmative defenses without providing the plaintiff with some direction as to their factual basis. *See* Susan S. DeSanti, *Whither Antitrust in the Supreme Court?*, 7 ANTITRUST SOURCE 1, 1 (2007) (noting that the Court in *Twombly* concluded that lower federal judges have been unable to control the costs of discovery in antitrust cases); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 64 (2010) (noting that the Supreme Court changed the pleading standard due to its concern over "high discovery costs"); Douglas G. Smith, *The* Twombly *Revolution?*, 36 PEPP. L. REV. 1063, 1073 (2009) ("[T]he Court expressed a concern that discovery costs were only increasing and that lawsuits were being settled based on their *in terrorem* value rather than the actual merits of the case."). Consistent with the Court's rationale, many district courts, as noted, require facts to be affirmatively stated at the pleading stage. *See, e.g.*, Cosmetic Warriors, Ltd. v. Lush Boutique, L.L.C., No. 09-6381, 2010 U.S. Dist LEXIS 16392, at *4 (E.D. La. Feb. 1, 2010) (holding that a defendant must provide "factual particularity" in the affirmative defense); Equal Emp't Opportunity Comm'n v. Hibbing Taconite Co., 266 F.R.D 260, 268 (D. Minn. 2009) (holding that affirmative defenses must be pled with "an adequate factual basis"); Stoffels v. SBC Commc'ns, Inc., No. 05-CV-0233-WWJ, 2008 WL 4391396, at *1 (W.D. Tex. Sept. 22, 2008) (holding that affirmative defenses require "'more than labels and conclusions'" and must be pled with "factual particularity" (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007))).

157 *Twombly*, 550 U.S. at 559 (quoting Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005)).

158 *Iqbal*, 129 S. Ct. at 1950. *See also* Robert G. Bone, *Plausibility Pleading Revisited*

Thus, as *Twombly* pointed out, *Conley*'s requirement that mere notice will suffice[159] no longer serves its purpose of allowing parties to bring their meritorious claims to court.[160] Instead of fulfilling this goal, oftentimes pleadings were simply a mechanism to force another party to settle out of fear that discovery costs would make fighting a claim financially irresponsible.[161] These increased costs often meant that parties

and Revised: A Comment on Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 868 (2010) ("[A] screening goal requires greater specificity. The requisite level of specificity is set by the strictness of the pleading standard, which in turn reflects a policy decision about how much screening is optimal at the pleading stage.").

159 *See* Conley v. Gibson, 355 U.S. 41, 47–48 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

160 Under *Conley*, pleading did not require parties to have specialized knowledge about technicalities and rules; rather, the pleadings were simply meant to "facilitate a proper decision on the merits." *Id.* at 48. However, with the increasing costs of discovery, allowing such easy access past the pleadings meant that the pleadings may now "push cost-conscious defendants to settle even anemic cases before even reaching pretrial proceedings." *Twombly*, 550 U.S. at 559. Thus, the overall concern of the *Twombly* Court was that *Conley*'s notice pleading allowed parties to abuse discovery "by substituting expenses for merits as the driving force behind litigation and settlement dynamics." Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J. 59, 77 (1997). The Court's concern is actually echoed in the Rules themselves. Rule 1 provides that the Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1. As discovery and litigation in general has grown more expensive though, this mandate by the Rules has become less feasible. *See* Elaine L. Spencer, *Common Sense Trial Preparation in a High-Tech World*, 15 THE PRAC. LITIGATOR 7, 7 (2004) ("Whether representing the plaintiff or the defendant, lawyers know that far from being 'just, speedy, and inexpensive,' the cost of litigation can bar plaintiffs from pursuing their claims and can force defendants to settle claims that really should be brought in front of a factfinder." (quoting FED. R. CIV. P. 1)).

161 B. Scott Daugherty, Comment, *Uncharted Waters: Securities Class Actions in Texas After the Securities Litigation Uniform Standards Act of 1998*, 31 ST. MARY'S L.J. 143, 160–61, (1999). Oftentimes then, a litigant with an otherwise meritorious claim would be faced with a choice of pursuing litigation and risking that the award would outweigh the costs of discovery, or simply settling, foregoing the costs of discovery. *See* Alistair Dawson, *House Bill 4 and the Future of Class Action Litigation*, 24 THE ADVOC. (TEX.) 60, 63 (2003) (noting that "regardless of the merits," in class action cases, oftentimes defendants would prefer to settle than to bear the high cost of discovery); Cameron S. Matheson, *Transvestite Cowboys, Thieving Brokers, and the Securities Litigation Uniform Standards Act: SLUSA's Trap for the Unwary Plaintiff*, 35 MCGEORGE L. REV. 121, 126 (2004) (noting that the high costs associated with discovery may allow a party with a frivolous suit to force the other party to settle); Sue Ann Mota, *Global Antitrust Enforcement: The Sherman Act Does Not Apply Without Any Direct Domestic Effect, But Discovery Assistance May Be Available to Aid a Foreign Tribunal, According to the U.S. Supreme Court*, 38 J. MARSHALL L. REV. 495, 510 (2004) (explaining that when discovery is involved in litigation, oftentimes its costs "may force parties to settle"); Mathias Reinmann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?*, 51 AM. J. COMP. L. 751, 817 n.351 (2003) (discussing why the high costs of discovery can work against a plaintiff as "those with small and medium-sized claims" may not be able to fully pursue these claims as the costs of discovery will often outweigh the small sum sought in the recovery); Jessica Lynn Repa, Comment, *Adjudicating Beyond the Scope of Ordinary Business: Why the Inaccessibility Test in* Zubulake *Unduly Stifles Cost-Shifting During Electronic Discovery*, 54 AM. U. L. REV. 257, 295–96 (2004) (noting that high discovery costs create incentives to settle, even for meritorious suits). Furthermore, not only are discovery costs excessive, much of it

with meritorious claims, but small amounts sought in the recovery, would have to forgo their claims, as the amount sought would not outweigh the costs of discovery.[162] This is particularly true with electronic discovery in which "[t]he sheer volume of electronic data that may be responsive to a given document request can burden the responding party with tremendous costs."[163] Although the mere act of producing electronic discovery may not be significant, the data that is responsive to a particular discovery request must be screened for privileged information, which in turn can be complex and create high costs for the responding party.[164] With the increasing costs of discovery and

results from pure waste. *See* Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 551 (1998) [hereinafter Willging et al., *Empirical Study*] (concluding that when discovery costs are disproportionately high, much of the information obtained in discovery is ultimately irrelevant to the case).

162 *See* Christopher M. Grengs & Edward S. Adams, *Contracting Around Finality: Transforming* Price v. Neal *from Dictate to Default*, 89 MINN. L. REV. 163, 186 n.172 (2004). Instead of individually bringing a claim, high discovery costs may force the litigant to seek a class that can sue collectively, out of fear that the costs of discovery will outweigh any potential damage claims brought individually. *See* Barry Litt & Genie Harrison, *Rights for Wrongs*, L.A. LAW., Dec. 2005, at 27 (noting that in order to properly compensate victims with small sums sought in recovery, the only cost-effective way may be to bring a class action).

163 Thomas R. Mulroy & Kristopher Stark, Article, *A Suggested Rule for Electronic Discovery in Illinois Administrative Proceedings*, 3 DEPAUL BUS. & COM. L.J. 1, 6–7 (2004) (describing a case where one party "spent $1.75 million to restore backup tapes to retrieve email."). Thus, with the increase in electronic products available and the increased use of technology, comes a concomitant rise in the amount of information that is discoverable. *See* THE SEDONA PRINCIPLES: BEST PRACTICES, RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 7 (Jonathan M. Redgrave et al. eds., 2005) (noting that electronic documents have now surpassed the amount of paper documents which has increased "the amount of information available for potential discovery"); Mulroy & Stark, *supra*, at 1 (explaining how an increase in reliance on technology brings about an increase in the amount of information that may be discoverable during litigation); Sonia Salinas, *Electronic Discovery and Cost Shifting: Who Foots the Bill?*, 38 LOY. L.A. L. REV. 1639, 1640 (2005) (discussing that with the increased use of technology and computers, a dramatic rise in the cost of discovery has ensued. Now simply requesting a document "may include not only the paper copy of the document, but also various versions saved on a network or hard drive"); Paul Travis, *The Cost of E-Discovery*, NETWORK COMPUTING (May 9, 2009), http://www.networkcomputing.com/e-discovery/the-cost-of-e-discovery.php?type=article ("Businesses and other organizations spent more than $2.7 billion on electronic data discovery last year [EDD], and spending on EDD will grow to more than $4.6 billion by 2010 . . . .").

164 Ronald J. Hedges, *Discovery of Digital Information*, *in* ELECTRONIC RECORDS MANAGEMENT AND DIGITAL DISCOVERY 221, 258 (ALI-ABA Course of Study Materials SK071, 2005). *See also* Steven C. Bennett, Marla S.K. Bergman & Jones Day, *Ethical Issues in Electronic Discovery*, *in* ELECTRONIC DISCOVERY AND RETENTION GUIDANCE FOR CORPORATE COUNSEL 2005, 379, 386 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. 733, 2005) (noting that due to the multitude of ways to now create and send information, a correlative increase in the costs of discovery has ensued); Richard Van Duizend, *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information—What? Why? How?*, 35 W. ST. U. L. REV. 237, 240 (2007) (discussing how the high costs of discovery can be attributed to the "costs of experts" needed to prepare the information); Robert E. Altman & Benjamin Lewis, Note, *Cost-Shifting in ESI Discovery Disputes: A Five Factor Test to Promote Consistency and Set Party Expectations*, 36 N. KY.

electronic discovery, a pleading standard focused on providing factual support to the plaintiff will assist tremendously in narrowing the scope of discovery and, thus, reducing these costs.[165]

To be fair though, there is another side to the debate as to whether discovery costs truly are an issue today. Although there are studies that show discovery costs have gotten out of control,[166] some argue that it is only a small number of cases with high discovery costs which "generate[] the anecdotal 'parade of horribles'" causing such concern among those seeking changes to the discovery controls and procedures.[167] One recent study found

L. REV. 569, 571 (2009) ("[O]ne primary reason for the high costs of electronic discovery is simply the large volume of ESI [electronically stored information].").

165 *See* Robins, *supra* note 29, at 642 (arguing that by requiring facts to be pled, the opposing party at least has "knowledge of the basis for the claim [or defense], thus manifesting any known basis for the claim's legitimacy"); Marlaina S. Freisthler, Comment, *Unfettered Discretion: Is* Gonzaga University v. Doe *a Constructive End to Enforcement of Medicaid Provider Reimbursement Provisions?*, 71 U. CIN. L. REV. 1397, 1415–16 (2003) ("In fact, 'in civil cases, high discovery costs and legal fees render legal assistance beyond the financial reach of ninety percent of the nation.'" (citing Joseph M. McLaughlin, *An Extension of the Right of Access: The Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgment Rule*, 55 FORDHAM L. REV. 1109, 1135 (1987))). Thus, the plaintiff should not be the sole bearer of a heightened pleading requirement; rather, it should be up to both pleadings to narrow the scope of discovery. *See* Robert D. Cooter & Daniel L. Rubinfeld, *Reforming the New Discovery Rules*, 84 GEO. L.J. 61, 75 (1995). Furthermore, in creating a heightened pleading requirement for both parties, access to the courts will be equalized in that both the wealthy and the average person will be more likely to be able to afford the costs of litigation. *See* Allegra J. Lawrence-Hardy & Nathan D. Chapman, *Clarity of Chaos?* Ashcroft v. Iqbal *One Year Later*, 4 BLOOMBERG L. REP. 39 (2010), *available at* http://www.sutherland.com/files/Publication/339b9dd3-0d19-4b34-8697-5c6869dc5655/Presentation/PublicationAttachment/e31d5169-f7c7-475e-88ea-61108cfae7e5/2010%20A%20%20Lawrence-Hardy%20N%20%20Chapman%20-%20Clarity%20or%20Chaos%20-%20Ashcroft%20v%20%20Iqbal%20One%20Year%20Lat.pdf ("[C]ourts have noted that the desire to avoid unnecessary discovery applies with equal force [to defendants] as well."); John Burritt McArthur, *Inter-Branch Politics and the Judicial Resistance to Federal Civil Justice Reform*, 33 U.S.F. L. REV. 551, 617 (1999) (noting that most groups, even "corporate counsel," believe that discovery costs create inequities as the wealthy can bear the costs, but the average person cannot do so).

166 *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYER'S TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM A-4 (2008), *available at* http://www.actl.com/AM/Template.cfm?Section=Home&CONTENTID=3650&TEMPLATE=/CM/ContentDisplay.cfm (finding that of those attorneys surveyed, "[o]ver 75% . . . agreed that discovery costs, as a share of total litigation costs, have increased disproportionately due to the advent of e-discovery"). *See also* Michael P. Catina & Cindy M. Schmitt, Note, *Private Securities Litigation: The Need for Reform*, 13 ST. JOHN'S J. LEGAL COMMENT. 295, 303 (1998) (noting that when plaintiffs use discovery simply as a "fishing expedition[]" its costs will often cause defendants to settle in lieu of dealing with the continuous discovery requests); Hon. Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 B.C. L. REV. 327, 367 (2000) (noting that as the amount of discoverable information continues to grow, discovery costs will do so as well).

167 Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 685 (1998) (quoting James S. Kakalik et al., *Discovery Management:*

that the median discovery costs today are on par with those of the 1990s after adjustments are made for inflation, and that the "monetary stakes in the litigation represent the primary cost driver in most civil litigation."[168] Thus, the argument goes, the majority of cases today actually do not have to deal with high discovery costs,[169] and so there is no need to change the current pleading scheme or discovery rules.[170]

Whether it is only a small number of cases in which discovery costs are high, or whether discovery costs are high across the board, the fact is that discovery costs are *high*, and furthermore, the Supreme Court has announced its interpretation of Rule 8, along with its intention to use the pleadings as a mechanism to control discovery.[171] Requiring an adequate factual basis to be pled is consistent with this intention, as attorneys will now have to plead factual support for their defenses, which in turn means that the plaintiff will have a much more effective way to focus the scope of discovery, thereby reducing costs.[172] In fact, in a recent survey conducted by the

Further Analysis of the Civil Justice Reform Act Evaluation Data, 39 B.C. L. REV. 613, 636 (1998)).

168 Emory G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 770–72 (2010). Thus, many studies have shown that for the most part, parties are fairly reasonable in their discovery requests, and do not use discovery as a means to harass the other side. *See* Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181, 202 n.116 (2006) (noting that the majority of research conducted actually finds that discovery costs are reasonable); Willging et al., *Empirical Study*, *supra* note 161, at 527 (concluding that high discovery costs are normally associated only with the most complex cases, and the average case is actually "conducted at costs that are proportionate to the stakes of the litigation . . . .").

169 Kakalik et al., *supra* note 167, at 636. Thus, these proponents argue that the data relied on by others skews the truth, in that it fails to display that the large costs of discovery are truly only borne by a small few who are engaged in complex litigation. *See* The Honorable John P. Sullivan, Twombly *and* Iqbal*: The Latest Retreat From Notice Pleading*, 43 SUFFOLK U. L. REV. 1, 54–55 (2009).

170 *See* Sullivan, *supra* note 169, at 55.

171 *See supra* notes 154–156 and accompanying text. It should be fairly apparent that it is not up to the lower courts to second-guess the findings of the Supreme Court. *See* Gonzalez v. Sec'y for Dep't of Corrs., 366 F.3d 1253, 1281 (11th Cir. 2004) (holding that lower federal courts "must follow" a "Supreme Court decision . . . regardless of whether [the lower court] would have arrived at a different approach."), *aff'd sub nom*. Gonzalez v. Crosby, 545 U.S. 524 (2005); Levine v. Heffernan, 864 F.2d 457, 459 (7th Cir. 1988) (holding that Supreme Court decisions must be followed by lower courts). Therefore, whichever side courts would like to fall on in the cost of discovery debate, the Supreme Court has already chosen a side, and lower courts must take the same side. Thus, the issue in this context is not whether the Supreme Court is right, but rather, the issue becomes one of how to properly implement its decision.

172 Molot, *supra* note 25, at 982–83. Fact pleading greatly assists litigants, as it requires more than a mere labeling of a claim or defense, but also the basis for that claim or defense. *See* Michele Taruffo, *Rethinking the Standards of Proof*, 51 AM. J. COMP. L. 659, 675 (2003). This prevents attorneys from quickly filing boilerplate claims or defenses, as the attorney must investigate said claims or defenses and determine if there is any factual basis to them. *Id.* Having conducted this initial investigation, once the claim or defense is filed, the parties have less need to search for relevant facts or evidence

Institute for the Advancement of the American Legal System, "[o]ver 64% of [respondents] indicated that fact pleading can narrow the scope of discovery."[173] Therefore, a federal regime, which is now truly focused on using pleadings to control the scope and costs of discovery,[174] should adopt a pleading standard consistent with that purpose.[175]

to support the claim or defense. *Id.* With such basis in hand, a pleader has the ability to properly control the scope and costs of discovery. *See* Gregory Gelfand & Howard B. Abrams, *Putting* Erie *on the Right Track*, 49 U. PITT. L. REV. 937, 977 n.128 (1998) (discussing how adopting a heightened pleading standard will narrow the scope of discovery). *See also* Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 334 (2001) ("[T]he badges of fact pleading included[:] . . . (ii) demanding 'specificity' or 'particularity' on each element of a claim or cause of action; (iii) expressing dissatisfaction with 'conclusory' allegations; [and] (iv) deploring the evil of 'frivolous' litigation . . . ."); Roger T. Brice & Penny Nathan Kahan, *Discovery Issues in Employment Discrimination Cases—Including Views From the Bench*, *in* 32ND ANNUAL INSTITUTE ON EMPLOYMENT LAW VOL. ONE 567, 613 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. H-696, 2003) (arguing that in order to decrease the costs of electronic discovery, the scope of discovery must be narrowed).

173 INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 166, at A-3.

174 *See supra* Part II (describing the Supreme Court's shift from using pleadings as a means to access discovery to using pleadings as a means to narrow issues and lower the costs of discovery).

175 *See supra* note 165 and accompanying text. A pleading standard that will require all affirmative defenses to be pled with an adequate factual basis is consistent with this purpose. A fact pleading standard will create more specificity in the pleadings and less opportunity for deceit. Through these benefits, discovery costs will necessarily be decreased as the parties will have some semblance of an idea as to how to properly focus discovery. *See* Burroughs, *supra* note 30, at 78 (noting that fact "pleading[] serve[s] to narrow the issues in litigation, identify baseless claims, and present each party's position based upon the facts as known to them"); Bedora A. Sheronick, Comment, *Rock, Scissors, Paper: The Federal Rule 26(a)(1) "Gamble" in Iowa*, 80 IOWA L. REV. 363, 381 (1995) (discussing that a regime requiring facts to be pled from the beginning of litigation has two major benefits; namely (1) that discovery costs will be decreased; and (2) the issues for trial, as well as discovery, will be narrowed). Another incidental benefit of adopting such a fact-based standard for affirmative defenses would occur in the insurance litigation realm. *See* R. Nicholas Gimbel & Elizabeth W. Fox, *Key Discovery Battlegrounds Regarding Coverage Under CGL Policies*, *in* INSURANCE COVERAGE LITIGATION: RECOVERY IN THE 1990S AND BEYOND 305, 310 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. H-598, 1999) (discussing how insurance companies will allege affirmative defenses simply to "act as place keepers or reservations depending on what is uncovered during the course of discovery"). For fear of waiving an affirmative defense that may end up freeing the insurance company from liability, insurance companies will plead "every conceivable affirmative defense," even those with no factual support. *See* Richard D. Milone & Stephen R. Freeland, *The Kitchen Sink Approach*, CONN. L. TRIB., May 2008, at 1, *available at* http://www.kelleydrye.com/publications/articles/0371/_res/id=Files/index=0/0371.pdf. What is worse, is that insurance companies will "resist[] all efforts by the insured to obtain discovery of the factual basis for such alleged defenses." Amanda Hairston, *Insurer Ordered to Produce Facts Regarding Affirmative Defenses, Drafting History and Underwriting Testimony*, FARELLA BRAUN & MARTEL, LLP (Mar. 23, 2010), http://www.farellacoveragelaw.com/2010/03/insurer-ordered-to-produce-facts.html. Such practice has become standard, which has only resulted in higher costs for litigation, as the plaintiff has little direction in how to focus his or her discovery requests. *See* Ray E. Critchett, *Ferreting Out Affirmative Defenses*, 19 OHIO TRIAL 26, 26 (2009), *available at* http://www.buckeyelaw.com/team/e_ray_critchett/Affirmative_Defenses.pdf.

C. It Is Unfair to Hold a Defendant to a Plausibility Standard as a Defendant Has Only Twenty-One Days to Respond to a Complaint That May Have Been Prepared for Years

Although the *Twombly* and *Iqbal* Courts set forth a principle that should apply to an affirmative defense, applying the plausibility standard to a defendant is patently unfair.[176] Imagine you have been in a car accident in which the other driver has suffered substantial injuries. That driver, having taken two years to gather enough information about the accident, sues you in federal district court (assume there is diversity jurisdiction)[177] alleging that your negligence was the sole cause of the accident. That driver has you personally served with the summons and complaint.[178] You now have twenty-one days to respond.[179] It takes you a week to find a lawyer you can afford, and now your time to respond is only fourteen days.[180] Another week goes by, and your attorney decides to plead some affirmative defenses in hopes that one of them will apply, or at the least, will provide a basis for discovery.[181] Since you decline to include any factual support gathered during an initial investigation, your affirmative defense simply states: "Plaintiff's

176 *See supra* notes 152–155 and accompanying text (explaining why narrowing the scope of discovery should apply to a defendant as well as to a plaintiff).

177 Assume that the other driver is a citizen of another state and is suing you for $75,001. *See* 28 U.S.C. § 1332 (2006) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States . . . .").

178 *See* FED. R. CIV. P. 4(c). Further assume that the driver has successfully pled enough facts to lead a judge to believe her complaint is plausible on its face. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

179 *See* FED. R. CIV. P. 12(a)(1)(A)(i) (noting that in the absence of waiver of summons, the defendant's time to answer is not extended beyond twenty-one days).

180 Rule 6 defines the standards for computing time. FED. R. CIV. P. 6. Under that rule:

> When the [time to respond] is stated in days or a longer unit of time: (A) exclude the day of the event that triggers the period; (B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and (C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

Id. Thus, for purposes of the above hypothetical, assume you were served on January 7, 2011. The deadline for your response would be January 28, 2011. FED. R. CIV. P. 12(a)(1)(A)(i).

181 It is common practice to plead all affirmative defenses which may apply in hopes of later ascertaining relevant evidence to rid the defendant of liability. *See* Gimbel & Fox, *supra* note 175, at 309–10 (1999) (describing how insurance companies plead any and all defenses in the hopes that one will apply). *See also* Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 979 (6th Cir. 2003) (noting that discovery under the Rules "provides that '[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . .'" (emphasis omitted) (quoting FED. R. CIV. P. 26(b)(1))).

negligence was the sole cause of the accident."[182] With two days before the twenty-one day timeline runs up, your attorney files your answer. Another two weeks go by, and the plaintiff files a motion to strike your affirmative defense.[183] What result?

Under this Comment's proposed standard, this affirmative defense would most certainly fail[184] as it lacks any factual basis to support it, and instead, pleads only a conclusory allegation.[185] By neglecting to provide the plaintiff with the facts used to support the defense, the plaintiff is stuck pondering the various ways the defendant may believe the plaintiff has been contributorily negligent.[186] One could hypothesize a multitude of ways this could be true: (1) Plaintiff may have been driving while intoxicated;[187] (2) Plaintiff may have been speeding;[188] (3) Plaintiff may have failed to drive on the right side of the road;[189] or (4) Plaintiff may have failed to yield the right of way.[190] The list could go on, but one can understand the difficulties a plaintiff

182 Rule 8(c)(1) lists a number of affirmative defenses including contributory negligence. FED. R. CIV. P. 8(c)(1).

183 *See* FED. R. CIV. P. 12(f).

184 However, it would very likely survive a pre-*Twombly* motion to strike, because merely listing the affirmative defense correctly was often acceptable. *See, e.g.*, Home Ins. Co. v. Matthews, 998 F.2d 305, 309 (5th Cir. 1993) ("A plea that simply states that complainant was guilty of contributory negligence . . . is sufficient.").

185 A number of district courts held that conclusory allegations in an affirmative defense are no longer acceptable. *See, e.g.*, Palmer v. Oakland Farms, Inc., No. 5: 10cv00029, 2010 WL 2605179, at *6 (W.D. Va. June 24, 2010) (striking the defendant's affirmative defenses for being conclusory); Barnes v. AT&T Pension Benefit Plan-Nonbargained Program, 718 F. Supp. 2d 1167, 1172–73 (N.D. Cal. 2010) (striking affirmative defenses for consisting largely of "conclusory statements"); Burns v. Dodeka, L.L.C., No. 4:09-CV-19-BJ, 2010 WL 1903987, at *1 (N.D. Tex. May 11, 2010) (striking affirmative defenses that "are wholly conclusory and fail to plead any facts that demonstrate the plausibility of such defenses as required by *Bell Atlantic Corp. v. Twombly* . . . ."). Regardless of the standard ultimately adopted by courts, this appears to be a fairly common minimum standard and is something in which litigators should be aware. *See* David N. Anthony & Timothy J. St. George, *"Plausibility" Pleading After* Twombly *and* Iqbal, 21 THE PRAC. LITIGATOR 9, 13 (2010), *available at* http://www.troutmansanders.com/files/Uploads/Documents/iqbal2.pdf ("Since *Iqbal*[,] . . . certain courts are displaying an increasing tendency to scrutinize such 'bare-boned' averments on the basis that such pleading does not comport with the standards articulated in *Twombly* and *Iqbal*.").

186 *See* Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647, 650 (D. Kan. 2009) (indicating that "the purpose of pleading requirements is to provide . . . some plausible, factual basis for the assertion and not simply a suggestion of possibility that it may apply to the case").

187 *See* Scott v. Thompson, 109 Cal. Rptr. 3d 846, 847 (2010) (alleging driver's intoxication constituted negligence), *modified*, No. G041860, 2010 Cal. App. LEXIS 996 (June 25, 2010).

188 *See* Rodkey v. City of Escondido, 67 P.2d 1053, 1055 (Cal. 1937) (holding driver negligent for driving over storm drain while speeding).

189 *See* People v. Thompson, 93 Cal. Rptr. 2d 803, 808 (2000) (stating that "failure to drive on right side of road" can constitute negligence), *modified*, No. H017519, 2000 Cal. App. LEXIS 282 (April 14, 2000).

190 *See* Jeld-Wen, Inc. v. Superior Court, 32 Cal. Rptr. 3d 351, 356 (2005) (alleging negligence for "failure to yield right of way").

would face if mere notice were required.[191] On the other hand, if *Twombly*'s and *Iqbal*'s plausibility standard were applied, the defendant would have to plead enough facts to raise the affirmative defense to a level of plausibility.[192] This may require an entire host of responses, such as alleging that the plaintiff had been drinking sometime in the day or alleging that the plaintiff had been drinking thirty minutes prior to the accident, for a specific length of time, which was the sole cause of the accident.[193] However, by only requiring "the defendant to plead an adequate factual basis for [the] affirmative defense[,]"[194] the

191 *See* John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 517 (2000) ("[T]he information-gathering and issue-defining functions that discovery must perform in a notice-pleading regime require broad and often copious discovery that generates disputes that require judicial intervention to resolve. Depending on one's definition, this voluminous discovery may also lend itself to 'abuse.'"). One main concern about notice pleading, then, is that it largely left the other pleader in the dark. Deprived of any knowledge as to what basis there was for a claim or defense, the other party, quite understandably so, sought as much information as possible in discovery in order to protect him or herself. *See* Mark E. Chopko, *Continuing the Lord's Work and Healing His People: A Reply to Professors Lupu and Tuttle*, 2004 BYU L. REV. 1897, 1916 n.113 (2004) (discussing that under a system of notice pleading, "the parties might guess what discovery might bring"); Emeka Duruigbo, *The Economic Cost of Alien Tort Litigation: A Response to Awakening Monster: The Alien Tort Statute of 1789*, 14 MINN. J. GLOBAL TRADE 1, 33 (2004) ("[T]he notice pleading system and discovery rules in the United States are so liberal that they allow plaintiffs to bring suits based on minimal facts with ample room to flesh them out later."); Marcus, *supra* note 23, at 492 (noting that notice pleading allows parties access to broad discovery which can easily lend itself to abuse); Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe*, 79 NOTRE DAME L. REV. 1981, 2001 (2004) (arguing that under a system of notice pleading, it is difficult for the opposing party to understand the factual basis for the other's claim or defense).

192 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

193 *See, e.g.*, Watts v. Fla. Int'l Univ., 495 F.3d 1289, 1296 (11th Cir. 2007) (adopting the plausibility standard in civil rights actions, requiring the complainant to "allege[] enough facts to suggest, raise a reasonable expectation of, and render plausible the fact that he sincerely held the religious belief that got him fired"); Allison Sirica, Case Comment, *The New Federal Pleading Standard:* Ashcroft v. Iqbal*,* 129 S. Ct. 1937 (2009), 62 FLA. L. REV. 547, 554 (2010) (noting the difficulty in determining how many facts are required to be pled in order to render a claim plausible). As stated, this Comment does not criticize the plausibility standard as applied to a complaint. The purpose of this paragraph is only to display that whatever the particular requirements of the plausibility standard actually are, they are necessarily higher than that of a standard which only requires facts to be pled. *See* Michael Eaton, *The Key to the Courthouse Door: The Effect of* Ashcroft v. Iqbal *and the Heightened Pleading Standard*, 51 SANTA CLARA L. REV. 299, 314 (2011) (noting that "after *Iqbal* the pleading standard is notably higher. . . ."). *Compare Iqbal*, 129 S. Ct. at 1949 (holding that "a complaint must contain sufficient *factual matter*, accepted as true, to 'state a claim for relief that is *plausible on its face*'" (emphasis added) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007))), *with* Equal Emp't Opportunity Comm'n v. Hibbing Taconite Co., 266 F.R.D. 260, 268 (D. Minn. 2009) (holding that the defendant only needs "to plead an adequate factual basis for affirmative defenses, where the basis is not apparent by the defense's bare assertion"). For a discussion on the uncertainty a party faces when held to a plausibility standard, see Pamela Atkins, Twombly, Iqbal *Introduce More Subjectivity to Rulings on Dismissal Motions, Judge Says*, 78 U.S.L. WK. 2667, 2667 (2010) ("[T]he new approach calls for 'tremendous subjectivity' on the part of a judge reviewing motions to dismiss.").

194 *EEOC*, 266 F.R.D. at 268.

defendant is given much greater control over whether or not that defense will survive a motion to strike.[195]

The point is that a plaintiff may have years to decide when to file a complaint, [196] while a defendant only has twenty-one days to respond.[197] Responding to a complaint requires a host of actions by the defendant within this mere twenty-one day timeline, such as hiring an attorney, researching the complaint and applicable defenses, and communicating with the attorney regarding the appropriate strategy for the case.[198] Given the time disparities, it is not unreasonable to require more factual development of a plaintiff at the pleading stage.[199] Worse yet, if

195 The defendant has greater control because the judge is not required to assess the ability of the defendant to prove what is being pled. Rather, the defendant simply has to provide the factual basis for the defense so that the plaintiff can efficiently narrow the scope of his or her discovery. Thus, the defendant's attorney would know that he or she cannot merely assert any boilerplate defense, but would have to first uncover some factual basis for the defense. *See* Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647, 650 (D. Kan. 2009) (asserting the importance of facts in affirmative defenses rather than mere conjectures that *may* apply); HCRI TRS Acquirer, LLC v. Iwer, 708 F. Supp. 2d 687, 691 (N.D. Ohio 2010) (noting that boilerplate affirmative defenses can negatively impact litigation costs); Gambol, *supra* note 52, at 2198 (footnote omitted) (stating that providing a factual basis allows the adverse party to tailor discovery). Furthermore, by pleading an affirmative defense, the defendant is not somehow making discovery available to him or herself. It is the complaint that "unlock[s] the doors of discovery." *Iqbal*, 129 S. Ct. at 1950. *See also* FTC v. Hope Now Modifications, L.L.C., No. 09-1204, 2011 WL 883202, at *3 (D. N.J. Mar. 10, 2011). Thus, "should the [p]laintiff need to request the factual basis of an asserted affirmative defense . . . *Twombly* and *Iqbal* do not counsel otherwise." *Id.*

196 *See, e.g.*, Allstar Mayflower, L.L.C. v. United States, 93 Fed. Cl. 169, 171 (2010) (applying the three year statute of limitations under the Interstate Commerce Act); Simpson v. Merchs. & Planters Bank, 441 F.3d 572, 579 (8th Cir. 2006) (holding that the statute of limitations under the Equal Pay Act is three years).

197 FED. R. CIV. P. 12(a)(1)(A)(i).

198 Michael A. Iannucci, *Changing the Game: The Effect of* Twombly/Iqbal *on Affirmative Defenses*, THE LEGAL INTELLIGENCER (Oct. 25, 2010), http://www.blankrome.com/pdf.cfm?contentID=37&itemID=2336.

199 *See* Holdbrook v. SAIA Motor Freight Line, L.L.C., No. 09-cv-02870-LTB-BNB, 2010 WL 865380, at *2 (D. Colo. Mar. 8, 2010). It has been argued that in *Twombly* and *Iqbal* the Court was establishing "a gatekeeping test" for parties seeking to bring suit into court. Clermont, *supra* note 143, at 1360. As defendants do not initiate litigation, the argument goes that this test should not apply to them. *Id.* However, this Comment does not go as far to conclude that no change should be made to the pleading standard for affirmative defenses. This Comment does, though, note the inherent unfairness in requiring a defendant to file a response to a complaint, which may have been researched for years, within twenty-one days. *See* R. David Donoghue, *The Uneven Application of* Twombly *in Patent Cases: An Argument for Leveling the Playing Field*, 8 J. MARSHALL REV. INTELL. PROP. L. 1, 12 (2008) (arguing that in patent cases, giving defendants either twenty days or sixty days to file a plausible defense is "unrealistic . . . . [because] [d]uring those three to eight weeks, a defendant must digest the complaint, hire counsel, analyze the patent and the alleged infringement, and at least sketch out a 'plausible' set of noninfringement and invalidity defenses, all while continuing to meet the obligations of defendant's business"). Thus, a balance needs to be struck, and it is this Comment's ultimate proposal that a pleading standard requiring a factual basis to be pled is this balance. Furthermore, a proper application of this Comment's proposed rule would examine the affirmative defense in conjunction with the complaint. This would best provide the reviewing court and the parties with the proper and most complete factual

the defendant fails to plead an affirmative defense, that defense is generally waived and likely to be permanently excluded from the case.[200] "[A]lthough the court, in its discretion, may give the defendant leave to amend" its insufficiently pled affirmative defense,[201] this is by no means a guarantee, and a defendant should attempt to plead as many applicable defenses as possible at the pleading stage.[202]

Of course a defendant could simply plead any and all affirmative defenses in the mere hope that one will survive a motion to strike.[203] This would be acceptable, but for Rule 11.[204] Rule 11, among other things, requires any pleading filed by an attorney to "have evidentiary support or . . . [to be] likely [to] have evidentiary support after a reasonable opportunity for further investigation or discovery . . . ."[205] Thus, a defendant who asserts an affirmative defense without reasonably believing the

basis for the defendant's affirmative defenses. *See* Baum v. Faith Techs., Inc., No. 10-CV-0144-CVE-TLW, 2010 WL 2365451, at *3 (N.D. Okla. June 9, 2010) (noting that when taken together, a complaint and an answer provide a plaintiff with sufficient notice of the affirmative defense).

200 Harris v. Sec'y, U.S. Dep't of Veterans Affairs, 126 F.3d 339, 343 (D.C. Cir. 1997) (quoting Dole v. Williams Enters., Inc., 876 F.2d 186, 189 (D.C. Cir. 1989)).

201 *See* JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 297–98 (3d ed. 1999).

202 *See* JAMES ET AL., *supra* note 39, at 253. Thus, to be safe, it is generally advised, or at least was advised under *Conley*'s standard, that a defendant should plead any and all defenses that may apply in order to avoid missing out on a defense that may ultimately relieve the defendant of liability. *See* Robinson v. Johnson, 313 F.3d 128, 134 (3d Cir. 2002) ("Parties are generally required to assert affirmative defenses early in litigation, so they may be ruled upon, prejudice may be avoided, and judicial resources may be conserved."); Campania Mgmt. Co. v. Rooks, Pitts & Poust, 290 F.3d 843, 852 (7th. Cir. 2002) (citing Grain Traders Inc. v. Citibank, N.A., 160 F.3d 97, 105 (2d Cir. 1998)); Ins. Co. of N. Am. v. Moore, 783 F.2d 1326, 1327–28 (9th Cir. 1986)) (holding that a party cannot assert an affirmative defense after failing to do so in the answer); SRAM Corp. v. Shimano, Inc., 25 F. App'x 626, 629 (9th. Cir. 2002) (citing Nw. Acceptance Corp. v. Lynnwood Equip., Inc., 841 F.2d 918, 924 (9th Cir. 1988) ("Where a defendant fails to raise the defense in a pretrial order or prior to trial, the defense is waived."); Wilkes Assocs. v. Hollander Indus. Corp., 144 F. Supp. 2d 944, 951 (S.D. Ohio 2001) (stating that Rule 8(c) requires a defendant to plead all applicable affirmative defenses in the answer); FRIEDENTHAL ET AL., *supra* note 201, at 299 ("A careful pleader necessarily will set forth every conceivable fact that she might wish to prove as one never can be certain what a court will hold to be a 'surprise.'").

203 *See, e.g.*, Anthony & St. George, *supra* note 185, at 13 (noting that it is a "common litigation strategy" for attorneys to plead as many affirmative defenses as possible at the pleading stage); Richard G. Morgan & William N.G. Barron IV, *Evolving with Affirmative Defense Pleading Standard*, LAW360 (2010), http://www.bowmanandbrooke.com/files/News/c3d848bb-cc6e-42dc-985e-8f5f99ed161f/Presentation/NewsAttachment/6573e813-8556-46af-9071-91d09edf6477/Law360%20-%200310.pdf (explaining that the reason behind pleading all possible affirmative defenses is to avoid having those defenses waived and excluded from the case).

204 *See generally* FED. R. CIV. P. 11 (detailing how pleadings, motions, and other papers should be signed, the representations an attorney makes to the court and the use of sanctions).

205 FED. R. CIV. P. 11(b)(3).

defense to be "factually and legally justified" will likely subject him or herself to Rule 11 sanctions.[206]

Taken together with *Twombly* and *Iqbal*, a defendant's attorney is torn between risking the filing of an affirmative defense that reasonably is not, or could not be, plausible and thus subject to Rule 11 sanctions, and filing an affirmative defense that may surpass Rule 11's floor, but still fails to rise to a level of plausibility and, thus, is stricken permanently from the case.[207]

206 Kaplan v. DaimlerChrysler, A.G., 331 F.3d 1251, 1255 (11th Cir. 2003). *See* FTC v. Hope Now Modifications, L.L.C., No. 09-1204 (JBS/JS), 2011 WL 883202, at *4 (D. N.J. Mar. 10, 2011) (noting that "although *Twombly* and *Iqbal* do not require specificity in stating defenses," a defendant's counsel who pleads a frivolous defense may be subject to Rule 11 sanctions). Furthermore, a defendant's "subjective good faith" belief is not enough and there must be actual support for the affirmative defense. Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985). For a list of possible sanctions for violating Rule 11, see FED. R. CIV. P. 11 advisory committee's note (noting that possible sanctions for violating Rule 11 include "striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; [or] referring the matter to disciplinary authorities . . . ."). For cases where defendant's attorneys were sanctioned for filing affirmative defenses in violation of Rule 11, see Aetna Cas. & Sur. Co. v. Kellogg, 856 F. Supp. 25, 33 (D. N.H. 1994) (awarding sanctions because defendant's counsel failed "to make a reasonable inquiry" into the legal basis for the affirmative defense pled); Kramer, Levin, Nessen, Kamin & Frankel v. Aronoff, 638 F. Supp. 714, 725–26 (S.D.N.Y. 1986) (awarding attorneys' fees for attorney filing a frivolous affirmative defense which caused plaintiff's counsel to expend funds in the investigation of the defense).

207 *See* D. Jeffrey Campbell & Jonathan R. Kuhlman, *Civil Justice Reform Act of 1990: An Experiment Gone Awry*, 60 DEF. COUNS. J. 17, 28 (1993) (explaining that Rule 11 can harm a defendant because the defendant likely does not have much factual support for an affirmative defense prior to discovery and thus when it does come time for discovery and the defendant is unable to produce evidence in support of the defense, the plaintiff may move for Rule 11 sanctions). For a discussion that Rule 11 should be used in lieu of a plausibility standard to deal with insufficient pleadings, see Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power Over Pleadings*, 88 B.U. L. REV. 1217, 1254 (2008) ("[A]n allegation that is implausible may also be said to violate Rule 11(b)(3) . . . ."); Mize, *supra* note 51, at 1267 (arguing that Rule 11 can be used to "combat the frivolous and bothersome claims that were a partial reason for the Court raising the [pleading] standard"); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 485–86 (2008) ("[T]he *Twombly* Court's statement that the plausibility standard would make sure that there is a 'reasonably founded hope that the [discovery] process will reveal relevant evidence' in support of the claim steps directly on the toes of Rule 11 because under that rule counsel already are certifying that asserted claims and allegations are warranted by the evidence . . . ." (footnote omitted) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007))). The above-cited articles, admittedly, make a good argument that Rule 11 can be used as a screening tool for pleadings. *See* Koly v. Enney, 269 F. App'x 861, 864 (11th Cir. 2008) (noting the deterrence function of Rule 11). However, this fails to take into account that Rule 11 is only as good as the pleading standard that it enforces. Thus, if an affirmative defense is held to *Conley*'s notice standard, the Rule 11 deterrent function will necessarily be lesser than if affirmative defenses were held to *Twombly*'s and *Iqbal*'s plausibility standard. *See* Samuels v. Wilder, 906 F.2d 272, 274 (7th Cir. 1990) (holding that Rule 11 does not change the notice pleading standards of *Conley*); Donaldson v. Clark, 819 F.2d 1551, 1561 (11th Cir. 1987) (holding that Rule 11 under a notice pleading regime does not require the parties to allege the facts on which the case is based). Therefore, Rule 11 may have some deterrent effect, but it cannot be treated as a substitute for a heightened pleading standard, but rather should be seen as a mechanism

These concerns are not equally present in a plaintiff who has been given years to decide when to file a complaint. Therefore, as a plausibility standard unduly burdens a defendant, a lower bar for a defendant is necessarily required to truly balance this inequity.[208]

D. It Is Unfair to the Plaintiff to Hold the Defendant to a Notice Standard Because the Plaintiff Still Needs to Conduct Discovery

A valid critique of this Comment's proposed rule is that if fairness to a defendant truly is the concern, then notice pleading should be adopted as its requirements can be met by merely labeling the affirmative defense correctly.[209] However, notice pleading allows the most liberal scope to be applied at the discovery stage.[210] A pleading system known for its ease of access to discovery[211] would allow a defendant adversely to affect a plaintiff by pleading numerous affirmative defenses with "no 'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support" the defense.[212] In the Institute for

in which to enforce the applicable pleading standard. *See* Stephen R. Brown, *Reconstructing Pleading:* Twombly*,* Iqbal*, and the Limited Role of the Plausibility Inquiry*, 43 AKRON L. REV. 1265, 1298 (2010) (footnote omitted) (noting that Rule 11 is not a pleading standard).

208 *See* Donoghue, *supra* note 199, at 11 (noting the inequity for plaintiffs and defendants regarding the time to respond and file complaints under the Rules).

209 *See, e.g.*, Teirstein v. AGA Med. Corp., No. 6:08cv14, 2009 WL 704138, at *2 (E.D. Tex. Mar. 16, 2009) (noting that simply listing the affirmative defense correctly may be sufficient under a notice standard).

210 *See* Tim Oliver Brandi, *The Strike Suit: A Common Problem of the Derivative Suit and the Shareholder Class Action*, 98 DICK. L. REV. 355, 370 (1994) (discussing how broad access to discovery can easily be abused and lead to the filing of claims with no merits). *See also* FRIEDENTHAL ET AL., *supra* note 201, at 388–89 (describing the Rule's broad discovery standards); William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1879 (2002) (noting the ease of access to discovery under the Rules).

211 Rubenstein, *supra* note 210, at 1880. When compared to common law and code pleading regimes, which focus on issue and factual development respectively, notice pleading, which is not concerned with issue or factual development at the pleading stage, has the easiest access to discovery of the three regimes. *See* Howard H. Wasserman, *Civil Rights Plaintiffs and John Doe Defendants: A Study in Section 1983 Procedure,* 25 CARDOZO L. REV. 793, 806 (2003) (arguing that notice pleading is the broadest of the pleading regimes, as it easily allows a party to make it past the pleadings and into discovery).

212 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007) (quoting Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005)). The concerns of the *Twombly* and *Iqbal* Courts regarding the costs of discovery do not disappear by simply raising the standard for a plaintiff only. The same issues that led the Court to abandon the notice pleading standard of *Conley* would still survive if affirmative defenses were not held to a higher standard. *See* Paul J. Cleary, *Summary Judgment in Oklahoma: Suggestions for Improving a "Disfavored" Procedure*, 19 OKLA. CITY U. L. REV. 251, 271 n.103 (1994) ("With notice pleading and liberal amendment of pleadings, the motion to dismiss is an ineffective tool for screening meritless cases."); Richard L. Marcus, *Reining in the American Litigator: The New Role of American Judges*, 27 HASTINGS INT'L & COMP. L. REV. 3, 10 (2003) (arguing that fact pleading restricts what can be alleged and narrows

the Advancement of the American Legal System survey, "[n]early half the respondents said that notice pleading has become a problem because extensive discovery is required to narrow the claims and defenses . . . ."[213] Thus, such a notice standard would shift the scales dramatically and cause the plaintiff to be placed at a disparate disadvantage.[214] The plaintiff still needs to conduct discovery, and as "the desire to avoid unnecessary discovery applies with equal force" to plaintiffs and defendants,[215] the defendant should not simply be allowed to throw any and all defenses "up against a wall to see what sticks."[216] This mindset is inconsistent with the Court's current direction.[217] Thus, this Comment proposes a standard that will have both plaintiff and defendant providing factual support for their complaints and affirmative defenses, respectively.

CONCLUSION

Admittedly, proposing a standard that permits a defendant to plead less than a plaintiff is at odds with certain notions of fairness and equality. However, there are two definitive rules that can be taken away from the *Twombly* and *Iqbal* decisions: (1) *only* complaints are held to a plausibility standard;[218] and (2)

the issues into "rather specific allegations"); Paul J. McArdle, *A Short and Plain Statement: The Significance of* Leatherman v. Tarrant County, 72 U. DET. MERCY L. REV. 19, 45 (1994) ("It has been suggested that by reason of the increase in the number of civil filings, the frequency of meritless or frivolous suits and the expense of federal litigation, it is best that the notice pleading theory of Rule 8 and *Conley* be abandoned for a return to fact pleading . . . ."). However, a fact pleading standard for an affirmative defense will bring Rule 8(c) into line with the Court's concerns regarding baseless claims and hopeless discovery. *See* Taruffo, *supra* note 172, at 675 ("When . . . a strict fact pleading rule is applied, much work has to be done by lawyers before filing a claim, and to decide whether or not there are facts sufficient to support the claim.").

213 INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 166, at 4. Furthermore, according to the same survey, "[m]ore than 76 percent said that answers to complaints likewise do not accomplish the goal of narrowing issues." *Id.*

214 *See* Mize, *supra* note 51, at 1260–61 (noting the imbalance in applying a lower standard to a defendant than to a plaintiff); Jane Perkins, *Pleading Standards After* Iqbal *and* Twombly, 43 CLEARINGHOUSE REV. 507, 513–14 (2010) (noting the inherent disparity in applying such different standards to defendants and plaintiffs).

215 Lawrence-Hardy & Chapman, *supra* note 165.

216 A. Jennings Stone, III, Twombly *and* Iqbal*: Good For Affirmative Defenses, Too?*, VIRGIN IS. L. BLOG (Nov. 16, 2010, 11:45 AM), http://lawblog.vilaw.com/2010/11/articles/litigation/twombly-and-iqbal-good-for-affirmative-defenses-too/.

217 Furthermore, the plaintiff, although with time to investigate, would still have to provide factual support to give a judge reason to believe the complaint is plausible, while the defendant would have to do little more than list the name of the affirmative defense correctly. *Compare* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009) (holding that a complaint must state "a plausible claim for relief"), *with* Teirstein v. AGA Med. Corp., No. 6:08cv14, 2009 WL 704138, at *2 (E.D. Tex. Mar. 16, 2009) (holding that under a notice standard, simply labeling the affirmative defense correctly may suffice). This alone should cause one to hesitate to adopt such an inequitable standard for a defendant.

218 *See supra* Part IV(A) (noting the textual differences in *Twombly*, *Iqbal*, and *Conley*).

notice pleading is inadequate to deal with the costs of discovery today.[219] However, requiring a defendant to uncover enough facts in twenty-one days to plead a plausible affirmative defense is unfair as compared to a plaintiff who may have years in which to plead a plausible claim for relief.[220] Furthermore, holding an affirmative defense to a plausibility standard forces an attorney to make a decision between risking Rule 11 sanctions and risking the possibility that a desirable affirmative defense will not be plausible, and thus will be unavailable for trial and discovery.[221] As a defendant may lose the right to plead that defense if it is stricken or not pled from the outset,[222] forcing such a requirement upon a defendant will only serve to discourage a true "decision on the merits."[223] It is also true though that affirmative defenses cannot be held to a notice standard, as that will inevitably conflict with the Court's intention to use the pleadings to combat discovery costs and that would be grossly unfair to a plaintiff.[224] Therefore, in order to remain fair to the plaintiff and the defendant,[225] to combat discovery costs,[226] and to remain consistent with *Twombly* and *Iqbal*,[227] the only proper standard is to require "the defendant to plead an adequate factual basis for [his or her] affirmative defenses."[228]

219 *See supra* Part IV(D) (describing notice pleading's inability to combat discovery costs).

220 *See supra* notes 192–202 and accompanying text (noting that such a high standard is unfair to a defendant).

221 *See supra* notes 203–208 and accompanying text (discussing how Rule 11 and waiver of affirmative defenses place defendant's attorneys in difficult and unfair positions).

222 *See supra* notes 200–202 and accompanying text (noting that defendants should include any and all defenses in the responsive pleading because they may otherwise not be allowed in as a defense).

223 Vivid Techs., Inc. v. Am. Sci. & Eng'g, Inc., 200 F.3d 795, 802 (Fed. Cir. 1999) (quoting Conley v. Gibson, 355 U.S. 41, 47–48 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)).

224 *See supra* notes 156–162 and accompanying text (noting the effects of adopting notice pleading for defendants).

225 *See supra* Part IV(C) (noting the unfairness in applying *Twombly* and *Iqbal* to affirmative defenses).

226 *See supra* Part IV(B) (explaining that the purpose and effect of pleading facts is to provide the opposing party with enough information to efficiently narrow the scope of discovery).

227 *See supra* Part IV(B) (noting that a fact pleading standard is most in line with the policies behind the *Twombly* and *Iqbal* decisions).

228 Equal Emp't Opportunity Comm'n v. Hibbing Taconite Co., 266 F.R.D. 260, 268 (D. Minn. 2009).

The FCC's Role in Regulating Network Neutrality: Protection of Online Innovation & Business

Caroline S. Scala[*]

"'Regulation' of the Internet is a Brave New Frontier"[1]

INTRODUCTION

The Smith family loads their dishes into their Whirlpool dishwasher every night. It does not matter which brand or material their dishes are made from, they all go into the dishwasher. In other words, the Whirlpool dishwasher does not discriminate. Currently, the Internet operates in a similar way. If Mr. Smith types a web address into his internet browser, his Internet Service Provider ("ISP") will connect him to that website at a high speed, even if the website is a competitor of the ISP.

What if Whirlpool made dishes and their dishwashers only accepted its own brand? Similarly, imagine if the websites that consumers were allowed to connect to depended on which ISP they had. For example, users with Verizon as their ISP would not be able to access competitors' websites (such as AT&T) at the same speed, thereby making harder-to-access websites less desirable to Internet users. This would result in Verizon's content gaining preferential treatment over that of AT&T's. This

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1 Aaron K. Brauer-Rieke, *The FCC Tackles Net Neutrality: Agency Jurisdiction and the Comcast Order*, 24 BERKELEY TECH. L.J. 593, 614 (2009).

resulting discrimination is an important concern of the network neutrality debate.[2]

A fundamental goal of today's communications landscape is to maintain a free and non-discriminatory Internet.[3] Today, there exists more than 100 million websites[4] and the demand for increased network capacity is growing.[5] With an increased demand for network capacity, comes the tension between allowing ISPs to prioritize content in order to manage bandwidth levels and the desire to maintain a neutral Internet, one without prioritization. This tension is a crucial aspect of the network neutrality issue.

The concept of network neutrality can be difficult to define and understand. California Public Utilities Commissioner Rachelle Chong noted that there are "31 flavors of [n]et [n]eutrality."[6] Despite its complexity, the basic principle of network neutrality is that "all Internet content should be treated equally, and that ISPs should not be allowed to deliver Internet content at different speeds or with selective access to their users."[7] The purpose of a "neutral" Internet is to protect against degradation, prioritization and blockage of content, price discrimination, and the vertical integration of ISPs with content providers.[8]

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2 The idea for this analogy came from Christopher E. Roberts, Comment, *Can I Still Google My Yahoo? Reframing the Net Neutrality Debate—Why Legislation Actually Means Deregulation*, 77 UMKC L. REV. 765, 766–67 (2009).

3 *See* Julius Genachowski, Chairman, Brookings Inst., Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity (Sept. 21, 2009), *available at* http://www.openinternet.gov/read-speech.html [hereinafter Preserving a Free and Open Internet] ("[Chairman Genachowski is] convinced that there are few goals more essential in the communications landscape than preserving and maintaining an open and robust Internet.").

4 *See* Marsha Walton, *Web Reaches New Milestone: 100 Million Sites*, CNN (Nov. 1, 2006, 7:32 PM), http://edition.cnn.com/2006/TECH/internet/11/01/100millionwebsites/ (noting that these numbers reflect the data available as of 2006, and bloggers and small businesses are in part responsible for the high increase of websites). *See also* Preserving a Free and Open Internet, *supra* note 3 ("Internet traffic is roughly doubling every two years.").

5 *See* FED. TRADE COMM'N, BROADBAND CONNECTIVITY COMPETITION POLICY 86 (2007), *available at* http://www.ftc.gov/reports/broadband/v0700000report.pdf (noting, as an example, that if YouTube becomes a high-definition video player then it, by itself, "would double the capacity needs of the entire Internet").

6 Rachelle B. Chong, *The 31 Flavors of Net Neutrality: A Policymaker's View*, 12 INTELL. PROP. L. BULL. 147, 147 (2008) ("Net Neutrality is like the Baskin-Robbins ice cream store. There are several flavors that appeal to various tastes. Whatever you want, we can serve it up in a Net Neutrality cone.").

7 George S. Benjamin, *Internet Content Discrimination: The Need for Specific Net Neutrality Legislation by Congress or the FCC in Light of the Recent Anti-Net Neutrality Actions by Comcast Corporation*, 39 SW. L. REV. 155, 155–56 (2009).

8 *See* Cody Vitello, Comment, *Network Neutrality Generates a Contentious Debate Among Experts: Should Consumers be Worried?*, 22 LOY. CONSUMER L. REV. 513, 525

At the core of the network neutrality debate are the network-management tools and data prioritization methods ISPs use to control traffic on their infrastructure.[9] Under the principles of network neutrality, ISPs would be prohibited from creating a preferred or tier-leveled system[10] controlling the order and speed that information passes over the Internet.[11] Tier-leveled systems would pose a number of problems for e-commerce.[12] ISPs which are allowed to discriminate among different types of content and information could provide some categories of Internet traffic with high priority delivery, while other traffic would be relegated to the "slow lane" on the Internet.[13]

Network neutrality is the status quo.[14] The Internet currently operates under a system "where users pay a fee to an [ISP] and have nearly unrestricted access to all online content."[15] The fear is that with the obliteration of network neutrality and

(2010) (noting that if ISPs were to vertically integrate—where a company merges or expands operations into its supply markets—they would then have the incentive to prioritize their own data at the expense of others, which could result in monopoly prices for consumers). *See also* Preserving a Free and Open Internet, *supra* note 3 (explaining that the FCC also expresses concern relating to ISP's bottom-line interests because those interests "may diverge from the broad interests of consumers in competition and choice").

9 Vitello, *supra* note 8, at 514.

10 *See Two-tiered Internet*, SEARCHNETWORKING.COM (last updated July 2006), http://searchnetworking.techtarget.com/definition/two-tiered-Internet ("Two-tiered Internet refers to proposed changes in Internet architecture that would give priority to the traffic of those who have paid for premium service.").

11 *See* Daniel Helling, *Net Neutrality and Preserving Freedoms of the Internet*, 6 L. & SOC'Y J. U. CAL. SANTA BARBARA 51, 53–54 (2007). *See also* Brauer-Rieke, *supra* note 1, at 598–99 (noting that the Internet is designed to prioritize traffic when necessary, and that some prioritization services are already available. Therefore, the network neutrality debate is one of *degree*, not absolutes. The further prioritization sought by ISPs is a relatively new kind of interference with Internet traffic which is why it is the subject of much controversy.).

12 Large companies "will be able to out-buy small companies, rendering faster connections to their websites" and "small companies that cannot pay for Internet bandwidth will be forced to operate at a loss, with compromised customer satisfaction, or be required to shut down." Helling, *supra* note 11, at 54.

13 Hercules K., *How Internet Neutrality Affects Online Innovation and Business*, BUSINESS 2.0 PRESS (Sept. 16, 2010, 8:58 AM), http://business2press.com/2010/09/16/how-internet-neutrality-affects-online-innovation-and-business/.

14 *See* Julius Genachowski, *The Third Way: A Narrowly Tailored Broadband Framework*, BROADBAND.GOV (May 6, 2010), http://www.broadband.gov/the-third-way-narrowly-tailored-broadband-framework-chairman-julius-genachowski.html [hereinafter *Third Way*].

15 Hercules K., *supra* note 13. *See also,* Roberts, *supra* note 2, at 768–69 (posing a hypothetical in which a user accesses the Internet through SBC Yahoo!, and where "SBC Yahoo! makes its competitors' websites load slowly so that SBC Yahoo!'s users are more inclined to use its services." The Internet user wants to use Google to run a search, however, upon entering the web address into the toolbar the user experiences longer than normal wait times. As a result, he goes to Yahoo! to run a search, thereby depriving the Internet user of his choice in Internet search engines. Without net neutrality protections in place (and if Google does not pay SBC Yahoo! a fee) there is discrimination against Google's content.).

the ability of ISPs to implement tiered services, the Internet will resemble cable television, where users must pay additionally to access premium content.[16] Although the Internet is currently neutral, there exists no formal legislation or authoritative government policy to ensure that it remains so.[17] Recent proposals by powerful ISPs and content providers working together to obliterate a neutral Internet,[18] and a recent decision in the United States Court of Appeals, D.C. Circuit,[19] prove that proactive, rather than retroactive, legislation is a necessity to protect the Internet as we currently know it.

Maintaining the Internet's current open structure is essential for businesses that operate solely or partially online.[20] The Internet is the perfect medium for businesses because, as an open platform, it fosters innovation and investment in new business opportunities.[21] Currently, online innovators are able to reach Internet users simply with an Internet connection of their own, providing for relatively low market entry barriers.[22] Preserving the openness of the Internet means ensuring that all content offered over the Internet continues to enjoy a level playing field. A lack of network neutrality could spell trouble for startup Internet businesses and related innovation.[23]

ISPs currently seek to sell prioritized access of bandwidth use, which would affect the functionality of the Internet.[24] These paid plans would reduce competition and free trade, limit freedom of speech, and could result in diminished use of the

16 *See* FTC STAFF REPORT, *supra* note 5, at 52. Imagine an Internet where websites such as Facebook and YouTube are deemed "premium content," resulting in additional fees for Internet users who wish to access these sites. *Id.* *See also* Chong, *supra* note 6, at 151 ("[W]ithout Net Neutrality, network providers may charge a fee for specific content that comes from certain sources.").

17 *See* Benjamin, *supra* note 7, at 157.

18 *See infra* "Why Legislation is Needed," Part III.

19 *See infra* "History and Background of the FCC's Regulatory Power," Part I(B)(ii).

20 *See* Benjamin, *supra* note 7, at 174.

21 *See* Kevin Werbach, *Why Network Neutrality is Good for Business,* HARV. BUS. REV. (Aug. 18, 2010, 9:08 AM), http://blogs.hbr.org/cs/2010/08/why_network_neutrality_is_good.html.

22 *See* Hercules K., *supra* note 13.

23 *See* Benjamin, *supra* note 7, at 160 ("For startup Internet businesses, 'the Internet could become a place where wealthy companies get faster and easier access to the Web than less affluent ones.'" (quoting Vishesh Kumar & Christopher Rhoads, *Google Wants its Own Fast Track on the Web*, WALL ST. J., Dec. 15, 2008, at A1.)).

24 *See* ANGELE A. GILROY, CONG. RESEARCH SERV., RS 22444, NET NEUTRALITY: BACKGROUND AND ISSUES 3 (2009), *available at* http://assets.opencrs.com/rpts/RS22444_20090319.pdf. If allowed to sell prioritization, there is a risk that ISPs will essentially become "gatekeepers and use their market power to the disadvantage of Internet users and competing content and application providers." *Id.*

Internet.[25] Small companies would suffer greatly from prioritized bandwidth use.[26] Large companies that can afford to pay more for faster data transmission could endanger smaller companies that otherwise would constitute competition.[27] Customers would begin to frequent large online businesses that could afford to purchase prioritized access, and would keep away from smaller companies with slow servers and the associated hassles of slow connection speed.[28]

These price-tier arrangements would negatively impact online business through consumers' obstructed online access as well.[29] If ISPs invoke price tiering arrangements for bandwidth use this will create fast lanes for wealthy consumers and slow lanes for those who cannot afford superior access.[30] As a result, the common consumer with limited bandwidth will be prevented from accessing and utilizing bandwidth-intensive content, which will in turn negatively impact the companies that supply said content. This would affect online companies' incentives to innovate.[31]

The Federal Communications Commission ("FCC") is charged with regulating communications in the United States.[32] The FCC's regulatory jurisdiction over the Internet is primarily derived from the Communications Act of 1934 which gives the FCC the power to regulate interstate and foreign commerce in communication by wire and radio.[33] The FCC has classified Internet companies as "information services."[34] Consequent to this classification, ISPs began implementing tiered pricing models to require heavy bandwidth users to pay more for their

25 *See generally* Helling, *supra* note 11.

26 *Id.* at 56.

27 Benjamin, *supra* note 7, at 161 ("Not only will users have potentially less content to choose from due to the effect of competition, but the 'Web sites by companies not able to strike fast lane deals will respond more slowly than those companies able to pay,' making the whole experience of web surfing less free and more restrictive." (quoting Kumar & Rhoads, *supra* note 23, at A1)).

28 Helling, *supra* note 11, at 54 ("[S]mall companies that cannot pay for Internet bandwidth will be forced to operate at a loss, with compromised customer satisfaction, or be required to shut down.").

29 *Id.* at 56.

30 Chong, *supra* note 6, at 154.

31 Vitello, *supra* note 8, at 526.

32 *See About the Federal Communications Commission*, FED. COMM. COMMISSION (last updated Mar. 17, 2011), http://www.fcc.gov/aboutus.html.

33 *See* 47 U.S.C. § 151 (2000).

34 Chong, *supra* note 6, at 149. *See also* Vitello, *supra* note 8, at 524 ("Network neutrality advocates first began to aggressively advance their call for national neutral-Internet legislation when, in February and March of 2002, the FCC classified Digital Subscriber Lines ("DSL") and cable modem systems as 'information systems.'" (quoting Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847, 1856 (2006)).

network connection, and limited speed to those who used too much bandwidth.[35]

"Currently, the FCC's Internet Policy Statement ("Statement") is the most direct authority that exists to regulate [network neutrality]."[36] "[P]olicy statements are among the most informal of an agency's official regulatory tools."[37] The Statement was released in September 2005,[38] and it recognized the FCC's authority over the national Internet policy established in section 230 of the Communications Act.[39] In the Statement, the FCC recognized its "duty to preserve and promote the vibrant and open character of the Internet as the telecommunications marketplace enters the broadband age."[40] But in light of the recent decision in *Comcast v. FCC*, 600 F.3d 642 (2010),[41] it is clear that a mere statement of policy is not enough.[42] The risks associated with the discriminatory practices posed by network providers and ISPs are not being adequately addressed by the Statement due to its various shortcomings,[43] such as the lack of legal authority associated with the Statement[44] and the generality of its terms.[45]

Part I provides insight into the FCC's role in regulating the Internet by detailing its initial creation and authority under the

35 *See* Yoo, *supra* note 34, at 1856.

36 Benjamin, *supra* note 7, at 170.

37 Brauer-Rieke, *supra* note 1, at 601 (emphasis added) ("Agency-issued policy statements typically serve to inform regulated entities and the public how an agency will carry out its administrative mandate or proceed under certain factual circumstances. Policy statements generally do not carry procedural requirements for their promulgation and are not legally binding. Agencies may not decide adjudicatory procedures based on a policy statement, but a policy statement can influence an agency decision within the scope of that agency's discretion.").

38 *See* FED. COMMC'NS COMM'N, 20 F.C.C.R. 14986, IN THE MATTERS OF APPROPRIATE FRAMEWORK FOR BROADBAND ACCESS TO THE INTERNET OVER WIRELINE FACILITIES (2005) [hereinafter INTERNET POLICY STATEMENT].

39 Section 230(b) includes general Internet policies including the promotion of continued development of the Internet and maximizing user control over information received. *See* 47 U.S.C. § 230(b) (2006).

40 INTERNET POLICY STATEMENT, *supra* note 38, at 14988.

41 *See infra* "Why Legislation is Needed," Part III(A).

42 *See* Vuze, Inc., WC Docket No. 07-52, at 4 (Fed. Commc'ns Comm'n Nov. 14, 2007), *available at* http://www.openinternetcoalition.com/files/Vuze%20Petition%2011-14-07%20FINAL.pdf.

43 The FCC's Policy Statement lacks specifics regarding penalties that will be imposed on violators, as well as any remedies available to victims of anti-net neutrality actions. The Policy also fails to mention that ISPs cannot discriminate against content. *See* INTERNET POLICY STATEMENT, *supra* note 38, at 14988.

44 *Id.* The Policy Statement is not a rule of law that has the force of inherent legal authority, rather it is simply a policy. *See id.* at 14988 n.15. ("Accordingly, we are not adopting rules in this policy statement. The principles we adopt are subject to reasonable network management.").

45 *Id.* at 14988.

Communications Act of 1934. It discusses how the FCC has tried to regulate ISPs under its ancillary jurisdiction under Title I of the Act, how the decision in *Comcast* has threatened this jurisdiction, and the FCC's response to the *Comcast* decision through its "third way" approach. Part II explores the importance of allowing the FCC to regulate network neutrality by looking at the impact on the economic aspects and free speech of online business in the current open Internet marketplace. It also discusses the potential adverse consequences to these businesses should the FCC not be given the power to regulate ISPs. Part III examines (1) the importance of legislation ensuring network neutrality by looking at what ISPs are planning to do, and will be able to do, should legislation not be implemented, (2) multiple (failed) attempts by Congress to implement network neutrality legislation, and (3) what *should* be implemented to protect the Internet. Part IV concludes by reiterating the current inadequate regulatory power of the FCC and the resulting importance of implementing legislation to protect network neutrality.

I. HISTORY AND BACKGROUND OF THE FCC'S REGULATORY POWER

A. Communications Act of 1934

The Federal Communications Commission was established by the Communications Act of 1934[46] ("the Act") because a "body with expertise" was needed for the United States' complex, fast-changing communications industry; specifically to resolve any contentious issues likely to arise.[47] Further, the Act empowers the FCC with the ability to regulate "interstate and foreign commerce in communication"[48] giving it the authority to "perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions."[49] Opponents of network neutrality regulation by the FCC argue that the FCC's power under the Act should be sufficient to regulate neutrality principals on the Internet without additional legislation;[50] however, as is portrayed in cases such as *Comcast vs. FCC*,[51] the FCC's power is simply not expansive enough.

46 *See* 47 U.S.C. § 151 (2006).
47 Werbach, *supra* note 21.
48 47 U.S.C. § 151.
49 47 U.S.C. § 154(i).
50 Benjamin, *supra* note 7, at 161.
51 *See infra* "Why Legislation is Needed," Part III.

B. FCC Ancillary Jurisdiction

i. Title I Ancillary Jurisdiction

Currently, "[t]here are no clear standards to guide the FCC in regulating the rapidly changing" Internet landscape.[52] The FCC has typically relied on its "ancillary jurisdiction" under Title I of the Act to regulate the Internet.[53] This "ancillary jurisdiction" refers to Title I's "necessary and proper" clause: Section 4(i) of the Communications Act of 1934 authorizes the FCC to "perform *any and all acts*, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."[54] The FCC may exercise this "ancillary" authority *only* if it demonstrates that its action is "'reasonably ancillary to the effective performance of the Commission's various responsibilities."[55] The Supreme Court, in *National Cable & Telecommunication Ass'n v. Brand X Services*, 545 U.S. 967 (2005), held that Internet providers are classified as "information service providers, which the FCC has authority to regulate under Title I."[56] However, the FCC "cannot rely on *Brand X* as an affirmation of Title I authority, because the Court in that case simply deferred to the Commission's regulatory classification of cable modem services."[57] In other words, the distinction between telecommunication services and information services was vague, and the Court gave the FCC the authority to make the decision about which category cable companies fell into.[58]

Under its Title I ancillary jurisdiction, the FCC seeks to ensure that "broadband networks are widely deployed, open, affordable, and accessible to all consumers."[59] ISPs (who provide "customers with connection to the Internet")[60] do not constitute carriers subject to regulation in the Act.[61] This is why the FCC is limited in available avenues with which it can regulate ISPs, and

52 Brauer-Rieke, *supra* note 1, at 614.

53 *Id.* at 602.

54 47 U.S.C. § 154(i) (emphasis added).

55 Am. Library Ass'n v. FCC, 406 F.3d 689, 693 (D.C. Cir. 2005) (quoting United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968)).

56 Benjamin, *supra* note 7, at 163 (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1001 (2005)).

57 Susan Crawford, *Comcast v. FCC—"Ancillary Jurisdiction" Has to be Ancillary to Something*, CIRCLEID (Apr. 6, 2010, 8:49 AM), http://www.circleid.com/posts/20100406_fcc_comcast_ancillary_jurisdiction_ancillary_to_something/.

58 *Id.*

59 Vitello, *supra* note 8, at 521.

60 *ISP*, THE FREE DICTIONARY (last visited Nov. 8, 2010), http://www.thefreedictionary.com/isp.

61 INTERNET POLICY STATEMENT, *supra* note 38, at 14987–88.

why Title I ancillary jurisdiction seems to be the only means, absent legislation, available for ISP regulation.[62] Acting under ancillary jurisdiction, the FCC established four principles in a Policy Statement "[t]o encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet."[63] These principles encompass the right of consumers to (1) access lawful Internet content, (2) run applications and services of their choice, (3) "connect their choice of legal devices that do not harm the network," and (4) to compete among network, application, service and content providers.[64] Noticeably absent from the Policy Statement is any mention of ISPs and related potential discriminatory practices that could harm network neutrality, which is why the FCC recently added a "fifth principle," which states that broadband providers cannot discriminate against particular Internet content or applications.[65] However, as is made so patently clear in *Comcast*, the FCC cannot rely on Title I ancillary jurisdiction to adequately regulate network neutrality,[66] which is why the Policy Statement, even with the addition of the "fifth principle," is insufficient.

ii. *Comcast v. FCC*

The Court of Appeals, D.C. Circuit in *Comcast v. FCC*[67] held that the FCC overreached its authority in trying to prohibit Comcast from slowing peer-to-peer traffic.[68] The holding in this case is another reason why formal network neutrality rules are vital if the FCC is to exercise regulatory power over ISPs.[69]

"In 2007, several subscribers to Comcast's high-speed Internet service discovered that the company was interfering

62 *Id.*

63 *Id.* at 14988.

64 *Id.*

65 Preserving a Free and Open Internet, *supra* note 3. Chairman Genachowski specifically mentions that ISPs cannot "block or degrade lawful traffic over their networks, or pick winners by favoring some content or applications over others in the connection to subscribers' homes. Nor can they disfavor an Internet service just because it competes with a similar service offered by that broadband provider. The Internet must continue to allow users to decide what content and applications succeed." *Id.* He also notes that "open Internet principles apply only to lawful content, services, and applications" and that advanced services should *supplement*, not supplant open access, to ensure enough bandwidth for all users. *Id.*

66 Vitello, *supra* note 8, at 527 (stating that this is a primary argument proponents make when arguing for federal legislation to maintain the neutrality of the Internet).

67 Comcast v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

68 *Id.* at 661.

69 *See* Grant Gross, *Survey Says US Public Doesn't Support Internet Regulation*, PCWORLD (Sept. 23, 2010, 3:50 PM), http://www.pcworld.com/businesscenter/article/206101/survey_says_us_public_doesnt_support_internet_regulation.html.

with their use of peer-to-peer networking applications."[70] A complaint was filed by two non-profit organizations, Free Press and Public Knowledge, accusing Comcast of discrimination against subscribers who used peer-to-peer applications.[71] The complaints alleged that Comcast violated the FCC's Internet Policy Statement.[72] As a result, the FCC issued an order in which it found that Comcast's selective interference with Internet traffic was both discriminatory and arbitrary, did not facilitate an open Internet, and was not an example of "reasonable network management."[73] The FCC also noted that Comcast had impeded consumers' content access in a notable way and that its method of bandwidth[74] management went against federal policy.[75] Comcast initially complied with the FCC order, but then challenged the Commission's jurisdictional right to regulate its network management practices in *Comcast*.[76]

The court held that the FCC did not have the authority to regulate an ISP's network management practices because the Commission's attempted regulation was not reasonably ancillary to the effective performance of its statutorily mandated responsibilities.[77] The court rejected the FCC's arguments as to why it has the authority to enforce Internet neutrality principles, stating that even though Congress gave the FCC broad jurisdiction for the purpose of keeping "pace with rapidly evolving communications technologies,"[78] the allowance of a wide latitude is "not the equivalent of untrammeled freedom to

70 *Comcast*, 600 F.3d at 644. *See also id.* ("Peer-to-peer programs allow users to share large files directly with one another . . . . Such programs also consume significant amounts of bandwidth.").

71 *Id.* "Comcast was jamming peer-to-peer traffic in a way that made it inconvenient—and extremely slow—for users." Complaint at 7, Free Press and Public Knowledge v. Comcast Corp. (Nov. 1, 2007), *available at* http://www.publicknowledge.org/pdf/fp_pk_comcast_complaint.pdf [hereinafter Formal Complaint]. Comcast's tactics were also kept deliberately secret from users. *Id.* at 9–11.

72 *Comcast*, 600 F.3d at 644.

73 Formal Complaint, *supra* note 71, at 25.

74 Bandwidth is the amount of data users can send "through a network or modem connection." *Bandwidth Definition*, TECHTERMS.COM (last visited Dec. 28, 2010), http://www.techterms.com/definition/bandwidth.

75 *Comcast*, 600 F.3d at 645.

76 *Id.*

77 *Id.* at 660–61. The two-part test the court used to determine the FCC's ancillary jurisdiction comes from the case *American Library Ass'n v. FCC*. *See* Am. Library Ass'n v. FCC, 406 F.3d 689, 691–92 (D.C. Cir. 2005) ("The Commission . . . may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission's general jurisdiction grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."). Whether the FCC's action satisfied the second prong was the central issue of *Comcast v. FCC*. *See Comcast*, 600 F.3d at 647–48.

78 *Comcast*, 600 F.3d at 660.

regulate activities over which the statute fails to confer Commission authority."[79] This direct denial of jurisdictional reach to the FCC over Comcast is specifically why direct legal authority guaranteeing a neutral Internet is essential.[80] Opponents to network neutrality legislation have maintained "any anti-consumer deviation since the Internet's inception has been swiftly dealt with and remedied by existing regulators."[81] The decision in *Comcast* makes it clear that ISPs are able to engage in discriminatory practices to which the FCC is without jurisdiction to regulate.[82] The *Comcast* decision also sharply reduces the FCC's ability to protect consumers and promote competition and creates serious uncertainty about the FCC's ability to perform basic oversight functions.[83]

iii. FCC's "Third Way" Jurisdiction

Following the decision in *Comcast v. FCC*, FCC Chairman Julius Genachowski unveiled the "third way" proposal under which the FCC would seek more power to police ISPs and enforce network neutrality rules.[84] Chairman Genachowski recognized the serious problem *Comcast* created, and hoped to solve it with his "third way" plan. The plan would give the Commission the power to implement important broadband policies that would protect consumers and promote competition by ensuring transparency in broadband access services and preserving the free and open Internet.[85] The "third way" proposal supports the FCC's goal in restoring the "status quo" that existed prior to the

79 *Id.* (citing to Nat'l Ass'n of Regulatory Util. Comm'rs v. Fed. Commc'ns Comm'n., 533 F.2d 601 (1976)).

80 *See* Werbach, *supra* note 21 (explaining that the recent decision in *Comcast v. FCC* "called into question the FCC's legal authority over broadband access, opening the door to many more years of lawsuits and Congressional lobbying. Such prolonged uncertainty benefits no one").

81 Vitello, *supra* note 8, at 539.

82 *See Third Way*, *supra* note 14.

83 *Id.*

84 *See* Sara Jerome, *First Look: FCC Moderation Just an 'Illusion,' Says Former Commish*, THE HILL (Sept. 13, 2010, 8:07 AM), http://thehill.com/blogs/hillicon-valley/technology/118295-first-look-former-fcc-commish-calls-agencys-moderation-claims-an-illusion. The Third Way approach specifically states that the Commission would:

> [r]ecognize the transmission component of broadband access service—and only this component—as a telecommunications service; [a]pply only a handful of provisions of Title II . . . that, prior to the *Comcast* decision, were widely believed to be within the Commission's purview for broadband; [s]imultaneously renounce—that is, forbear from—application of the many sections of the Communications Act that are unnecessary and inappropriate for broadband access service; and [p]ut in place up-front forbearance and meaningful boundaries to guard against regulatory overreach.

Third Way, *supra* note 14.

85 *Third Way*, *supra* note 14.

court's decision in *Comcast*, that restricted the FCC's role in regulating broadband Internet service.[86] Chairman Genachowki maintains that the "third way" will remain in line with "the bipartisan consensus . . . [and] that the FCC should adopt a restrained approach to broadband communications, one carefully balanced to unleash investment and innovation while also protecting and empowering consumers."[87]

Under the "third way," the FCC would be able to regulate broadband services by placing them under telecommunication service regulation.[88] Recognizing the serious drawbacks a full suite of telecommunication obligations would pose on broadband communications, Chairman Genachowski promised that the FCC would not subject broadband services to the complete set of rules that govern telephone services upon reclassification; rather, the FCC would implement a "forbearance" process in order for FCC regulation to remain moderate.[89] Forbearance is necessary because many sections of the Communications Act are unnecessary and inappropriate for broadband access service and would impede against the promotion of goals long associated with the Internet, such as protecting consumers and fair competition.[90]

The "third way" approach is a step in the right direction. Its most important virtues are that it will establish necessary boundaries and constraints to regulatory overreach and restore the status quo that existed before the *Comcast* decision.[91] But it is just that—a step. Without actual implementation by Congress of legislation embodying these goals, the FCC's "third way" leads to a dead end.[92]

II. ALLOWING THE FCC TO IMPOSE REGULATIONS ON ISPS IS VITAL FOR ONLINE BUSINESS

The Internet is an important resource for business. Any individual can use the Internet as a platform for their product,

86 *Id.*

87 *Id.*

88 *See* Charles Cooper, *The FCC's "Third Way," Will it Work?*, CBS NEWS (May 6, 2010, 1:13 PM), http://www.cbsnews.com/8301-501465_162-20004332-501465.html. *See also* Hercules K., *supra* note 13 (stating that following the *Comcast* decision the FCC issued a notice of inquiry asking if the FCC should reclassify broadband as a telecommunications service, over which the FCC has definite jurisdiction).

89 *See* Cooper, *supra* note 88.

90 *Id.*

91 *Id.* Namely, that the FCC would not be given greater obligations than what was in place prior to the decision in *Comcast*. *Id.*

92 The "third way" approach is another example of *policy* being implemented by the FCC, which is not legally enforceable under the decision in *Comcast*.

content, thoughts and opinions. Without regulation, ISPs could impose restrictions and additional costs on users that would burden freedom of speech and small business innovation, resulting in economic loss and the potential violation of Constitutional rights.

A. Free Speech

Minnesota Senator Al Franken pronounced net neutrality as "the first amendment issue of our time."[93] The important debate surrounds whose First Amendment rights will prevail—those of ISPs, or those of content providers and individual users.[94] The Internet is a "blank canvas" that allows "anyone to contribute and to innovate without permission,"[95] and is viewed as a democratic medium that fosters innovation and free speech.[96] The Supreme Court of the United States, in *Reno v. ACLU*,[97] overturned the Communications Decency Act;[98] in doing so, the Court gave Internet users the highest level of free speech protections, recognizing the benefits of openness of expression, competition, and innovation.[99]

Proponents of network neutrality are concerned about effects on innovation by content providers as well as a diminution of free expression.[100] The free speech argument relates to the power that ISPs would hold if they were given the ability to filter their traffic. ISPs may be in the position to restrict content they do not agree with.[101] This data discrimination would restrict their

93 Jamilah King, *Al Franken: Net Neutrality is the Free Speech Issue of our Time*, COLORLINES (Aug. 20, 2010, 3:11 PM), http://colorlines.com/archives/2010/08/600_convene_for_broadband_town_hall.html.

94 Hercules K., *supra* note 13 ("When this question is finally settled, we could see innovation and online startups severely stifled.").

95 Preserving a Free and Open Internet, *supra* note 3.

96 *See Frequently Asked Questions*, SAVE THE INTERNET (last visited Dec. 28, 2010), http://www.savetheinternet.com/frequently-asked-questions ("Net Neutrality is the reason why the Internet has driven economic innovation, democratic participation, and free speech online.").

97 Reno v. ACLU, 521 U.S. 844 (1997).

98 The Communications Decency Act was an attempt to protect minors from explicit material on the Internet by criminalizing the knowing transmission of "obscene or indecent" messages to any recipient under 18. *Id.* at 859. All nine Justices of the Court voted to strike down anti-indecency provisions of the Communications Decency Act, finding they violated the freedom of speech provisions of the First Amendment. *Id.* at 874.

99 *See* Hercules K., *supra* note 13. A letter on behalf of the Writer's Guild of America was sent to the FCC, urging the agency to move forward with network neutrality rules. Gross, *supra* note 69. The open structure of the Internet gives musicians and other creators and innovators an equal technological playing field with some of the biggest companies. *Id.* The result is a blossoming marketplace that compensates creators and rewards fans with an array of access to large amounts of music. *Id.*

100 Vitello, *supra* note 8, at 525.

101 BROADBAND CONNECTIVITY COMPETITION POLICY, *supra* note 5, at 59–60.

subscribers from rival content instead of offering unfettered access to the Internet.[102] The Federal Trade Commission notes that "[t]he end result might resemble an Internet analogous to contemporary cable-television service where you are given access to a standard set of channels, but must pay to receive premium content."[103] Network providers could interfere with the connection between buyer and seller, or restrict their subscribers to content in which they have a financial interest.[104] Analogizing ISPs to telephone companies, one could argue that because telephone companies cannot tell consumers who they can call, ISPs should not dictate what people can do online.[105]

B. Economic Effects on Online Business

A neutral, open Internet benefits both consumers and businesses.[106] FCC Chairman Genachowski stated: "The principles that will protect the open Internet are an essential step to maximize investment and innovation in the network and on the edge of it—by establishing rules of the road that incentivize competition, empower entrepreneurs, and grow the economic pie to the benefit of all."[107] The fact that the Internet is an open system[108] is why it is such a powerful engine for creativity, innovation, and economic growth.[109] Chairman Genachowski notes: "The Internet has unleashed the creative genius of countless entrepreneurs and has enabled the creation of jobs—and the launch of small businesses and the expansion of large ones—all across America."[110] The potential for jobs and opportunity are everywhere broadband exists.[111]

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102 *Id.*

103 Vitello, *supra* note 8, at 525.

104 INTERNET POLICY STATEMENT, *supra* note 38, at 15. *See also* Vishesh Kumar & Christopher Rhoads, *Google Wants its Own Fast Track on the Web*, WALL ST. J., Dec. 15, 2008, at A1 ("AT&T . . . recently launched its own online video service, called VideoCrawler, to compete with YouTube and others. One way AT&T can win that competition is to give their own video service preferential treatment on their network.").

105 Letter from Vinton Cerf, Chief Internet Evangelist, Google, Inc., to Joe Barton, Chairman, Comm. On Energy & Commerce, U.S. House of Representatives, and John D. Dingell, Ranking Member, Comm. On Energy & Commerce, U.S. House of Representatives (Nov. 8, 2005), *available at* http://googleblog.blogspot.com/2005/11/vint-cerf-speaks-out-on-net-neutrality.html.

106 Preserving a Free and Open Internet, *supra* note 3.

107 *Id.*

108 Open systems are computer systems that include specific installations that are configured to allow unrestricted access by people and other computers. *Open system (computing)*, WIKIPEDIA (last visited Dec. 28, 2010), http://en.wikipedia.org/wiki/Open_System_(computing).

109 Preserving a Free and Open Internet, *supra* note 3.

110 *Id.*

111 *Id.* There are countless examples of Internet-related success stories. One example is the story of Allie Brosch, creator of the humorous blog "Hyperbole and a Half,"

The fewer obstacles that exist for innovators online, the more economic opportunities are available.[112] If ISPs are allowed to redirect or block certain kinds of content, they will impinge upon the democratic nature of the Internet.[113] As a result, the ability of consumers to access and share information of their choosing may be diminished.[114] Take for example, a startup content distributor online company similar to YouTube or Twitter. This startup company ("StartUp") seeks to compete with the aforementioned giants, but cannot adequately do so without equal access to bandwidth.[115] For content providers such as StartUp that utilize large amounts of bandwidth, the lack of an open channel may sufficiently degrade the quality of the content.[116] In turn, this can affect its ability to adequately compete, as customers are less likely to access content that is subject to periodic pauses or other interruptions.[117] The tiered system offered by the ISPs could also result in ISPs favoring companies they own[118] or those with which they select to do

created while she was studying for a physics final. As of April 2010, she makes a living operating the site through ads and related merchandise. *See FAQ*, HYPERBOLE AND A HALF (last visited Dec. 28, 2010), http://hyperboleandahalf.blogspot.com/p/faq_10.html.

112 Preserving a Free and Open Internet, *supra* note 3.

113 Susan Crawford, *FAQ on Net Neutrality*, SUSAN CRAWFORD BLOG (May 31, 2006), http://scrawford.blogware.com/blog/_archives/2006/5/31/1998151.html ("Network providers will have every incentive to favor their own services and make exclusive deals.").

114 Brauer-Rieke, *supra* note 1, at 596. ISPs selling a higher priority service to users can be analogized to someone purchasing a spot at the front of the line that simply pushes everyone else further back. *See Net Neutrality, "Paid Prioritization," and "Network Management"—Part I*, ETI VIEWS AND NEWS (Sept. 2010), http://www.econtech.com/newsletter/september2010/september2010a2.php.

115 *See* Yoo, *supra* note 35, at 1881 (suggesting tiered access will have an effect directly on businesses by prohibiting bandwidth-intensive startup companies from gaining access to potential customers due to their inability to purchase increased bandwidth).

116 *See* ETI VIEWS AND NEWS, *supra* note 114.

117 *Id.* An article concerning the Google/Verizon deal lists three possible scenarios resulting from tiered access: 1) YouTube vs. other video channels: If YouTube (owned by Google) paid Verizon for prioritized access, its videos would be swiftly downloaded to a user's computer, while videos hosted elsewhere would be much slower. For competitors of YouTube, this would result in an unequal playing field where potential customers and users would opt to look elsewhere to host their videos, as YouTube would be much faster; 2) Amazon vs. your store: Amazon could afford to pay to ensure priority access for its content, while a small e-commerce website could not pay such fees; 3) Images vs. video: Marketing options would be affected, companies would choose to use lower bandwidth-consuming options, such as images as opposed to videos. *See* Ruud Hein, *Google & Verizon Deal Would End Net Neutrality, Favor Big Players*, SEARCH ENGINE PEOPLE, http://www.searchenginepeople.com/blog/google-verizon-deal-would-end-net-neutrality-favor-big-players.html (last visited Dec. 28, 2010).

118 *See* Vitello, *supra* note 8, at 526 (noting that allowing ISPs to vertically integrate (vertical integration occurs when a company merges its operations with its own supply and distributive markets) will give them the incentive to prioritize their own data packets at the expense of others, which could lead to monopoly prices).

business.[119] ISPs could use data discrimination technologies to restrict their subscribers to rival content.[120] If this rival content is the broadband provider's own offering, and is not subject to such minimized broadband use that results in slower access, then consumers will not bother with companies like StartUp[121] and will stick with what works the fastest, which could result in the vertical foreclosure of downstream[122] content markets.[123] In order to maintain fairness it is important that ISPs make "technically comparable dedicated channels available to competing downstream providers of the same types of services that the service provider itself offers."[124]

Because there is currently no law ensuring network neutrality, companies that rely on the Internet to distribute their products and services operate in an uncertain marketplace.[125] In fact, Internet giants such as Google, eBay, Yahoo!, Microsoft, and Apple have protested various propositions by ISPs to manipulate networks in ways that affect bandwidth use.[126] These companies assembled and sent an open letter to FCC Chairman Genachowski about the need for the FCC to enforce a "guarantee of neutral, nondiscriminatory access by users."[127] The absence of a comprehensive legal framework exerts a drag on the market.[128]

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119 *See* Helling, *supra* note 11, at 54.

120 BROADBAND CONNECTIVITY COMPETITION POLICY, *supra* note 5, at 52.

121 ETI VIEWS AND NEWS, *supra* note 114.

122 Downstream markets are "[m]arket[s] at the next stage of the production/distribution chain." *Downstream market*, CONCURRENCES, http://www.concurrences.com/article.php3?id_article=12295&lang=en (last visited Dec. 28, 2010). In this case, these content providers supply consumers with access to the content, after the content is actually created. Think: YouTube. YouTube is a video-sharing website on which users can upload, share, and view videos. YouTube uses technology to display a wide variety of user-generated video content, including movie clips, TV clips, and music videos, as well as amateur content such as video blogging and short original videos. *See YouTube*, WIKIPEDIA, http://en.wikipedia.org/wiki/YouTube (last visited Dec. 28, 2010).

123 ETI VIEWS AND NEWS, *supra* note 114.

124 *Id.*

125 *See* Vuze, Inc., WC Docket No. 07-52, 14 (Fed. Commc'ns Comm'n Nov. 14, 2007), *available at* http://www.openinternetcoalition.com/files/Vuze%20Petition%2011-14-07%20FINAL.pdf.

126 *See* Yoo, *supra* note 35, at 1856–57. Google in particular was once a leading advocate of network neutrality. *See* Richard Whitt, *Facts About Our Network Neutrality Policy Proposal*, GOOGLE PUBLIC POLICY BLOG (Aug. 12, 2010, 1:26 PM), http://googlepublicpolicy.blogspot.com/search/label/Net%20Neutrality. Google, however, later changed its mind. *See infra* notes 135–38 and accompanying text.

127 Berin Szoka & Adam Thierer, *Net Neutrality, Slippery Slopes & High-Tech Mutually Assured Destruction*, 11 PROGRESS & FREEDOM FOUNDATION 1, 2 (Oct. 2009), *available at* http://www.scribd.com/doc/21520140/Net-Neutrality-Slippery-Slopes-High-Tech-Mutually-Assured-Destruction.

128 Werbach, *supra* note 21 ("Venture capitalists seeking the next YouTube or Twitter want assurance that a broadband access provider won't throttle the new application to advantage its own affiliates.").

Legislation that regulates network neutrality will help guarantee a fair marketplace on the Internet and maximize competition and innovation by prohibiting barriers of entry for new companies.[129]

III. WHY LEGISLATION IS NEEDED

FCC Chairman Genachowski conceded that the "FCC's role . . . should *not* involve regulating the Internet itself."[130] Rather, the FCC exists to provide consumers with basic protection against anticompetitive conduct by the companies that provide broadband access services which consumers subscribe to in order to access the Internet.[131] The FCC needs authority "to prevent these companies from restricting lawful innovation or speech, or engaging in unfair practices."[132] The FCC has already shown that it can prevent unreasonable discrimination in the ruling it issued against Comcast, before it was struck down by the Court of Appeals. In *Comcast v. FCC*, no service was "blocked," rather Comcast's actions were reprimanded because they were not done to "exercise reasonable network management."[133]

A. What ISPs Want

One of the most controversial aspects of the network neutrality debate centers around whether ISPs should have the right to offer customers prioritized delivery of Internet traffic and to impose additional charges for those services.[134] Since the appellate court's decision in *Comcast v. FCC*,

> the FCC has been trying to find a way to regulate broadband delivery, and that effort has been the subject of a series of private meetings at the agency's headquarters. . . . At the meetings, officials from the nation's biggest Internet service and content providers, including Google and Verizon, have tried to reach a consensus on how broadband Internet service should be regulated in light of the decision.[135]

As a result of these "secret talks," two communication behemoths have presented a proposal that offers compromised

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129 Benjamin, *supra* note 7, at 175.

130 *Third Way*, *supra* note 14. *See also* Edward Wyatt, *Google and Verizon Near Deal on Web Pay Tiers*, N.Y. TIMES, (Aug. 4, 2010) http://www.nytimes.com/2010/08/05/technology/05secret.html?_r=2&hp, ("The F.C.C. has said that it does not want to impose strict regulation on Internet service and rates, but seeks only the authority to enforce broadband privacy and guarantee equal access.").

131 *See Third Way*, *supra* note 14.

132 *Id.*

133 INTERNET POLICY STATEMENT, *supra* note 38.

134 *See* ETI VIEWS AND NEWS, *supra* note 114.

135 Wyatt, *supra* note 130.

solutions to the major disputed elements of network neutrality.[136] The *New York Times* reported: "Google and Verizon, two leading players in Internet service and content, are nearing an agreement that could allow Verizon to speed some online content to Internet users more quickly if the content's creators are willing to pay for the privilege."[137] Google is a major content provider and Verizon is a major ISP, and the proposal they put forth

> would allow an altogether new fee to be charged for wireless throughput—an access fee, a toll paced on data after it leaves [the] hosting firm's building, or [the] company-owned server farm. This means that content providers—bloggers, e-commerce sites, social networks, you name it—will all be assessed wireless transmission fees. The higher the fee paid, the faster their data will be allowed to travel.[138]

The proposal has elicited much criticism, especially because it exempts wireless and other online services from network neutrality.[139] The inherent danger in allowing tiered access is that ISPs could essentially act as "Internet gatekeepers."[140] Barriers of entry for online innovators would be significantly raised if they were required to negotiate with ISPs to be assured access to users. This would result in benefits for large Internet players and foreclose competition for small businesses that use the Internet as their main platform.[141]

Consumer advocates are fervently against the proposal because they feel that it would concentrate in a few corporations' control of a free and open Internet, where currently consumers

136 Werbach, *supra* note 21.

137 Wyatt, *supra* note 130. "The agreement could eventually lead to higher charges for Internet users." *Id.*

138 Jeff Sayre, *How the Death of Net Neutrality Effects* [sic] *You*, JEFFSAYRE.COM, http://jeffsayre.com/2010/08/16/how-the-death-of-net-neutrality-effects-you/ (last visited Dec. 28, 2010).

139 *See* VERIZON & GOOGLE, VERIZON-GOOGLE LEGISLATIVE FRAMEWORK PROPOSAL, *available at* http://www.scribd.com/doc/35599242/Verizon-Google-Legislative-Framework-Proposal ("Regulatory Authority: The FCC would have exclusive authority to oversee broadband Internet access service, but would not have any authority over Internet software applications, content or services. Regulatory authorities would not be permitted to regulate broadband Internet access service."). *See also* Wyatt, *supra* note 130 ("Wireless companies, meanwhile, want no restrictions on wireless broadband, which they see as a different technology than Internet service over wires.").

140 *See* Hercules K., *supra* note 13. *See also Vint Cerf Speaking Out on Internet Neutrality*, CIRCLEID (Nov. 10, 2005, 10:27 AM), http://www.circleid.com/posts/vint_cerf_speaking_out_on_internet_neutrality/ ("The remarkable social impact and economic success of the Internet is in many ways directly attributable to the architectural characteristics that were part of its design. The Internet was designed with no gatekeepers over new content or services.").

141 *See* Hercules K., *supra* note 13.

decide which companies are successful.[142] This would result in a non-neutral Internet which could give large ISPs such as AT&T, Comcast, Verizon and Google as well as content providers the power to turn the Internet into a system similar to cable television and pick winners and losers online.[143]

B. What the House and Senate Have Tried to Do

Whether government regulation is needed is a significant question when it comes to network neutrality. Proponents of network neutrality believe that the government needs to pass legislation to prevent ISPs from discriminating against certain Internet content. Opponents are against implementation of legislation, arguing that ISPs should be given the "freedom to establish their own Internet discrimination policies, and the ability to regulate the content Internet users can access at a reasonable speed."[144] Because of the Google-Verizon proposal (proposing tiered Internet access), and the recent decision in *Comcast v. FCC*, it is clear that federal regulatory legislation is needed to protect against data discrimination by ISPs.

There has been much debate over whether it is necessary for policymakers to take steps to ensure equal access to the Internet for content providers and consumers, and what those steps should be.[145] On the one hand, "more specific regulatory guidelines may be necessary to protect the marketplace from potential abuses which could threaten the net neutrality concept."[146] On the other hand, opponents to legislation regulating network neutrality contend that "existing laws and [FCC] policies are sufficient to deal with potential anticompetitive behavior[147] and that such regulations would have

142 *See* Wyatt, *supra* note 130 (quoting Gigi B. Sohn, president and a founder of Public Knowledge, a consumer advocacy group: "The point of a network neutrality rule is to prevent big companies from dividing the Internet between them").

143 Josh Silver, *Google-Verizon Deal: The End of The Internet as We Know It*, THE HUFFINGTON POST (Aug. 5, 2010, 9:26 AM), http://www.huffingtonpost.com/josh-silver/google-verizon-deal-the-e_b_671617.html. Silver makes an interesting point in an author's note. He brings up a quote Google made in 2006:

> Today the Internet is an information highway where anybody—no matter how large or small, how traditional or unconventional—has equal access. But the phone and cable monopolies, who control almost all Internet access, want the power to choose who gets access to high-speed lanes and whose content gets seen first and fastest. They want to build a two-tiered system and block the on-ramps for those who can't pay.

Id. These words are in stark contrast to the Google-Verizon proposal.

144 Roberts, *supra* note 2, at 767.

145 Gilroy, *supra* note 24.

146 *Id.*

147 *Id.* The court's holding in *Comcast v. FCC* makes it clear that any existing power the FCC currently holds is without a doubt insufficient to protect against anti-

negative effects on the expansion and future development of the Internet."[148]

Congress has proposed a substantial amount of network neutrality legislation, none of which has been enacted into law. There have been two proposed bills that deserve consideration. The first is the "Internet Freedom Preservation Act"[149] ("IFPA") proposed by the Senate. It is the most comprehensive bill to date and includes a majority of critical principles needed for effective legislation ensuring network neutrality. The House proposed a similar bill: the Internet Freedom Preservation Act of 2008 ("IFPA 2008").[150] Like the IFPA, IFPA 2008 seeks to amend the Communications Act,[151] and states that "[i]t is the policy of the United States . . . to maintain the freedom to use . . . broadband telecommunications networks, including the Internet, without unreasonable interference from or discrimination by network operators."[152]

IFPA 2008 states that it is the policy of the United States "to guard against unreasonable discriminatory favoritism for, or degradation of, content by network operators based upon its source, ownership, or destination on the Internet."[153] Furthermore, IFPA 2008 requires the FCC to commence a proceeding to assess if ISPs are "refrain[ing] from blocking, thwarting, or unreasonably interfering with the ability of consumers to . . . access, use, send, receive, or offer lawful content, applications, or services" of their choice.[154] However, IFPA 2008 is inadequate because it proposes to amend the Communications Act of 1934 with "policies" and not "laws."[155] This lack of legal authority is problematic, because ISPs will not have the same incentives to obey policies as they would laws.[156] IFPA 2008 also fails to outline any potential remedies for those injured by anti-neutral Internet violators, or penalties for those who have violated network neutrality principles.[157] Because of these shortcomings, IFPA 2008 fails to alleviate current concerns

neutral Internet actions taken by ISPs.

148 Gilroy, *supra* note 24.

149 *See* S. 215, 110th Cong. (2007).

150 *See* H.R. 5353, 110th Cong. (2008).

151 *Id.* at § 3.

152 *Id.* at § 12(1).

153 *Id.* at § 12(4).

154 *Id.* at § 4(a)(2)(A).

155 *Id.* at § 12. The bill begins by stating that its purpose is "[t]o establish broadband *policy*." *Id.* (emphasis added).

156 This is the same problem posed by the FCC's Policy Statement. *See supra* Part II(A).

157 *See* H.R. 5353 at §§ 2–3, 12.

regarding network neutrality. In fact, the Act itself even questions the need for enforceable rules, permitting the FCC to assess "whether the need for enforceable rules governing openness, consumer rights, and consumer protections or prohibiting unreasonable discrimination is lessened if a broadband network provider provides significantly high bandwidth speeds to consumers."[158]

IFPA seeks to amend the Communications Act of 1934 to ensure network neutrality.[159] The Bill states that ISPs shall "not block, interfere with, discriminate against, impair, or degrade the ability of any person to use a broadband service to access, use, send, post, receive, or offer any lawful content, application, or service made available via the Internet."[160] Additionally, IFPA requires the FCC to "establish enforcement and expedited adjudicatory review procedures"[161] as well as penalties to ISPs who violate network neutrality rules.[162] The idea behind IFPA was that:

> [t]he internet [is] a robust engine of economic development by enabling anyone with a good idea to connect to consumers and compete on a level playing field. The marketplace picked winners and losers, not some central gatekeeper. That freedom—the very core of what makes the Internet what it is today—must be preserved.[163]

Under this legislation, ISPs must operate the network in a nondiscriminatory manner, but would remain free to manage the network to protect the security of the network or offer different levels of broadband connection to users.[164] The different levels would be offered without charge for such prioritization.[165]

There have been numerous obstacles for both the FCC and Congress in attempting to regulate network neutrality; advocates have been wary of ISPs providing tiered access in any form, and proponents have been unwilling to budge on the allowance of governmental regulation of any kind. IFPA offers a compromise between the two extremes and is therefore the optimal proposal for ensuring network neutrality while continuing to allow ISPs to offer special services to their customers, but not at the expense of

158 *Id.* at § 4(a)(2)(F).
159 *See* S. 215, 110th Cong. (2007).
160 *Id.* at § 12(a)(1).
161 *Id.* at § 12(e)(2).
162 *See id.* at § 12(f).
163 *U.S. Senators Dorgan and Snowe Introduce Internet Freedom Preservation Act*, GOVERNMENT TECHNOLOGY (Jan. 10, 2007), http://www.govtech.com/e-government/US-Senators-Dorgan-and-Snowe-Introduce.html.
164 *See* S. 215 at §§ 12 (a)(4)–(6).
165 *Id.*

unfair competition. It should be implemented, along with the policy found in the FCC's "third way" proposal, to ensure that concrete laws are in place to guide both the FCC and ISPs in ensuring network neutrality.

CONCLUSION

It is necessary that Congress adopt legislation to clarify the FCC's authority regarding broadband Internet service providers. The benefits of passing the proposed legislation are enormous, and the outcome in *Comcast* coupled with the Google-Verizon proposal reflects the importance of implementing legislation. The argument made by ISPs that legislation prevents them from profiting from the access to the Internet they provide to their consumers is unfounded under the passage of this legislation as ISPs will still be able to profit by making access to the Internet quicker. Free speech concerns will also be protected by passage of this legislation. If ISPs were allowed to discriminate against data they could slow access to speech in which they disapproved. Legislation is needed proactively, rather than retroactively, and the previous examples of discrimination and the desire of ISPs to continue down that path strongly suggest implementation.

AUTHOR'S NOTE

On December 21, 2010, the FCC announced the passage of an order to preserve Internet freedom and openness.[166] The order contains three primary focuses: transparency, no blocking, and no unreasonable discrimination.[167] Transparency is established to ensure that ISPs are clear about their network management practices by publicly disclosing these practices, performance characteristics, and terms and conditions of their broadband service are sufficient for consumers to make informed decisions.[168] "No blocking" ensures that fixed broadband providers shall not block lawful content, applications, services, or non-harmful devices; and mobile broadband providers may not block lawful websites, or block applications that compete with their voice or video telephone services.[169] "No unreasonable discrimination" is established to ensure that ISPs refrain from

166 Press Release, Fed. Commc'ns Comm'n, FCC Acts to Preserve Internet Freedom and Openness (Dec, 21, 2010), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2010/db1221/DOC-303745A1.pdf.

167 *Id.*

168 *Id.*

169 *Id.*

unreasonably discriminating in transmitting lawful network traffic.[170]

The rules outlined in this order are subject to "reasonable network management" and are considerably diluted for wireless providers.[171] Whether the FCC has the power to enforce these rules due to the decision in *Comcast v. FCC* will surely be hotly debated in the months to come, as the almost 200 pages of rules are sifted through and analyzed.[172]

170 *Id.*

171 *Id.*

172 *See* FEDERAL COMMUNICATIONS COMMISSION, 10-201, IN THE MATTER OF PRESERVING THE OPEN INTERNET BROADBAND INDUSTRY PRACTICES (2010), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2010/db1223/FCC-10-201A1.pdf.

The *Elkins* Legislation: Will California Change Family Law Again?

Steven K. Berenson[*]

INTRODUCTION

For many years, California has been at the forefront of innovations in the area of family law. For example, in 1970, California became the first state to apply a no-fault law relating to dissolutions of marriage.[1] California was the first state to mandate mediation in child custody and visitation disputes.[2] California was also the first state to recognize that unmarried cohabitants might have rights to share in property accumulated by their partner during the course of their relationship.[3]

Recently, California enacted what may prove to be the most significant changes to its Family Code in the last two decades.[4] While the legislation contains a large number of changes, three of the changes will be the focus of this article. First, California law now contains a preference for the introduction of live testimony in court hearings in family law matters. Second, the legislation modifies the role of minor's counsel in child custody proceedings to more closely resemble that of an attorney for one of the adult parties to a lawsuit, than that of a guardian ad litem. Third, the legislation increases the likelihood that children will testify in custody proceedings.[5]

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1 *See* Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 291–92 (1987).

2 Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1552 (1991).

3 Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 314 (2008).

4 *See infra* Part III. The California Legislature passed two bills amending the California Family Code. *See* Assemb. B. 939, 2009–2010 Assemb., Reg. Sess. (Cal. 2010); Assemb. B. 1050, 2009–2010 Assemb., Reg. Sess. (Cal. 2010).

5 *See infra* Part III.

These changes are significant because they represent a clear break from a decades-long trend in family law, both in California and across the entire country away from reliance on traditional methods of adversary litigation in resolving family law disputes, particularly in cases involving issues of child custody and visitation. This trend has been so dramatic that it has been described by scholars as a "paradigm shift"[6] and a "revolution."[7] Indeed, the move to no-fault divorce in California, and then elsewhere across the country, as well as the introduction of mandatory mediation in child custody cases, first in California and then elsewhere across the country, represent major contributions to the trend away from adversarial litigation in family law cases. Other examples of this trend include the advent and spread of collaborative divorce methods, parenting coordination, high conflict couples counseling, and hybrid-mediation-evaluation processes.[8] The California legislative changes that are the focus here represent a stunning reversal of course for a state that has led the movement away from traditional adversary litigation methods in family law cases and represent a movement back in the direction of resolving family law matters in California through traditional adversary litigation.

The genesis of the statutory changes in discussion here lies in the recent decision of the California Supreme Court in the case of *Elkins v. Superior Court*.[9] *Elkins* involved a dissolution of marriage action from Contra Costa County, California.[10] Pursuant to local rules of court, all direct testimony in family law trials was to be provided in the form of written declarations,

6 *See, e.g.*, Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 894 (2010); ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 175 (2004) [hereinafter SCHEPARD, CHILDREN, COURTS]; Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363, 363 (2009).

7 Deborah J. Cantrell, *The Role of Equipoise in Family Law* 2 (Univ. of Colo. Law Sch. Legal Studies Research Paper Series, Working Paper No. 04-11, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1805927.

8 *See, e.g.*, John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280, 280–88 (2004) (discussing the advantages and disadvantages of mediation, collaborative law, and cooperative law in family law proceedings); Peter Salem, Debra Kulak & Robin M. Deutsch, *Triaging Court Services: The Connecticut Judicial Branch's Family Civil Intake Screen*, 27 PACE L. REV. 741, 745 (2007) (discussing high conflict counseling, hybrid mediation-evaluation processes, and collaborative divorce methods); Andrew Schepard & Peter Salem, *Foreword to the Special Issue on the Family Law Education Reform Project*, 44 FAM. CT. REV. 513, 516 (2006) (noting the rise of collaborative dispute resolution in family law cases); Singer, *supra* note 6, at 364 & n.5.

9 Elkins v. Superior Court, 163 P.3d 160 (Cal. 2007).

10 *Id.* at 161.

though cross-examination would be permitted at the hearing.[11] Additionally, all trial exhibits were required to be filed prior to the hearing, with the evidentiary basis for each exhibit set forth in the written declarations.[12] In *Elkins*, the husband, who was not represented by counsel, ultimately failed to comply with the aforementioned local rules by not submitting any admissible evidence for the court to consider in the divorce trial.[13] Given the absence of any evidence submitted on behalf of the husband, the trial court, not surprisingly, issued a ruling that favored the wife with regard to each of the disputed issues.[14] On appeal,[15] the California Supreme Court ruled that the superior court's local rules violated state statutes relating to hearsay evidence and affording litigants a "day in court."[16] The high court struck down the local court's rules,[17] and reversed the judgment in the dissolution of marriage case, remanding the case for further proceedings consistent with its opinion.[18]

More importantly for present purposes, numerous counties around California had adopted local rules that were similar to those that were struck down in *Elkins*.[19] The purpose behind such rules was to increase efficiency and the timely resolution of cases in light of the crushingly large caseloads in family courts around California.[20] While the California Supreme Court acknowledged the legitimacy of these goals, it went on to conclude that courts' bona fide interests in efficiency cannot trump individual litigants' right to fair judicial proceedings.[21] In any event, recognizing that the issues involved went well beyond the interests of solely the parties to the *Elkins* case, the court recommended that the California Judicial Council set up a task force to review issues relating to the competing goals of efficiency and access to justice in California's family courts.[22]

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11 *Id.*

12 *Id.*

13 *Id.* at 163–64.

14 *Id.* at 165.

15 The intermediate appellate court summarily denied Mr. Elkins' petition for a writ of mandate or prohibition. *Id.*

16 *Id.* at 169, 170. Thus, the court was able to avoid ruling on Mr. Elkins' claims that the local rules violated his constitutional rights to due process of law. *Id.* at 170 ("The conclusion we reach also permits us to avoid the difficult question whether the local rule and order violate petitioner's right to due process of law . . . .").

17 *Id.* at 171.

18 *Id.* at 178.

19 *Id.* at 177 ("A recent statewide survey reflects a similar concern with court procedures that do not permit family law litigants to tell their story . . . .").

20 *Id.* at 175–77.

21 *Id.* at 176–77 ("That a procedure is efficient and moves cases through the system is admirable, but even more important is for the courts to provide fair and accessible justice.").

22 *Id.* at 178 n.20.

The Judicial Council followed the court's recommendation, and established the Elkins Family Law Task Force (hereinafter "Elkins Task Force" or "Task Force").[23] The Task Force contained a broad representation of actors from within the family law practice community.[24] It conducted its work over a period of two years, holding public meetings and receiving comments from a wide range of sources.[25] Eventually, the Task Force issued a lengthy report, along with numerous recommendations for actions to be taken to improve the practice of family law in California.[26] Many of the Task Force's recommendations were subsequently enacted into law as part of the legislative changes discussed above including the preference for live testimony in family law hearings and the changes to the role of minor's counsel in child custody proceedings.[27] The legislative changes relating to child testimony in custody cases did not result from recommendations made by the Task Force, though those changes were enacted around the same time as the Task Force's recommendations were enacted.[28]

Of course, only time will tell if the aforementioned legislative changes will be emulated around the country as other innovations in California family law have been, and whether they will usher in a broad pendulum swing in family law back in the direction of traditional modes of adversary litigation. Regardless, there are reasons to be skeptical of the wisdom of the legislative changes under discussion here. These reasons relate to both the process engaged in to arrive at the Elkins Task Force's recommendations and the substance of the three legislative changes discussed here.

First, the Task Force's recommendations and the subsequent legislation seem to be overreactions to one particularly bad trial court decision. Second, the Task Force took what I describe as a "consumerist" approach to the fact-finding and investigation that preceded its issuance of its recommendations. The Task Force

23 ADMIN. OFFICE OF THE COURTS, JUDICIAL COUNCIL OF CAL., THE ELKINS FAMILY LAW TASK FORCE FINAL REPORT: EXECUTIVE SUMMARY 1 (2010), *available at* http://www.courts.ca.gov/xbcr/cc/elkins-executive.pdf.

24 *Id.* ("The 38-member task force included appellate court justices, judges, court commissioners, private attorneys, legal aid attorneys, family law facilitators, self-help-center attorneys, court executives, family court managers, family court child custody mediators, court administrators, and legislative staff.").

25 *Id.* at 2.

26 ADMIN. OFFICE OF THE COURTS, THE ELKINS FAMILY LAW TASK FORCE: FINAL REPORT AND RECOMMENDATIONS (2010), *available at* http://www.courts.ca.gov/xbcr/cc/elkins-finalreport.pdf [hereinafter ELKINS FINAL REPORT].

27 *See supra* note 4.

28 Ciaran McEvoy, *Family Law System Reformed,* DAILY JOURNAL, Oct. 29, 2010, http://www.fmbklaw.com/10daily_journal_family_law.pdf.

surveyed the opinions of a wide range of the users of family court services including lawyers, judges, litigants, and court personnel.[29] The Task Force then took great pains to make its recommendations responsive to the opinions expressed. There is definitely something laudable about the efforts of a government entity to be responsive to expressed views of its constituents in policy-making activities. However, the Task Force may have taken this notion of "customer satisfaction" a bit too far. Indeed, there are perspectives other than those of the consumers of court services that are worthy of consideration in any court reform effort. In particular, the Task Force seemed to make no effort to engage academic or other scholarly perspectives that might have been valuable to consider in making its recommendations. Had the Task Force considered these perspectives, it would have encountered a voluminous literature that demonstrates the ineffectiveness of, and indeed the harms caused by traditional adversary litigation methods of dispute resolution in family law disputes, particularly those involving issues of child custody.[30]

Perhaps the Task Force's lack of consideration of academic or scholarly writings regarding effective dispute resolution procedures in part led to what I consider to be the substantive failings of the recent legislative changes. For example, the move toward increased use of live testimony in family law hearings will do nothing to improve the accuracy and reliability of child custody decision making, while at the same time unleashing the harms associated with contested custody litigation, as demonstrated by the literature mentioned above. Further, the move toward live testimony in family court hearings seems inconsistent with caseload and budgetary realities that must be considered in conjunction with any movement toward family court reform. This article contends that the Elkins Task Force's move toward live testimony is ill advised in light of the Task Force's failure to confront these issues.

One of the main forces driving the legislation's return to live testimony is the virtual explosion in the number of litigants representing themselves in family court.[31] The Elkins Task

29 *See* ELKINS FINAL REPORT, *supra* note 26, at 11.

30 *See supra* notes 6–8 and accompanying text.

31 *See* Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 105, 110 (2001) [hereinafter Berenson, *Family Law*] ("[T]he percentage of cases in which one or both of the parties appears without a lawyer is significantly higher in family law cases than in any other area of the law."); Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIMONIAL LAW. 193, 194 (2008) ("[D]epending on the type of proceeding, studies show that in between fifty-five and eighty percent of domestic relation matters, at least one party appears pro se."); Jona

Force and the California Legislature seem convinced that self-represented litigants will encounter the same difficulties that Mr. Elkins did in complying with local rules similar to those that were in issue in that case, and will be better able to present their cases through live testimony than under the time-saving procedures adopted by Contra Costa County and other California courts. Certainly, though courts have adopted many innovations to address the challenges created by self-represented litigants, more work needs to be done to provide adequate access to justice for such litigants.[32] Nonetheless, this article contends that it is misguided to believe that self-represented litigants will be more successful as trial practitioners than they are in pre-trial practice. Moreover, the move to live testimony, at least in the case of self-represented litigants, will place judges and other court personnel in unfamiliar and uncomfortable positions, which may limit the effectiveness of the move in increasing access to justice.[33]

This article also questions the legislative changes regarding the role of minor's counsel in custody cases. There is a long-standing and unresolved debate regarding whether or not children should be represented in custody proceedings,[34] and if

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Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 36 (2002) ("The surge in pro se litigation, particularly in the family courts of every common law country, is reported in official reports and anecdotally by judges and court managers and in systematic studies.").

32 *See, e.g.*, Steven Berenson, *Homeless Veterans and Child Support*, 45 FAM. L.Q. 173, 180–81 (2011).

33 *But cf.* Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 659, 661–62 (2006) (explaining that court rules and policies, which systematically silence *pro se* litigants in New York City's Housing Court, impede their ability to receive a fair trial); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2028–31 (1999) (arguing that judges must be as active as necessary to ensure that self-represented litigants receive a fair trial because "[i]f the courts hold out the promise of fairness and justice, but claim for practical reasons to be unable to achieve such a result, the advertising is false"); Goldschmidt, *supra* note 31, at 53 (advocating for an expansion of judges' roles in pro se litigation in order to improve access to justice).

34 *Compare* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 164 (2005) (arguing that appointing counsel for the child in custody cases is misguided most of the time), *with* Linda Elrod, *Counsel for the Child in Custody Disputes: The Time is Now*, 26 FAM. L.Q. 53, 69 (1992) [hereinafter Elrod, *Counsel for the Child*] (concluding that children need "court-appointed counsel" and that it is time "to give children a voice in the legal determinations that so substantially affect their physical and mental well-being"). By contrast, there is a broad consensus that children should be represented in juvenile court matters, such as delinquency proceedings, where the U.S. Supreme Court has recognized a right on the part of the child to be represented by counsel. *See In re* Gault, 387 U.S. 1, 41 (1967). There is also a broad consensus that children should be represented in dependency matters, where abuse or neglect of the child is alleged. *See, e.g.*, 42 U.S.C. § 5106(a)(b)(2)(A)(xiii) (2006) (requiring the appointment of a Guardian Ad Litem in child protection cases). The focus of this article is exclusively on the question of

they are represented, what form that representation should take.[35] The traditional approaches are to provide a Guardian Ad Litem (GAL) for the child, an attorney to represent the child (minor's counsel), or both.[36] If minor's counsel is appointed, that attorney might be charged with advancing the best interests of the child, or with advancing the child's expressed preference as to the outcome of the custody dispute.[37] Prior California law did not provide for the appointment of a GAL in custody proceedings.[38] However, California law did provide for appointment of minor's counsel,[39] and set forth a role for minor's counsel that was quite similar to that of a GAL as traditionally understood.[40] For example, minor's counsel might be required to submit a statement of issues and contentions that was essentially the same as a report traditionally submitted by a GAL to the court.[41] Further, minor's counsel was charged with representing the best interests of the child.[42]

A consensus has developed among academic commentators both that it is inappropriate for minor's counsel to play the neutral role of a GAL,[43] and that best interests representation is incompatible with attorneys' proper professional role and the autonomy interests of children.[44] The Elkins legislation satisfies one of these critiques, by modifying the role of minor's counsel to more closely resemble that of an attorney representing an adult client than that of a GAL.[45] However, the relevant statutes, as

representation in custody cases in family court.

35 *See* Elrod, *Counsel for the Child*, *supra* note 34, at 57 (discussing the confusion over the roles for attorneys in representing children).

36 Linda D. Elrod, *Client-Directed Lawyers for Children: It Is the "Right" Thing to Do*, 27 PACE L. REV. 869, 907–09 (2007) [hereinafter Elrod, *Client-Directed Lawyers*].

37 *Id.* at 910.

38 *See In re* Marriage of Lloyd, 64 Cal. Rptr. 2d 37, 41 (Cal. Ct. App. 1997).

39 CAL. FAM. CODE § 3150 (West 2004), *amended by* Stats. 2010 ch. 352 § 14 (AB 939) (effective Jan. 1, 2011).

40 *See* Elrod, *Client-Directed Lawyers*, *supra* note 36, at 907–08 ("[A] guardian ad litem . . . advocates for the best interests of the child by conducting an investigation, writing reports or otherwise making recommendations . . . .").

41 FAM. § 3151(b), *amended by* Stats. 2010 ch. 352 § 15 (AB 939) (effective Jan. 1, 2011); Amy Pellman, Robert Jacobs & Dara K. Reiner, *A Child-Centered Response to the Elkins Family Law Task Force*, 20 WM. & MARY BILL RTS. J. 81, 115–16 (2011) [hereinafter Pellman, *A Child-Centered Response*].

42 FAM. § 3151(a).

43 *See, e.g.*, ABA, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES § III(b) (2003), *reprinted in* 37 FAM. L.Q. 131, 131–60 (stating that a lawyer for a child should not testify, file a report, or make a recommendation as to custody); Elrod, *Client-Directed Lawyers*, *supra* note 36, at 908–10.

44 *See, e.g.*, Barbara A. Atwood, *Representing Children Who Can't or Won't Direct Counsel: Best Interests Lawyering or No Lawyer at All?*, 53 ARIZ. L. REV. 381, 382 & n.1 [hereinafter Atwood, *Best Interests*] (citing numerous articles); Elrod, *Client-Directed Lawyers*, *supra* note 36, at 910–12.

45 FAM. § 3151(b) (West 2011) (eliminating authority of the court to require minor's counsel to prepare a statement of issues and contentions, and prohibiting minor's counsel

modified, still retain best interests representation by minor's counsel.[46] The result is something of an incoherent or at least conflicted role for minor's counsel in California that also fails to account adequately for the autonomy interests of older children. Further, it is argued here that something important is lost in depriving courts of the neutral and reliable information that formerly came in the form of minor's counsels' statements of issues and contentions. This article takes the position that a better solution for the *Elkins* legislation to have taken would have been to recognize expressly a GAL role in custody cases, and further, to modify minor's counsels' role to abandon best interests representation for children old enough to express a mature preference as to the outcome of the custody case. The interests of younger children would be protected adequately by a GAL appointment, or a GAL appointment along with a minor's counsel appointed to represent the child.

Lastly, this article also questions the legislation increasing the use of child testimony in custody cases.[47] There is an overwhelming consensus among child psychologists that heavy involvement by children in their parents' custody disputes puts the children at serious risk of psychological harm.[48] Yet there is no activity that puts children squarely in the cross-hairs of their parents' dispute to the degree that testifying in open court, and being subject to cross-examination does. Prior law gave judges ample authority to allow children to testify in court, when it was necessary and important to do so.[49] However, prior law's preference for using alternative means to take children's views into account in custody cases was more in line with children's best psychological interests than the amended statute's move toward child testimony. Indeed, this change, along with the previously mentioned changes that will increase the adversarial aspect of child custody proceedings, will serve primarily to exacerbate the necessary harm caused to children by being the subject of contested custody proceedings.

from testifying as a witness in custody proceedings); Pellman, *A Child-Centered Response*, *supra* note 41, at 115–16.

46 FAM. § 3151(a).

47 Pellman, *A Child-Centered Response*, *supra* note 41, at 115.

48 *See, e.g.*, ROBERT E. EMERY, MARRIAGE, DIVORCE, AND CHILDREN'S ADJUSTMENT 20 (2d ed. 1999) [hereinafter EMERY, MARRIAGE, DIVORCE] ("Many negative consequences of divorce for children in the United States today could be avoided if family, social, and economic disruptions could be minimized.").

49 *See* FAM. § 3042 (West 2004), *amended by* Stats. 2010 ch. 187 § 1 (AB 1050) (effective Jan. 1, 2012).

The article proceeds as follows. First, the article engages in a more detailed description of the *Elkins* case and decision.[50] Next, the article describes the work of the Elkins Task Force,[51] and the legislation that followed the Task Force's Report.[52] The article then engages in a critique of the *Elkins* family law changes.[53] It begins at a general level,[54] first characterizing the changes as an overreaction to one particularly bad judicial decision,[55] second, questioning the process utilized by the Task Force to arrive at its recommendations,[56] and third, questioning the legislation's turn away from the trend against adversary litigation as the primary means of resolving family law disputes.[57] The article then proceeds to offer a more specific critique of the three aspects of the recent California family law changes that are the focus here,[58] the preference for live testimony in family law hearings,[59] the revisions to the role of minor's counsel in custody cases,[60] and the increased likelihood of child testimony in custody disputes.[61] The article concludes by offering a revised set of recommendations that would accomplish many of the goals set forth by the Elkins Task Force, but without imposing the negative consequences of the changes that have actually been adopted.[62]

I. THE *ELKINS* DECISION

Marilyn Elkins filed for dissolution of her more than two-decade marriage to Jeffrey Elkins.[63] The financial issues were scheduled to be tried on September 19, 2005.[64] Pursuant to a local rule of the Contra Costa County (California) Superior Court, the matter was to be decided based upon "the pleadings submitted by the parties without live testimony."[65] The rule further provided that "direct examination on factual matters

50 *See infra* Part I.
51 *See infra* Part II.
52 *See infra* Part III.
53 *See infra* Part IV.
54 *See infra* Part IV(A).
55 *See infra* Part IV(A)(i).
56 *See infra* Part IV(A)(ii).
57 *See infra* Part IV(A)(iii).
58 *See infra* Part IV(B).
59 *See infra* Part IV(B)(i).
60 *See infra* Part IV(B)(ii).
61 *See infra* Part IV(B)(iii).
62 *See infra* Part V.
63 Respondent's Return by Answer to Petition for Writ of Mandate or Prohibition at 11 Elkins v. Superior Court, 163 P.3d 160 (Cal. 2007) (No. S139073), 2006 WL 1267810. The parties were married in 1980 and separated in 2001. *Id.*
64 *Elkins*, 163 P.3d at 162.
65 *Id.* at 163 (quoting SUP. CT. CONTRA COSTA CNTY. R. 12.5(b)(3) (effective July 1, 2005) (repealed 2008)).

shall not be permitted except in unusual circumstances or for proper rebuttal."[66] The parties' declarations would be admitted in evidence at the hearing, "subject to legal objection, amendment, and cross-examination . . . ."[67] A local trial scheduling order (TSO) further restricted the parties' ability to submit evidence at the hearing.[68] The TSO reiterated that direct testimony would be presented at trial in the form of declarations submitted prior to trial "in lieu of oral direct testimony, subject to cross-examination."[69] Declarations from the parties and their witnesses were required to be filed ten court days prior to trial, along with trial briefs.[70] The TSO further provided that all trial exhibits needed to be appended to the declarations and that the evidentiary basis for the admissibility of the exhibits needed to be set forth in the declarations as well.[71]

Marilyn was represented by counsel for purposes of the hearing, but Jeffrey was not.[72] Both parties submitted their trial briefs and declarations on September 2, 2005.[73] Jeffrey, however, did not attach his exhibits to his declaration as required by the TSO, but rather delivered a binder with thirty-six exhibits to the court and opposing counsel one court day prior to the hearing.[74] Marilyn filed a responsive declaration on September 8, 2005.[75] At the hearing, Marilyn's attorney objected to the introduction of all but two of Jeffrey's exhibits on grounds that only those two exhibits were described in his declaration as required by the TSO.[76] The court ultimately sustained counsel's objection to the introduction of the exhibits.[77] After a lengthy colloquy with the court regarding its reasons for disallowing the exhibits, Jeffrey also declined to offer his declaration in evidence.[78] With no evidence from Jeffrey to consider, the matter proceeded "quasi by default, so to speak," in the words of the trial judge.[79] Though

66 *Id.* (quoting SUP. CT. CONTRA COSTA CNTY. R. 12.5(b)(3) (effective July 1, 2005) (repealed 2008)).

67 *Id.* (quoting SUP. CT. CONTRA COSTA CNTY. R. 12.5(b)(3) (effective July 1, 2005) (repealed 2008)).

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.* The TSO required these documents to be filed ten court days before the hearing. *Id.*

74 *Id.*

75 *Id.* The TSO required responsive declarations and exhibits to be filed five court days before the hearing. *Id.*

76 *Id.*

77 *Id.* at 164. The TSO did provide that "[f]ailure to comply with [its] requirements will constitute good cause to exclude evidence or testimony at trial . . . ." *Id.* at 163.

78 *Id.* at 164.

79 *Id.*

the judge awarded Jeffrey an interest in the marital home and in Marilyn's pension, the court resolved the other property issues in a manner substantially in conformity with the proposed order submitted by Marilyn's counsel.[80]

Jeffrey appealed the judgment of the trial court, arguing that there was no statutory authority for the local requirements preventing direct testimony at the hearing, requiring declarations to be filed, and requiring the evidentiary foundation for trial exhibits to be set forth in the declarations.[81] He also contended that the system of "trial by declaration" deprived him of his due process right to a hearing on the merits of his claim, and that the sanctions available for violation of the local rule and TSO were inconsistent with policies favoring resolution on the merits of disputes.[82] California's intermediate appellate court summarily denied Jeffrey's petition.[83] However, the California Supreme Court granted Jeffrey's petition for review, and ordered the Contra Costa County Superior Court to show cause why the local rule and order should not be deemed invalid for the reasons argued by Jeffrey before the intermediate appellate court.[84]

The California Supreme Court noted that while "some informality and flexibility have been accepted in marital dissolution proceedings," the same statutory rules of evidence and procedure that govern other civil matters remain applicable in the family court.[85] Additionally, declarations of the sort required by Contra Costa County are hearsay, and therefore are inadmissible at trial, unless an exception to the hearsay rule provides for their admission.[86] One such exception appears in section 2009 of the California Code of Civil Procedure, which provides for the admissibility of affidavits or declarations in *motion* proceedings.[87] However, the court made clear that section 2009 did not support the Contra Costa County rule because that rule applied at trial, rather than in motion proceedings.[88]

80 *Id.* at 165.
81 *Id.*
82 *Id.*
83 *Id.*
84 *Id.*
85 *Id.* at 167–68.
86 *Id.* at 168.
87 CAL. CIV. PROC. CODE § 2009 (West 2007) ("An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, and in uncontested proceedings to establish a record of birth, or upon a motion, and in any other case expressly permitted by statute."); *see also Elkins*, 163 P.3d at 168.
88 *Elkins*, 163 P.3d at 168.

The court went on to discuss the policy in favor of the admissibility of all relevant evidence, that evidence relating to the credibility of other evidence falls within the scope of such relevant evidence, and that live testimony may be particularly important to determining the credibility of witnesses and other evidence presented in marital dissolution and other trials.[89] The court offered numerous examples of statutory and case law support for this proposition, and therefore was able to conclude that the lower court's rules contravened these authorities and were invalid, without having to reach Jeffrey's due process arguments.[90]

The primary justification offered by the County in support of its rules focused on "efficiency" and the desire to provide for the "expeditious resolution of family law cases . . . ."[91] The California Supreme Court praised the County's desire to provide efficient procedures and to move cases quickly through the system.[92] It also acknowledged the particularly heavy volume of marital dissolution cases required to be handled by superior courts, and the additional challenges presented by the fact that such a high percentage of litigants in such cases appear without counsel.[93] Nonetheless, the court concluded that these interests cannot trump the rights of litigants to "fair and accessible justice."[94] Given that trial courts all around the state face similar challenges to those faced by Contra Costa County, and many courts have adopted similar rules and procedures to those that the high court struck down as impermissible, the court concluded by recommending to the Judicial Council[95] that

89 *Id.* at 170.
90 *Id.* at 169–70.
91 *Id.* at 175.
92 *Id.* at 176.
93 *Id.* at 177.
94 *Id.* at 176.
95 Created by a state constitutional amendment in 1926, the California Judicial Council is the governing body of California's judicial branch, administering the extremely large California Court system. *See* Ronald M. George, *Brennan Lecture: Challenges Facing an Independent Judiciary*, 80 N.Y.U. L. REV. 1345, 1353 & n.24 (2005); ADMIN. OFFICE OF THE COURTS, PROFILE: JUDICIAL COUNCIL OF CALIFORNIA 1 (4th ed. 2006), *available at* http://www.courts.ca.gov/xbcr/cc/profilejc.pdf. According to article VI of the California Constitution:

> The Judicial Council consists of the Chief Justice and one other judge of the Supreme Court, three judges of courts of appeal, 10 judges of superior courts, two nonvoting court administrators, and any other nonvoting members as determined by the voting membership of the council, each appointed by the Chief Justice for a three-year term pursuant to procedures established by the council; four members of the State Bar appointed by its governing body for three-year terms; and one member of each house of the Legislature appointed as provided by the house.

CAL. CONST. art. VI, § 6(a).

> it establish a task force, including representatives of the family law bench and bar and the Judicial Council Advisory Committee on Family and Juvenile Law, to study and propose measures to assist trial courts in achieving efficiency and fairness in marital dissolution proceedings and to ensure access to justice for litigants, many of whom are self-represented. Such a task force might wish to consider proposals for adoption of new rules of court establishing statewide rules of practice and procedure for fair and expeditious proceedings in family law, from the initiation of an action to postjudgment motions. Special care might be taken to accommodate self-represented litigants. Proposed rules could be written in a manner easy for laypersons to follow, be economical to comply with, and ensure that a litigant be afforded a satisfactory opportunity to present his or her case to the court.[96]

II. THE ELKINS FAMILY LAW TASK FORCE

Pursuant to the recommendation of the California Supreme Court, the Judicial Council appointed the Elkins Family Law Task Force in 2008.[97] The Task Force consisted of thirty-eight members, including "appellate court justices, judges, court commissioners, private attorneys, legal aid attorneys, family law facilitators, self-help-center attorneys, court executives, family court managers, family court child custody mediators, court administrators, and legislative staff."[98] The Task Force worked for nearly two years in formulating its recommendations.[99] It sought input from a variety of sources including: focus groups with court users, attorneys, judicial officers and court staff; comments at public meetings and one public hearing; and numerous e-mail and print letters commenting on the work of the commission.[100] The Task Force also conducted a survey of attorneys, and reviewed available court data.[101] In September 2009 the Task Force released a set of draft recommendations.[102] The Task Force then held additional public hearings and sought additional input regarding the draft recommendations before finalizing its recommendations in an April 2010 report.[103]

The Task Force made recommendations in five broad areas. These areas were: (1) efficient and effective procedures to help

96 *Elkins*, 163 P.3d at 178 n.20.

97 ADMIN. OFFICE OF THE COURTS, THE ELKINS FAMILY LAW TASK FORCE FINAL REPORT: EXECUTIVE SUMMARY 1 (2010), *available at* http://www.courts.ca.gov/xbcr/cc/elkins-executive.pdf.

98 *Id.*

99 ELKINS FINAL REPORT, supra note 26, at 11.

100 *Id.*

101 *See* Laurie Zelon, *The Elkins Task Force: Meeting the Challenges of Family Law in California's Courts*, 1 CAL. L. REV. CIR. 25, 27 (2010).

102 ELKINS FINAL REPORT, *supra* note 26, at 14.

103 *Id.*

ensure justice, fairness, due process and safety;[104] (2) more effective child custody procedures;[105] (3) ensuring meaningful access to justice for all litigants;[106] (4) enhancing the status of, and respect for, family law litigants and processes;[107] and (5) laying the foundation for future innovation.[108] In total, the Task Force offered 117 separate recommendations.[109] Naturally, discussing each of the recommendations goes well beyond the scope of the present analysis. Moreover, many of the recommendations are laudable. For example, the report recommends: the adoption of caseflow management procedures for family law cases similar to those that have been successfully implemented regarding other civil cases;[110] better information for litigants regarding court processes and procedures;[111] providing increased assistance to those who seek to settle their family law disputes;[112] simplification of mandatory court forms;[113] greater availability of interpreters for those who do not speak English adequately to participate effectively in court proceedings;[114] and greater accessibility of court facilities for persons with disabilities.[115] Thus, the focus here will be on the task force's more controversial recommendations. These include a presumption in favor of live testimony at all family law hearings[116] and a new definition of the role of minors' counsel to more closely approximate the traditional understanding of an attorney representing a client.[117] Further, those recommendations that subsequently led to legislative changes are the most significant for purposes of the present analysis.

III. THE *ELKINS* FAMILY LAW LEGISLATION

Unlike many "blue-ribbon" task forces whose recommendations quickly end up in the dust-bin of policy analysis,[118] the Elkins Task Force's recommendations led quickly

104 *Id.* at 19.
105 *Id.* at 44.
106 *Id.* at 58.
107 *Id.* at 74.
108 *Id.* at 88.
109 Pellman, *A Child-Centered Response*, *supra* note 41, at 83.
110 ELKINS FINAL REPORT, *supra* note 26, at 21.
111 *Id.* at 23.
112 *Id.*
113 *Id.* at 33–36.
114 *Id.* at 69.
115 *Id.* at 73.
116 *Id.* at 29.
117 *Id.* at 53–54.
118 For example, in 2010, President Obama created the National Commission on Fiscal Responsibility and Reform, also known as the Simpson-Bowles Commission, after its co-chairmen, former Senator Alan Simpson (Republican) and former White House

to significant legislative changes to California family law. The two major pieces of legislation were California Assembly Bills 939 and 1050.[119] The highlights of this legislation will be addressed below.

First and foremost, California Assembly Bill 939 added to the California Family Code section 217, which provides that:

> (a) At a hearing on any order to show cause or notice of motion brought pursuant to this code, absent a stipulation of the parties or a finding of good cause pursuant to subdivision (b), the court *shall* receive any live, competent testimony that is relevant and within the scope of the hearing and the court may ask questions of the parties.
>
> (b) In appropriate cases, a court may make a finding of good cause to refuse to receive live testimony and shall state its reasons for the finding on the record or in writing. The Judicial Council shall, by January 1, 2012, adopt a statewide rule of court regarding the factors a court shall consider in making a finding of good cause.[120]
>
> (c) A party seeking to present live testimony from witnesses other than the parties shall, prior to the hearing, file and serve a witness list with a brief description of the anticipated testimony. If the witness list is not served prior to the hearing, the court may, on request, grant a brief continuance and may make appropriate temporary orders pending the continued hearing.[121]

Chief-of-Staff Erskine Bowles (Democrat). *See About the National Commission on Fiscal Responsibility and Reform*, NAT'L COMM'N ON FISCAL RESPONSIBILITY AND REFORM, www.fiscalcommission.gov/about (last visited Nov. 30, 2011). The Commission was charged with "identifying policies to improve the fiscal situation in the medium term and to achieve fiscal sustainability over the long run." *Id.* Despite issuing a very well received report, the Commission's recommendations have not been implemented. *See* Op-Ed, *Let's Take Another Look at Simpson-Bowles*, HOUS. CHRON., Nov. 16, 2011, http://www.chron.com/opinion/editorials/article/Let-s-take-another-look-at-Simpson-Bowles-2273167.php; Thomas Friedman, Op-Ed, *Go Big, Mr. Obama*, N.Y. TIMES, Nov. 23, 2011, at A31.

119 Pellman, *A Child-Centered Response*, *supra* note 41, at 83.

120 The factors set forth in Rule 5.119(b) of the California Rules of Court are:

> 1) [w]hether a substantive matter is at issue—such as child custody, parenting time (visitation), parentage, child support, spousal support, requests for restraining orders, or the characterization, division, or temporary use and control of the property or debt of the parties;
>
> 2) [w]hether material facts are in controversy;
>
> 3) [w]hether live testimony is necessary for the court to assess the credibility of parties or other witnesses;
>
> 4) [t]he right of the parties to question anyone submitting reports or other information to the court;
>
> 5) [i]n testimony from persons other than the parties, whether there has been compliance with Family Code section 217(c); and
>
> 6) [a]ny other factor that is just and equitable.

CAL. R. CT. 5.119(b).

121 CAL. FAM. CODE § 217 (West 2011) (emphasis added).

Assembly Bill 939 also contained a number of provisions relating to the award of attorney's fees in family law cases.[122] The Bill also had provisions expanding the availability of the summary dissolution process.[123] Further, it redefined the role of minor's counsel in contested custody cases to more closely approximate the traditional understanding of the role of an attorney representing a client in litigation.[124] Thus, minor's counsel is restricted to presenting admissible evidence to the court, in the form of "notices and pleadings . . . consistent with requirements for parties."[125] Minor's counsel is not to testify as a witness in the proceedings.[126] Minor's counsel is required to present the child's wishes to the court if the child so desires.[127] "Counsel may introduce and examine counsel's own witnesses, present arguments to the court concerning the child's welfare, and participate further in the proceeding to the degree necessary to represent the child adequately."[128]

Under California law, mediation is mandatory in child custody disputes.[129] Moreover, at the election of each county, the county may allow the family court mediator to make a recommendation to the court regarding the custody dispute.[130] Under the *Elkins* legislation, in counties that have opted for this evaluative mediation, the family court services mediator will now be known as the "child custody recommending counselor."[131]

The other major piece of family law legislation enacted following the Elkins Task Force Report was Assembly Bill 1050.[132] However, AB 1050 was not the result of recommendations made by the task force. Still, consistent with the *Elkins* changes, AB 1050 expands the role of child testimony in custody disputes.[133] Thus, AB 1050 amends existing California family law to require judges to allow a child, age fourteen or higher, to address the court on the issues of custody and visitation, unless the court determines that doing so would not be in the child's best interests.[134] Moreover, the revised statute further states that nothing in the law "shall be

122 Assemb. B. 939, 2009–2010 Assemb., Reg. Sess., §§ 4–6, 13, 17 (Cal. 2010).
123 Assemb. B. 939, §§ 8–9.
124 Assemb. B. 939, § 15.
125 *Id.*
126 *Id.*
127 *Id.*
128 *Id.*
129 CAL. FAM. CODE § 3170(a) (West 2011).
130 FAM. § 3183.
131 2010 Cal. Legis. Serv. 1916, 1924 (West) (to be codified at FAM. § 3183).
132 Assemb. B. 1050, 2009–2010 Assemb., Reg. Sess., (Cal. 2010).
133 Assemb. B. 1050 § 1.
134 Assemb. B. 1050, § 1 (enacted at FAM. § 3042 (West 2011)).

interpreted to prevent a child who is less than 14 years of age from addressing the court regarding custody or visitation . . . ."[135]

IV. WHY MANY OF THE *ELKINS* FAMILY LAW CHANGES ARE MISGUIDED

This part of the article outlines some of the many reasons why the *Elkins* family law changes under consideration here are misguided. It first addresses some general criticisms of the changes, then the three specific statutory changes that are the focus here.

A. General Criticisms of the *Elkins* Family Law Changes

There are at least three general criticisms of the *Elkins* family law changes. First, they represent an overreaction to a particularly bad decision in a single case. Second, the information gathering processes relied upon by the Elkins Task Force in making its recommendations were lacking in important respects. Third, the changes make an ill-advised reversal of course from the strong trend in family law in recent decades away from adversary litigation.

i. Bad Decisions Make Bad Law

One of Justice Oliver Wendell Holmes' famous aphorisms is that hard cases make bad law.[136] Well, bad decisions make bad law as well, and it is quite clear that Judge Baskin made a bad decision in essentially depriving Jeffrey Elkins of any meaningful opportunity to be heard regarding his divorce trial.[137] However, the changes recommended by the Task Force and adopted by the Legislature go far beyond what would have been required to remedy the injustice caused in the *Elkins* case.

First, as the California Supreme Court's decision makes abundantly clear, the *Elkins* appeal involved a *trial* rather than a mere motion hearing.[138] And of course, the due process implications of restricting testimony at the final hearing in a proceeding are much more significant than for doing so at a preliminary hearing. Indeed, the court expressly stated that its decision should not be read as applying to motion hearings rather

135 FAM. § 3042(d).

136 *See* N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

137 Unfortunately, Mr. Elkins was not able to benefit from the remand ordered by the California Supreme Court in his case. He died in 2008 before the case could be tried. Barbara Kate Repa, *Reform or Wreckage*, CAL. LAW., Aug. 2011, at 26, 30 [hereinafter Repa, *Reform or Wreckage*].

138 Elkins v. Superior Court, 163 P.3d. 160, 168–69 (Cal. 2007).

than trials.[139] Yet, the Task Force and subsequent legislation went well beyond the scope of what the court intended by extending the requirement for live testimony to motion hearings as well as to trials.

The Task Force rightly recognized that the results of motion hearings in family law cases may have a greater impact on the outcome of proceedings than in other areas of practice.[140] Particularly where custody of a child is concerned, a court will be highly reluctant to disturb the results of a *pendente lite* motion where the effect will be changing the custodial arrangement of a minor child.[141] Such disruptions can be highly detrimental to children, and courts' reluctance to change custody back and forth between parents over the course of family law litigation makes sense.[142] Thus, it is arguable that decisions in motion hearings in family court set something of a status quo that courts are reluctant to disturb; therefore, the importance of such pre-trial motions is elevated, and the drawbacks of requiring live testimony at such hearings are nonetheless warranted.

However, it is clear that regardless of the import of pre-trial hearings in family law cases, litigants still get a final (and indeed their most extensive) "bite at the apple," should they choose to exercise their right to a final trial on the contested custody issues in the case. Preserving a right to present live testimony at such a final hearing would address the due process concerns the California Supreme Court raised in *Elkins*, while at the same time failing to unleash all of the negative consequences, discussed below, that will accompany increased use of live testimony in pre-trial motion hearings in family law cases. Thus, the Task Force and the Legislature should have stopped at the court's call for increased use of live testimony at trials, rather than greatly expanding the scope of the court's suggestion.

139 *Id.* at 162 n.1.

140 ELKINS FINAL REPORT, *supra* note 26, at 27–28.

141 *See, e.g.*, Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 112–13 (1997) (describing this phenomenon as "sequentiality").

142 *See, e.g.*, *In re* Marriage of Burgess, 913 P.2d 473, 478–79 (Cal. 1996) ("[T]he paramount need for continuity and stability in custody arrangements—and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker—weigh heavily in favor of maintaining ongoing custody arrangements.").

ii. The Information Gathering Processes Used by the *Elkins* Task Force Were Flawed

It is true that the Elkins Task Force included a broad cross-section of judges, court personnel, and family law practitioners.[143] However, notably absent from the Task Force were any academics. And while the Task Force purports to have examined data available from the California Administrative Office of the Courts regarding the practice of family law in California,[144] there is no indication that the Task Force paid any attention whatsoever to the vast amount of existing scholarly research and literature regarding adversary justice generally and family law litigation in particular. An analysis of that literature reveals a profound skepticism regarding the efficacy of the adversary processes that the Elkins legislation reintroduces into family law practice, and a particular concern about the damage caused to the participants in family law disputes from the employment of adversary processes to resolve such disputes.[145]

Additionally, the Elkins Task Force displayed a "consumerist" approach to its fact-finding and analysis regarding the pre-existing family law dispute resolution processes. The Task Force, prior to issuing its recommendations, surveyed a broad range of "consumers" of the services of the family law department during its fact-finding inquiry.[146] These consumers included lawyers, litigants, court personnel, and judges. Moreover, it is clear that, in issuing its recommendations, the Task Force took great pains to respond to the concerns expressed by these consumers of its services. Indeed, the Task Force's Final Report frequently states where a particular recommendation is responsive to a comment or comments made by one of its consumers.[147]

Of course it is laudatory when a government entity such as a court seeks to assert a high level of responsiveness to the constituents it exists to serve. More government entities should seek to emulate the customer service orientation of the task force. However, it is also possible to take this customer service orientation too far. For example, the consumers of judicial

143 *See* ELKINS FINAL REPORT, *supra* note 26, at ii–iii (listing the members of the Elkins Task Force).

144 *Id.* at 14 n.7.

145 *See infra* notes 148–56 and accompanying text.

146 ELKINS FINAL REPORT, *supra* note 26, at 11–14.

147 *See, e.g.*, ELKINS FINAL REPORT, *supra* note 26, at 28 ("According to the surveys conducted and the response of the members of the public who presented testimony to the task force, these limitations on the right to present live testimony and the resulting exclusive use of declarations are significant concerns to attorneys and the self-represented alike.").

services are unlikely to be experts in important matters such as court administration and substantive family law, let alone broader concepts like due process. And, as pointed out above, the task force seems to have paid little attention to scholarly writing, academic experts, or broader empirical studies regarding the effectiveness of various approaches to dispute resolution in family courts. While the Task Force's customer service orientation is commendable, that orientation would have been more effective coupled with the consideration of the broader range of important information suggested here that the task force should have, but failed, to consider.

iii. The Paradigm Shift Away from Adversary Litigation

Over the past four decades, many family law scholars have concluded that traditional adversary litigation measures are poorly suited to resolving family law disputes, particularly those involving children.[148] Family law disputes differ significantly from the typical tort, contract, and property disputes that our adversary system was designed to address. Litigation involving most disputes in these other areas of law is "backward looking": courts must determine what happened with regard to a past event or events, and assign blame for what went wrong.[149] By contrast, while custody cases do involve a certain measure of fact finding with regard to past events, the ultimate goal of such proceedings is to make a prediction regarding future possibilities—for example, which potential custody arrangement will serve the best interests of the child.[150] Yet adversarial litigation methods were not designed to predict the future, but rather to assess and assign a remedy regarding past events, and they do a poor job in making such future predictions.[151]

By its very nature, the adversary system encourages litigants to assert extreme positions. Indeed, one of the

148 *See, e.g.*, Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 501 (2001) [hereinafter Elrod, *High Conflict*]; Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal To Transform the Adversarial System*, 42 FAM. CT. REV. 203, 203 (2004); Murphy, *supra* note 5, at 894; Andrew Schepard, *The Evolving Judicial Role in Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395, 428 (2000) [hereinafter Schepard, *Evolving Judicial Role*]; Singer, *supra* note 6, at 363; Weinstein, *supra* note 141, at 82.

149 Elrod, *High Conflict*, *supra* note 148, at 501; SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 3; Weinstein, *supra* note 141, at 98.

150 Elrod, *High Conflict*, *supra* note 148, at 501; SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 3; Weinstein, *supra* note 141, at 98.

151 Elrod, *High Conflict*, *supra* note 148, at 501; Firestone & Weinstein, *supra* note 148, at 205; Weinstein, *supra* note 141, at 111 ("Decisions about the best interests of the child rest upon an effort to predict what will occur in the future . . . [and] [c]learly, neither judges nor attorneys have the training to make such predictions . . . .").

foundational premises of the adversary system is that truth is most likely to emerge from the presentation of competing and contrasting positions.[152] The presentation of competing extremes is often enhanced by the zealous advocacy responsibilities of the parties' lawyers.[153] Naturally, this process can create additional friction between the parties to the dispute, who would not be suing one another in the first place if their relationship were not already strained. However, in tort, contract, and property contexts, the increased friction is tolerable because, once the lawsuit is over and the dispute resolved, the parties go their separate ways.[154] Yet, this is not so in most family law contexts, particularly not in custody litigation. Except in unusual cases, both parents will continue to play a major role in their child's life, and they will need to co-parent successfully, often for many years into the future, in order to serve the best interests of the child. Yet, the strains engendered by hotly contested custody litigation may have a highly negative impact on the parents' ability to work together in future co-parenting.[155]

The tendency to assert extreme positions takes place at every stage of the adversarial litigation process.[156] In their pleadings, the parties advance the most extreme positions possible, if only to keep their options open later in the case. Indeed, the "all or nothing" quality of litigation judgments requires parties to ask for everything, or risk receiving nothing at the end of the case.[157] In a typical custody case, parents exaggerate their own parenting strengths, as well as the other parent's weaknesses, in an effort to enhance their position in the litigation. This process of exaggeration continues at every further stage of the litigation process:[158] in discovery events such as depositions, interrogatories, and document requests; in settlement negotiations; and, of course, reaches its apogee during

152 *See, e.g.*, Cantrell, *supra* note 7, at 6; Judge Leonard Edwards (ret.), *Comments on the Miller Commission Report: A California Perspective*, 27 PACE L. REV. 627, 635 (2007) [hereinafter, Edwards, *Comments*]; Firestone & Weinstein, *supra* note 148, at 203.

153 *See, e.g.*, Elrod, *High Conflict*, *supra* note 148, at 501; Firestone & Weinstein, *supra* note 148, at 204; Andrew Schepard, Kramer vs. Kramer *Revisited: A Comment on* The Miller Commission Report *and the Obligation of Divorce Lawyers for Parents to Discuss Alternative Dispute Resolution with Their Clients*, 27 PACE L. REV. 677, 685–86 (2007) [hereinafter, Schepard, *Kramer*]; Weinstein, *supra* note 141, at 90–91.

154 Elrod, *High Conflict*, *supra* note 148, at 501.

155 *See* Firestone & Weinstein, *supra* note 148, at 204; Weinstein, *supra* note 141, at 122.

156 *See, e.g.*, Edwards, *Comments*, *supra* note 152, at 636 (describing adversarial tactics in an at-fault divorce proceeding).

157 Weinstein, *supra* note 141, at 87–88.

158 Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL'Y & L. 129, 131 (2002).

the contested courtroom hearing or trial.[159] The likelihood of increased hostility between the parties at every stage of the process as a result of this competition is obvious.[160]

Over the past four decades, psychologists and other researchers have developed a more sophisticated understanding of the impact that divorce and child custody litigation has on the children involved. At the beginning of this cycle, researchers held the perception that in virtually all cases, divorce had a significantly negative psychological impact on children.[161] However, over time, psychologists have come to conclude that not all children suffer long-term harm as a result of divorce.[162] Indeed, the pivotal factor in determining children's long-term adjustment to family dissolution relates to the amount of intra-family conflict to which the children are exposed.[163] This exposure can occur within the family home prior to the break-up of the family, or during the divorce/custody litigation, or post-litigation as the parents struggle to co-parent the child after the marriage has been dissolved.[164] In virtually all cases, increases in the amount of intra-family conflict result in increased negative outcomes for the children as they age.[165] Thus, adversary litigation events that increase the amount of conflict between parents during the litigation process, and then have a negative impact on the on-going, post-dissolution relationship of the parents, will logically result in adverse consequences to the children involved.

In recognition of these findings by both legal scholars and psychologists, courts have taken significant steps to modify traditional adversary processes in family law by moving from those procedures that engender conflict between the litigants to newer and emerging processes designed to decrease conflict between the litigants. Perhaps the most widespread and best known of such changes is the move toward mediation of family

159 *See infra* Part IV(B)(i).

160 *See* Edwards, *Comments*, *supra* note 152, at 637.

161 *See* Paul R. Amato, *Good Enough Marriages: Parental Discord, Divorce, and Children's Long-Term Well-Being*, 9 VA. J. SOC. POL'Y & L. 71, 72 (2001); Cassandra Brown, Comment, *Ameliorating the Effects of Divorce on Children*, 22 J. AM. ACAD. MATRIMONIAL LAW. 461, 461 (2009); SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 28.

162 Amato, *supra* note 161, at 71–72; Elizabeth S. Scott, *Divorce, Children's Welfare, and the Culture Wars*, 9 VA. J. SOC. POL'Y & L. 95, 100 (2001).

163 *See, e.g.*, Brown, *supra* note 161, at 462; Elrod, *High Conflict*, *supra* note 148, at 497; John H. Grych, *Interparental Conflict as a Risk Factor for Child Maladjustment: Implications for the Development of Prevention Programs*, 43 FAM. CT. REV. 97, 98 (2005); Kelly, *supra* note 158, at 129–30; Murphy, *supra* note 6, at 894–95; SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 31; Scott, *supra* note 162, at 98–99; Singer, *supra* note 6, at 363.

164 Brown, *supra* note 161, at 462.

165 *See* Elrod, *High Conflict*, *supra* note 148, at 497.

law disputes, as discussed above.[166] Mediation is meant to encourage parties to resolve their differences rather than to engage in protracted courtroom battles.[167] Other examples of procedures developed in family court to reduce litigation conflict include: differentiated case management,[168] parenting plans,[169] parent education classes,[170] parenting coordinators,[171] neutral custody evaluations,[172] and collaborative law.[173] A detailed discussion of these procedures lies well beyond the scope of the present article. Though not each of these reforms has been adopted in every jurisdiction, the overall move toward the adoption of non-adversarial methods to help to resolve family law disputes has been widespread, national, and overwhelming in scope. And, as pointed out earlier, California has been a leader in the adoption of such methods in many respects.[174]

Certainly, the *Elkins* changes represent a 180-degree turn from this long-standing trend away from adversarial litigation methods in family law cases. As the Elkins Task Force pointed out, in many courts the presentation of live testimony had become the exception, rather than the rule, in contested family law proceedings, particularly in motion proceedings rather than trials.[175] Yet, as will be discussed in greater detail below, the presentation of live testimony through witnesses in court represents the most adversarial of all possible litigation activities.[176] The legislation also redefines the role of minor's counsel more along the lines of the traditional adversarial attorney, rather than the guardian ad litem-like role minor's

166 *See supra* notes 129–31 and accompanying text.

167 *See* Elrod, *High Conflict*, *supra* note 148, at 527 & n.124; Schepard, *Kramer*, *supra* note 153, at 682 (discussing benefits of mediation in custody disputes); Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process*, 42 FAM. L.Q. 659, 662 (2008).

168 Elrod, *High Conflict*, *supra* note 148, at 521–22; Ver Steegh, *supra* note 167, at 668–69.

169 Elrod, *High Conflict*, *supra* note 148, at 529–30.

170 Grych, *supra* note 163, at 103; Shelley Kierstead, *Parent Education Programs in Family Courts: Balancing Autonomy and State Intervention*, 49 FAM. CT. REV. 140, 140 (2011); Susan L. Pollet & Melissa Lombreglia, *A Nationwide Survey of Mandatory Parent Education*, 46 FAM. CT. REV. 375, 375 (2008).

171 *See* Brown, *supra* note 161, at 477–78; Elrod, *High Conflict*, *supra* note 148, at 533; Joi T. Montiel, *Why and How Alabama Courts Should Use Parenting Coordination in Divorce Cases*, 72 ALA. LAW. 300, 301 (2011); Ver Steegh, *supra* note 167, at 663–64.

172 Mary Kay Kisthardt & Barbara Glesner Fines, *Making a Place at the Table: Reconceptualizing the Role of the Custody Evaluator in Child Custody Disputes*, 43 FAM. CT. REV. 229, 229–30 (2005); Ver Steegh, *supra* note 167, at 663.

173 *See* Brown, *supra* note 161, at 479–80; Ver Steegh, *supra* note 167, at 667–68.

174 SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 83–84 (comparing the dissolution process in New York with that of California); Schepard, *Evolving Judicial Role*, *supra* note 148, at 397–98.

175 ELKINS FINAL REPORT, *supra* note 26, at 27.

176 *See infra* Part IV(B)(i).

counsel had come to play in family law cases in California.[177] This too will have the effect of increasing the adversarial nature of custody litigation. Finally, the legislative changes making it more likely that children will testify or otherwise play an active role in family law litigation will also serve to further increase the adversarial quality of such proceedings.[178]

To be sure, the *Elkins* legislation does not represent a wholesale abandonment of collaborative procedures in California family law practice. After all, California was the first state to mandate mediation in child custody disputes,[179] and such mediation remains required under California law. However, some of the *Elkins* changes do suggest that California's commitment to non-adversary procedures is less steadfast than its first-to-mandate mediation status would appear to indicate. From early on, California counties have had the option to decide whether, in the event the parties are not able to reach an agreement as to the custody issues in their case, the mediator should make a recommendation to the court as to how the custody dispute should be resolved.[180] This practice has long been criticized by mediation scholars as violating some of the fundamental principles of mediation including confidentiality and neutrality.[181] Indeed, many would consider a "mediator's recommendation" to be an oxymoron.

While this author shares the criticisms of the manner in which mediation is conducted in "recommending" counties, those arguments have been fully aired elsewhere, and will not be repeated here.[182] The Elkins Task Force noted, but sidestepped the controversy surrounding mediator recommendations and made none of its own recommendations on the subject.[183] However, the Task Force did note that many family law litigants expressed frustration and surprise at the fact that what they presumed was a confidential process (mediation), was anything but, when they found their statements to the mediator quoted and provided directly to the judge in the case in the form of the

177 *See infra* Part IV(B)(ii).

178 *See infra* Part IV(B)(iii).

179 *See* Grillo, *supra* note 2, at 1552.

180 *See* CAL. FAM. CODE § 3183 (West 2004).

181 *See, e.g.*, Edwards, *Comments*, *supra* note 152, at 649; Susan C. Kuhn, Comment, *Mandatory Mediation: California Civil Code Section 4107*, 33 EMORY L.J. 733, 776 (1984); Angel Lawrence, *Capitulate or Else: San Diego's Mandatory Mediation Process and Procedural Fairness*, 16 J. CONTEMP. LEGAL ISSUES 247, 251 (2007); *see also* Robert Rubinson, *Mapping the World: Facts and Meaning in Adjudication and Mediation*, 63 ME. L. REV. 61, 64 n.16 (2010) (illustrating the current debate over which style of mediation is best).

182 *See* Kuhn, *supra* note 181, at 777.

183 ELKINS FINAL REPORT, *supra* note 26, at 45.

mediator's recommendation.[184] As a result, the *Elkins* legislation did adopt a change in nomenclature, so that mediators in "recommending" counties will no longer be referred to as mediators, but rather will be referred to as "child custody recommending counselors."[185] This change further reflects the *Elkins* legislation's movement away from non-adversary procedures.

One family law scholar, at least at first glance, seems to support *Elkins*' move away from less adversarial processes in family law litigation. In an important article, Professor Jane Murphy argues that the adversary system needs to be revitalized in the case of family law.[186] Murphy is also referring to the "paradigm shift" discussed above in which the focus of family law dispute resolution has moved from the courtroom to settings such as the psychologist's office, the mediation conference room, etc. However, Murphy's critique is not about the different approaches within the adversarial system that might be used to adjudicate family law disputes, such as live testimony versus written declarations, what role minor's counsel should play, and child testimony versus other means of giving children a voice in custody disputes. Rather, her critique focuses on whether courts have the institutional competence to provide the extra-judicial processes of the therapeutic regime that has replaced the adversarial one,[187] and whether these processes adequately protect the due process rights of family law litigants, particularly poor ones.[188] The *Elkins* legislation does not, in fact, move away, in a fundamental fashion, from the types of extra-judicial process that concern Professor Murphy. Indeed, the *Elkins* legislation includes provisions for family centered case management, independent evaluation, and mediation of family law disputes. It will remain the case that the vast majority of California family law cases will settle before trial. Thus, Professor Murphy's critique does not provide support for the specific *Elkins* changes that are the focus of the present discussion.

B. Specific Criticisms of the *Elkins* Family Law Changes

This section of the article offers more particular criticisms of three specific legislative changes ushered in by the Elkins Report and its aftermath. The move to live testimony in family law motion hearings, the changes to the role of minor's counsel in

184 *Id.*
185 FAM. § 3183(a).
186 Murphy, *supra* note 6, at 891–92.
187 *Id.* at 897.
188 *Id.* at 910.

custody proceedings, and the increased reliance on child testimony in such proceedings will each be addressed.

i. The Presumption in Favor of Live Testimony in Motion Hearings

The increased reliance on live testimony in motion hearings in family law cases is the single most misguided aspect of the *Elkins* legislation. This change will do little if anything to increase the accuracy and reliability of judicial decision making in such proceedings. Yet the costs to litigants as a result of the increased adversarial nature that will be engendered by the increased use of live testimony will be significant. In an era of severe budgetary constraints for California courts, the increased use of live testimony will have a significant negative impact on both litigants and the court system itself in terms of increased delays and other costs in family law cases. Further, the primary purpose behind the increased use of live testimony, to increase fairness to self-represented litigants, will not be realized by the *Elkins* changes.

a. The Benefits of Live Testimony Do Not Outweigh the Costs of Increased Adversarialness

As discussed previously, the costs of increased conflict in family law litigation in terms of its negative impact on parties and their children are significant.[189] And no aspect of the family law litigation process engenders more conflict than the presentation of live testimony at a contested hearing. Indeed, the courtroom confrontation remains a staple of popular culture vehicles including film, television, and novels, precisely because of the drama and conflict engendered by such courtroom confrontations.[190] While such drama and conflict may be good for ratings, they are most certainly destructive for families that must continue to co-exist and work together after judgment is rendered.

Sticking with the popular culture theme for a moment, the 1979 Academy Award winning film *Kramer v. Kramer* was the first such vehicle to bring broad exposure to the brutality of the courtroom process for determining child custody disputes.[191] In

189 *See supra* Part IV(A)(iii).

190 *See generally* Michael Asimow, *Popular Culture and the Adversary System*, 40 LOY. L.A. L. REV. 653, 655–56 (2007); James R. Elkins, *Popular Culture, Legal Films, and Legal Film Critics*, 40 LOY. L.A. L. REV. 745, 746 (2007); David Ray Papke, *Conventional Wisdom: The Courtroom Trial in American Popular Culture*, 82 MARQ. L. REV. 471, 472 (1999).

191 Michael Asimow, *Divorce in the Movies: From the Hays Code to* Kramer v. Kramer, 24 LEGAL STUD. F. 221, 222 (2000).

the penultimate trial scene in the film, each of the parties' lawyers destroys the opposing party on cross-examination, pointing out that party's every possible failure, both as a parent and as a human being, in the most exaggerated terms, in order to sway the decision their way.[192] In the film, the father, played by Dustin Hoffman, leans over to his lawyer after the cross-examination of the mother, played by Meryl Streep, and asks the lawyer: "Did you have to be so hard on her?" The lawyer's response: "Do you want the kid or don't you?"[193]

As Hoffman's lawyer is cross-examining Streep, while the tears are streaming down the witness' face, the lawyer insists on an answer to his question whether she was a bad mother to her son.[194] Hoffman shakes his head and silently whispers the word "no" to his former wife, even while she admits on the stand to being a poor parent.[195] Of course, in a real courtroom proceeding, nothing along these lines would take place.[196] The father would at most sit by stoically as his lawyer rips the opposing party to shreds, and might in fact cheer internally given that the custody battle, at least for that moment, seems to be going his way. In any event, the damage to the parties' ability to cooperate in co-parenting the child in the future seems obvious.[197]

It is true that family law litigation has changed significantly since the time of *Kramer v. Kramer*.[198] However, it has done so via the proliferation of extra-judicial means of resolving family law disputes,[199] as has been discussed previously in this paper.[200] What happens inside the courtroom, when custody disputes cannot be resolved outside of it, in terms of live testimony, really

192 *See* David Ray Papke, *Peace Between the Sexes: Law and Gender in* Kramer vs. Kramer, 30 U.S.F. L. REV. 1199, 1204–05 (1996) (describing scenes from the movie) [hereinafter Papke, *Peace*]; Schepard, *Kramer*, *supra* note 153, at 681 (describing scenes from the movie).

193 Schepard, *Kramer*, *supra* note 153, at 681. Other scholars have recognized the brutality of cross-examination, while at the same time recognizing its importance. *See, e.g.*, MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 161 (1990); *see generally* Robert P. Lawry, *Cross-Examining the Truthful Witness: The Ideal Within the Central Moral Tradition of Lawyering*, 100 DICK. L. REV. 563 (1996) (exploring themes in cross-examination).

194 Papke, *Peace*, *supra* note 192, at 1204–05.

195 *Id.* at 1205.

196 *Id.*

197 To be fair, in the film, the mother ultimately relinquishes custody of the child to the father, even though she prevails in the courtroom proceeding. Schepard, *Kramer*, *supra* note 153, at 681. However, even at the end of the film, there is no indication that the wounds from the courtroom battle have healed, or that the father and mother will be able successfully to work together in parenting their child into the future.

198 *See, e.g.*, Schepard & Salem, *supra* note 8, at 516.

199 *Id.*; *see also* SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 175.

200 *See* Part IV(A)(iii).

has not changed all that much from the time of the film.[201] Again, the costs engendered by the contested courtroom custody hearing in terms of the parties' ability to work together in the future are significant.

Given the significant increase in conflict likely to follow from the increased reliance on live testimony family law hearings, one would have to believe that the benefits to result from such an increase are substantial, in order to make such a change. And sure enough, the Elkins Task Force displayed what I like to refer to as a "lawyer's faith" that the adversary process is the best available means for the resolution of disputes. Lawyers largely believe that the presentation of live testimony, through direct and cross-examination, is the best available means of discovering truth.[202] However, this belief truly is an article of faith, because there is virtually no empirical evidence that demonstrates that the use of live testimony, as opposed to other possible fact-finding methods, including the provision of written or other documentary submissions, provides for more accurate or reliable judicial decision making.[203]

This is particularly true in the area of family law, where all would agree that there is never one "correct" result of a child custody dispute, that courts could arrive at if they just employed better fact-finding and decision making procedures.[204] Instead, it is clear that there exist a range of possible acceptable outcomes of a custody dispute, and there is no process available that can demonstrate with certainty which of those outcomes will prove to be best in the future—given what I previously described as the "forward-looking" nature of custody determinations.[205] In a well-known article focusing on this indeterminacy in child custody decision-making, Professor Robert Mnookin only half-jokingly suggested that child custody determinations should be made by a coin toss, rather than by the adversary litigation methods currently employed.[206] Mnookin's point was that given that

201 *See* SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 83–84 (discussing the events of a divorce dispute in court).

202 Asimow, *Popular Culture*, *supra* note 190, at 653; Edwards, *Comments*, *supra* note 152, at 635 ("Many attorneys pride themselves on their ability to use the adversarial process effectively to win their cases."); Weinstein, *supra* note 141, at 84–85 (discussing lawyers' stubborn allegiance to the adversary process).

203 *See, e.g.*, DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 32–40 (2007) (discussing the lack of empirical support for the adversarial system in achieving truth).

204 *See, e.g.*, Weinstein, *supra* note 141, at 111–12; *cf.* SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 25 ("[C]ourtroom combat between parents does not necessarily lead to wise or just judicial custody decision-making.").

205 *See supra* notes 150–63 and accompanying text.

206 Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 289 (Summer 1975).

adversary litigation methods only marginally improve the odds of a "correct" determination of child custody disputes over the odds of a coin toss, the costs of such methods, including time and expense to the parties and the court system, increased conflict, etc., do not warrant the employment of such methods.[207]

Of course few of us would be willing to go so far as Mnookin suggests and leave child custody determinations to the toss of a coin.[208] Most of us believe that it is worth *trying* to improve on the odds of a coin toss in terms of getting better results in child custody disputes, though we know that arriving at a single, correct outcome in child custody proceedings is an unattainable goal. But where the costs of increased use of live testimony are well documented—in terms of time, expense, and intra-family conflict—and the benefits of increased use of live testimony are speculative and ephemeral at best, the *Elkins* legislation made the wrong choice in moving toward the increased use of live testimony. Families would be best served by quick and determinate custody decisions that would allow them to move rapidly toward working to make the new arrangement succeed, rather than drawing out the decision-making process and increasing the amount of conflict involved.

Another argument that may be made in favor of *Elkins*' move toward live testimony is that whether or not the increased use of live testimony improves the outcome of child custody disputes, parents have a due process right to present live testimony in judicial proceedings that implicate their fundamental right to determine the nature of the relationship they will have with their children.[209] However, the prioritizing of parental rights over the child's interest in minimizing conflict and having the best possible ongoing relationship with both parents, has been one of the main focuses of the critics of reliance on adversary litigation methods as the primary means of resolving family law disputes.[210] While parental rights are certainly an important concern, the state has *parens patriae* obligations to ensure the welfare of children that are equally weighty, and children have interests that must be considered as well.[211] As the California Supreme Court pointed out, parents' due process rights are adequately protected when they have a right to present live

207 *Id.* at 289–90.

208 Mnookin acknowledges as much. *Id.* at 290–91.

209 *See* Troxel v. Granville, 530 U.S. 57, 66 (2000).

210 *See, e.g.*, Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 639–40 (2006); Firestone & Weinstein, *supra* note 148, at 203–04; Schepard, *Kramer*, *supra* note 153, at 687–88; Weinstein, *supra* note 141, at 88.

211 *Troxel*, 530 U.S. at 86–88 (Stevens, J., dissenting).

testimony at a final trial in child custody proceedings.[212] Due process does not compel the presentation of live testimony at motion hearings, as the task force seemed to believe, and children's interests in positive family dynamics going forward outweigh whatever interests parents have in presenting live testimony at motion hearings.

b. Live Testimony Will Add to Delays in the Family Law Process and Raise Other Litigation Costs as Well

One of the Task Force's major goals was to reduce delay in family law proceedings. The Task Force rightly noted that delays can be particularly problematic in family law cases.[213] It is clear that hearings involving live testimony will generally take longer to conduct than prior hearings where live testimony was the exception rather than the rule. Given that dockets in family law departments in California are already overcrowded,[214] the new rules favoring live testimony will only exacerbate such crowding and delays.[215]

The Task Force's response to this concern was to call for greater devotion of resources to family law cases.[216] The Task Force pointed out that the family law department has traditionally received short shrift when it comes to budgetary allocations within the trial court system.[217] However, it is simply reckless to count on increased resources at a time when California and its courts face an unprecedented budgetary crisis.[218] At least one conspiracy theorist contends that the Task Force deliberately sought to "crash" the family court system, making the delivery of greater resources and other reforms unavoidable.[219] A more realistic view is that the Task Force engaged in a high stakes game of "chicken" with the Administrative Office of Courts and the Legislature over increased funding for the family law department. Given California's budgetary realities, this seems like a game the Task Force is certain to lose, although the real losers will be California family law litigants who will face even greater delays than is currently the case in having their cases adjudicated. Those litigants who can afford it are likely to turn increasingly to

212 Elkins v. Superior Court, 163 P.3d 160, 170 (Cal. 2007).
213 ELKINS FINAL REPORT, *supra* note 26, at 39.
214 *See, e.g.*, Edwards, *Comments*, *supra* note 152, at 644–45.
215 Repa, *Reform or Wreckage*, *supra* note 137, at 44.
216 ELKINS FINAL REPORT, *supra* note 26, at 75.
217 *Id.*
218 Repa, *Reform or Wreckage*, *supra* note 137, at 44.
219 *Id.* at 43–44.

private dispute resolution mechanisms.[220] Those who cannot will be left to deal with the overburdened public system. The resulting "two-tiered" system for resolving family law disputes—private for those who can afford it and public for those who cannot—will be a particularly sad legacy of the *Elkins* changes.[221]

The Task Force was also of the view that the current practice of adjudicating motions primarily through written submissions increases the cost of family law litigation. It asserted that attorneys frequently spend a great deal of time drafting and re-drafting lengthy declarations,[222] driving up the fees charged to their clients. Such declarations often include hearsay and other inadmissible material, thus requiring opposing counsel to invest a great deal of time, again at great cost to the parties, drafting objections to inadmissible material.[223]

While these are serious concerns,[224] the Task Force's assumption that a shift to full blown evidentiary hearings will mean less attorney time, and therefore less expense to litigants than prior practice, seems misguided. First of all, it is clear that the evidentiary hearings themselves will take longer than their predecessor hearings, as it will take a good deal of time for witnesses to testify to the evidence to be submitted. Moreover, given evidentiary objections and other delays that can pop up during evidentiary hearings, it seems like the increase in time will be substantial. Also, because many attorneys charge their clients *more* for time in court than time spent working outside of court, it may be that the shift to evidentiary hearings will result in an increase in attorney's fees to litigants.

However, even if the Task Force is correct that it will take less time to present evidence through live testimony than it would take to present the same evidence in written form, a net cost savings to clients relies on the assumption that attorneys will spend virtually no time outside of court preparing for the evidentiary hearings. But anyone even remotely familiar with trial practice knows that good trial attorneys spend an extraordinary amount of time preparing their witness examinations, as well as preparing the witnesses themselves for direct and cross-examination. It is downright fanciful to think

220 *Id.* at 44.

221 *See* Ver Steegh, *supra* note 167, at 659 (discussing two-tiered justice system that results from overburdened and under-funded family court systems).

222 ELKINS FINAL REPORT, *supra* note 26, at 27.

223 *Id.*

224 California did address these concerns to a certain extent by modifying its statewide court rules in family law cases to limit the length of declarations in most instances to ten pages. *See* CAL. R. CT. 5.118(f) (as amended effective July 1, 2011).

that the shift to live testimony will save attorney time in contrast to current practice when preparation time and hearing time are taken into account. Yet even if the Task Force is correct, a conclusion that clients will save money in attorney's fees under the new regime requires a further assumption that attorneys will stop spending time drafting, filing, and objecting to evidentiary declarations once the opportunity to present live testimony at hearings is available. But this too seems like an unfounded assumption. Attorneys will continue to submit evidentiary declarations at hearings, in addition to live testimony, at continued high costs to clients for a variety of reasons.

First, the *Elkins* decision and section 2009 of the California Civil Procedure Code make clear that evidentiary declarations are still admissible at motion hearings despite the *Elkins* legislation.[225] So attorneys will have to make strategic decisions about which evidence they wish to present through live testimony, and which evidence through declaration. Further, section 217 of the California Family Code and Rule 5.119 of the California Rules of Court still give judges a great deal of discretion as to how live testimony is admitted, and what live testimony to admit. There is a great deal of uncertainty among family law practitioners regarding exactly how the move to live testimony will play out in practice.[226] Thus, at least until practice under the *Elkins* legislation sorts itself out, it is likely that cautious attorneys will err on the side of presenting evidence in both formats, rather than risk that the evidence will not be admitted if one format is relied on to the exclusion of the other. Indeed, many family law attorneys who are not experienced in the presentation of live evidence will likely submit evidentiary declarations to cover in the event that they fail to introduce successfully certain evidence through live testimony. Additionally, given the scheduling challenges that are going to be imposed by the *Elkins* legislation,[227] cautious attorneys will also present evidentiary declarations to cover for the fact that they may not be able to secure enough hearing time to present all of the evidence they wish to present through live testimony. Thus, the end result is likely to be a combination of live and written testimony at family law hearings, ultimately increasing the amount of attorney time involved in preparing for and conducting

225 CAL. CIV. PROC. CODE § 2009 (West 2007).

226 Repa, *Reform or Wreckage*, *supra* note 137, at 44 ("Many family law practitioners say the recommendations could actually wreak havoc with the panel's stated goals."); *see also* CAL. FAM. CODE § 217 (West 2011); CAL. R. CT. 5.119 (as amended effective July 1, 2011).

227 *See supra* notes 214–15 and accompanying text.

such hearings, resulting in an increase in the cost of litigation to clients rather than the decrease anticipated by the Task Force.

c. The Issue of Self-Represented Litigants

In recent decades, there has been a virtual explosion in the number of self-represented litigants appearing in our courts.[228] This development has perhaps been most prevalent in the family law branch of our court system.[229] The strains that this development has placed upon judges, court personnel, and court systems as a whole are palpable.[230] Perhaps more importantly, the litigants who represent themselves often find their experiences in the judicial system to be extremely frustrating,[231] and there is little doubt that self-represented litigants often obtain significantly poorer outcomes through their judicial proceedings than would have been the case had they been represented by competent counsel.[232]

Despite these facts, there is little reason to believe that the flood of self-represented litigants is likely to abate in the foreseeable future. For this reason, judges, court administrators, and lawyers have responded with a variety of innovations in order to address the problems created by the increase in self-representation.[233] There is little doubt that both the California Supreme Court in *Elkins*, and the Task Force that followed it, were trying to address both the specific barriers imposed on Jeffrey Elkins in trying to represent himself effectively in his individual case, as well as the barriers imposed on self-represented litigants more generally in family court. However,

228 *See, e.g.*, Feitz, *supra* note 31, at 194; Stephen Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 440 (2009); Drew A. Swank, Comment, *The Pro Se Phenomenon*, 19 B.Y.U J. PUB. L. 373, 376 (2005) [hereinafter Swank, *Pro Se*].

229 *See, e.g.*, Berenson, *Family Law*, *supra* note 31, at 110; Goldschmidt, *supra* note 31, at 36.

230 *See, e.g.*, Berenson, *Family Law*, *supra* note 31, at 112 ("The burgeoning number of self-represented litigants, particularly in the family law area, has placed great demands on the limited time resources available to court staff."); Feitz, *supra* note 31, at 195; Landsman, *supra* note 228, at 449; Swank, *Pro Se*, *supra* note 228, at 384.

231 *See* Goldschmidt, *supra* note 31, at 37.

232 *See* Engler, *supra* note 33, at 1988.

233 Among these innovations are simplified court forms that laypersons can fill out, in place of traditional pleadings. Berenson, *Family Law*, *supra* note 31, at 123; Margaret B. Flaherty, Note, *How Courts Help You Help Yourself: The Internet and the Pro Se Divorce Litigant*, 40 FAM. CT. REV. 91, 93 (2002). Educational programs to assist self-represented litigants in filling out these forms and in representing themselves in court have been provided by court personnel and a variety of legal services providers. *See* Berenson, *Family Law*, *supra* note 31, at 127; Feitz, *supra* note 31, at 204; Landsman, *supra* note 228, at 455–56. Such forms, along with assistance in filling them out, can be made available online, to make them even more accessible to self-represented litigants. Flaherty, *supra*, at 91.

there are serious questions whether the means chosen by the Task Force and the subsequent legislation were the best possible ways to achieve this goal.

The Task Force and the Legislature rejected an approach that provided detailed rules regarding the steps that need to be taken prior to their hearings in order for self-represented litigants to have their evidence considered by the court.[234] Instead, they favored an approach that defers most of that work to the hearings themselves, in terms of decisions regarding the admissibility of different types of live testimony at the hearing. But there is no reason to believe that self-represented litigants will do a better job of navigating the rules of evidence and other procedural requirements during the course of their hearings than they did in relation to the pre-trial filings required by prior rules. Thus, the Task Force and the Legislature seem to rely on the ability of trial judges to play an active role in assisting self-represented litigants to present their cases during hearings, whereas judges are not able to play such a role with regard to filings that must be provided prior to hearings.

It is true that a number of academics have similarly focused on the role of trial judges as a critical component in assisting self-represented litigants to present their cases more effectively.[235] However, many judges themselves express deep discomfort with a role that would have them be more active in assisting one or more of the parties to a dispute in presenting their cases. At heart, many judges see such a role as violating the fundamental tenet of judging—neutrality.[236] Indeed, particularly where one of the parties is represented by counsel and one is not, assisting the self-represented party might even be seen as punishing the represented party for their decision to retain an attorney. Further, many judges feel extremely uncomfortable offering assistance to a litigant when the judge actually knows very little about the details of, and facts and circumstances surrounding, the litigant's case. Add in caseload pressures, frequent rotations in and out of different trial court departments, and often little experience with family law, and the primary reliance on trial

234 *See supra* notes 65–71 and accompanying text.

235 *See, e.g.*, Baldacci, *supra* note 33, at 688; Engler, *supra* note 33, at 2028; Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367, 368 (2008); Goldschmidt, *supra* note 31, at 48.

236 *See, e.g.*, Hon. Robert Bacharach & Lyn Entzeroth, *Judicial Advocacy in Pro Se Litigation: A Return to Neutrality*, 42 IND. L. REV. 19, 42–43 (2009); Hon. Gerald W. Hardcastle, *Adversarialism and the Family Court: A Family Court Judge's Perspective*, 9 U.C. DAVIS J. JUV. L. & POL'Y 57, 120–21 (2005); *see also* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1583 (2005).

judges to help self-represented litigants effectively to present their cases seems misguided.[237]

Ultimately, it may be necessary for courts to play a more active role in assisting self-represented litigants to present their cases. However, it seems that the burden of dealing with the self-representation crisis should continue to be shared by judges with other court personnel, bar associations, legal services providers, and other public and private resources. Certainly counties like Contra Costa could have and should have done a better job of drafting their pre-hearing rules and procedures to be more accessible to lay persons such as Jeffrey Elkins, and also could have done more to provide assistance, both inside and outside of the courthouse, to self-represented litigants in complying with those rules and procedures. But it is simply too much to ask trial judges alone to make up for those failures.

ii. Modifying the Role of Minor's Counsel in Custody Cases

In theory, two distinct approaches are available to provide children with a "voice" in child custody proceedings. The first approach involves appointing a GAL to represent the child's interest in the litigation.[238] The GAL is charged with advancing the "best interests" of the child in the case.[239] While the GAL may be a lawyer, a non-lawyer may also be appointed.[240] The court may utilize any one of a number of approaches to receiving the GAL's input into the decision making process. For example, the GAL may testify as a witness during the custody proceedings, but more commonly, the GAL presents a written report to the court.[241]

Aside from appointing a GAL, a court may also appoint an attorney to represent the child in custody proceedings. In such instances, there is a divergence of roles that can be played by the child's attorney. First, to the extent the child is old enough and mature enough to have formulated an expressed preference regarding the outcome of the case, the attorney may work to

237 Repa, *Reform or Wreckage*, *supra* note 137, at 30.

238 *See* Elrod, *Client-Directed Lawyers*, *supra* note 36, at 907–08 ("[Guardian ad litems] advocate for the best interests of the child by conducting an investigation, writing reports or otherwise making recommendations with some required to inform the court if the child's wishes differ . . . ."); Dana E. Prescott, *The Guardian Ad Litem in Custody and Conflict Cases: Investigator, Champion, and Referee?*, 22 U. ARK. LITTLE ROCK L. REV. 529, 537–39 (2000).

239 SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 142.

240 *Id.* at 143.

241 *See* Linda D. Elrod, *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 FAM. L.Q. 105, 115–16 (2003) [hereinafter Elrod, *Raising the Bar*].

advance the expressed preference of the child.[242] Indeed, this is consistent with the traditional understanding of the role of an attorney—to advocate for the lawful objectives of the client.[243] On the other hand, if the child is either too young or too immature to express a preference as to the outcome of the proceedings, or is unwilling to do so, the attorney may represent the child on a "best interests" or "substituted judgment" basis.[244]

In practice, jurisdictions are all over the map in terms of the variations and combinations among these alternatives that are actually employed. For example, some states provide for the appointment of an attorney for the child, but define the attorney's role similarly to that of a GAL as described above.[245] Other states provide for hybrid attorney/GAL roles, or other variations on the above-described alternatives.[246] Further, some jurisdictions call for attorneys to represent children involved in custody proceedings on a best interests basis even if the child is mature enough to express a preference as to the outcome of the proceedings.[247] In such instances, the attorney might advocate for an outcome that is at odds with the expressed preference of the child if the attorney believes that the child's preference is not the outcome that would be in the child's best interests.[248]

Additionally, appointing a GAL and an attorney are not mutually exclusive options. A court may be able to appoint both in the same case.[249] In such circumstances, the most common approach is for the attorney to act as lawyer for the GAL, who stands in the place of the child client in terms of directing the lawyer's activities. However, it would be possible in some circumstances for the attorney to advocate for the child's expressed wishes, and for the GAL to advocate for what the GAL believes to be in the child's best interests—where the GAL

242 *See* Elrod, *Client-Directed Lawyers*, *supra* note 36, at 911; SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 142.

243 *See, e.g.*, David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 470–71 (1990).

244 *See* Elrod, *Client-Directed Lawyers*, *supra* note 36, at 910–11.

245 *See* Atwood, *Best Interests*, *supra* note 44, at 391 ("[M]ost states in the United States continue to permit children's lawyers to engage in best interests representation."); Barbara Ann Atwood, *The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism*, 42 FAM. L.Q. 63, 75 (2008) [hereinafter Atwood, *Bridging the Divide*] ("[M]any states routinely appoint lawyers as guardians ad litem without careful delineation of the distinctions between the two roles."); Elrod, *Client-Directed Lawyers*, *supra* note 36, at 908.

246 *See* Atwood, *Best Interests*, *supra* note 44, at 391–92; Elrod, *Client-Directed Lawyers*, *supra* note 36, at 908–09.

247 *See supra* notes 37–42 (discussing California law and the role of the lawyer).

248 *See, e.g.*, SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 144 (discussing Carballeira v. Shumway, 710 N.Y.S.2d 149 (N.Y. App. Div. 2000)).

249 Atwood, *Best Interests*, *supra* note 44, at 391–92.

believes that the child's expressed preferences are contrary to their best interests. However, in family court, there are generally no public resources to pay for either GALs or attorneys for children in custody cases.[250] Given, as discussed above, that most parties do not even hire attorneys to represent themselves in custody proceedings, it seems unlikely that most parties will have the resources to pay for either an attorney for the child, or a GAL, let alone both, in the context of custody proceedings. Thus, child representation, in whatever form, is the exception, rather than the rule in custody proceedings.

In California, prior to the *Elkins* legislation, the statutory scheme for child representation in family court should perhaps be described as a combination between the roles of GAL and best interests attorney. Formally, California law did not provide for the appointment of a GAL in family court.[251] However, sections 3150 and 3151 of the California Family Code do allow a court to appoint counsel to represent the child in custody proceedings if the court determines that doing so would be in the child's best interests.[252] Further, under section 3151, the child's attorney is to represent the best interests of the child.[253] And, under the prior version of section 3151, the court could require the child's attorney to submit a written "statement of issues and contentions setting forth the facts that bear on the best interests of the child."[254] Such a statement was virtually indistinguishable from the report traditionally prepared by a GAL for the court.

There has been a tremendous amount of discussion in recent years among legal scholars and advocates for children regarding the appropriate role for attorneys representing children in child custody proceedings.[255] Though the discussion has often been

250 SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 147. By contrast, most states provide funding to pay for representation for children in juvenile court proceedings. *See supra* note 34.

251 *In re* Marriage of Lloyd, 64 Cal. Rptr. 2d 37, 39–40 (Cal. Ct. App. 1997).

252 CAL. FAM. CODE § 3150(a) (West 2004).

253 FAM. § 3151(a) (West 2011).

254 FAM. § 3151(b) (West 1998), *amended by* Stats. 2010 ch. 352 § 15 (AB 939) (effective Jan. 1, 2011); Pellman, *A Child-Centered Response*, *supra* note 41, at 116.

255 Two conferences, attended by many of the nation's leading children's law scholars and advocates, taking place a decade apart, published recommendations regarding the appropriate role for lawyers to play in representing children. *See generally Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301 (1996); *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. 592 (2006). Further, a number of professional organizations have promulgated standards offered to guide attorneys in the representation of children. For example, in 2003 the American Bar Association promulgated its *Standards of Practice for Lawyers Representing Children in Custody Cases*, *reprinted in* 37 FAM. L.Q. 131 (2003). In 2006, the Uniform Law Commission (ULC) (formerly known as the National Conference of Commissioners on Uniform State Law) offered its Uniform Representation

heated, it seems that a broad consensus has emerged from this debate regarding a couple of points. The first is that lawyers should act like lawyers in custody proceedings, and not like GALs.[256] Thus, lawyers should be limited to presenting information to the court in the manner that lawyers have traditionally presented information to the court—through admissible evidence and proper legal argument. Therefore, lawyers should be prohibited from offering personal opinions regarding the outcome of custody proceedings, from testifying as witnesses in custody proceedings, and offering reports to the court, like GALs traditionally offered, containing hearsay and other inadmissible evidence.[257]

The second point of consensus to emerge from this debate is, at least in circumstances where the child is mature enough to express a preference regarding the outcome of the proceedings, that best interests representation is inappropriate, and that the attorney for the child should adhere to the traditionally accepted role for counsel of advocating for the lawful preferences of their client.[258] Two separate justifications have been advanced for this second point. First, it is contended that best interests representation is incompatible with the basic ethical requirements of attorney representation, because the agent/lawyer is freed from following the directives of the principal/client.[259] The other justification is that, to the extent best interests representation allows the child's attorney to advocate for an outcome that is contradictory to the expressed preferences of the child, the child is essentially deprived of having a voice relating to the outcome of the proceedings that are supposed to be primarily about the child to begin with.[260] Many would contend that children have a right of some type, to have their preferences heard and considered in proceedings that will

of Children in Abuse, Neglect, and Custody Proceedings Act. UNIFORM REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT (2007). However, a contentious debate caused the ULC to withdraw the Act from consideration by the ABA House of Delegates. *See* Atwood, *Bridging the Divide*, *supra* note 245, at 72–73; Martin Guggenheim, *The AAML's Revised Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective*, 22 J. AM. ACAD. MATRIMONIAL LAW. 251, 269–75 (2009) [hereinafter Guggenheim, *AAML*]. And, in 2009, the American Academy of Matrimonial Lawyers promulgated its Standards for Attorneys and GALs in custody proceedings. Am. Acad. of Matrimonial Lawyers, *Representing Children: Standards for Attorneys for Children in Custody or Visitation Proceedings with Commentary*, 22 J. AM. ACAD. MATRIMONIAL LAW. 227 (2009). For an overview of each of these proposals, see Atwood, *Best Interests, supra* note 44, at 387–89.

256 *See, e.g.*, Elrod, *Raising the Bar*, *supra* note 241, at 115–19.

257 *Id.*

258 *See* Atwood, *Bridging the Divide*, *supra* note 245, at 90–91.

259 *Id.* at 92.

260 *Id.*

have such a dramatic effect on the child's life,[261] and that best interests representation deprives the child of that voice.

The consensus disappears, to a certain extent, for children who either cannot, or will not express a preference regarding the outcome of the proceedings, whether due to age, incapacity, or another reason. In such circumstances, some scholars and child advocates would allow for best interests representation.[262] On the other hand, others would argue that child representation should be forgone entirely in such circumstances.[263]

On review, it is clear that the *Elkins* legislation is halfway consistent with the scholarly consensus described above. First, the change to section 3151 that prevents judges from requiring children's lawyers to submit a statement of issues and contentions is consistent with the view that lawyers should act as lawyers in custody proceedings, and should be prohibited from acting as GALs traditionally have.[264] On the other hand, the *Elkins* legislation also maintains best interests representation as the role to be played by children's lawyers in custody proceedings.[265] While it is true that the revised section 3151 requires children's lawyers to present the child's wishes to the court if the child so requests (the former statute gave the child's lawyer discretion whether or not to present the child's wishes to the court),[266] it still allows the lawyer to argue against the child's expressed preference if the lawyer believes that doing so is in the child's best interests.

The result of the *Elkins* legislation is a somewhat incoherent role for children's attorneys in California custody proceedings. On the one hand, lawyers will be confined to their traditional roles of presenting admissible evidence and argument in support of their positions in court. On the other hand, they will continue to be required to pursue the best interests of their child clients, despite the arguments that best interests representation is incompatible with the traditional role of an attorney as an advocate for the lawful pursuits of their client. Further though, lawyers for children will be required to present the child's

261 *See infra* notes 282–83 and accompanying text.

262 *See* Atwood, *Best Interests*, *supra* note 44, at 423 ("If lawyers should take on a broader 'moral' view of their responsibilities vis-à-vis their clients with full capacity, a lawyer for a child who cannot direct counsel surely acts within his or her professional role when pursuing that client's interests.").

263 Guggenheim, *AAML*, *supra* note 255, at 278 (explaining that restricting a child's lawyer's role to enforcing substantive rights can significantly restrict the lawyer's prerogatives).

264 *See supra* notes 251–54 and accompanying text.

265 *See supra* notes 36–42 and accompanying text.

266 *See supra* note 127 and accompanying text.

preference to the court, even where the lawyer believes that preference to be incompatible with the very best interests of the child that the lawyer has been charged with pursuing.

This author somewhat reluctantly agrees with the *Elkins* legislation's decision to confine children's attorneys to the presentation of admissible evidence and argument at trial, rather than presenting a statement of issues and contentions, testifying as a witness, or stating a personal opinion regarding the outcome of the proceedings. The policies behind the well-entrenched "advocate-witness rule,"[267] support the notion that GAL-like functions are incompatible with the role of an attorney representing a client in contested litigation.[268] However, while it is appropriate that lawyers be required to act as lawyers at all times, forcing lawyers into a more traditional role as adversary advocates is also likely to further increase the "adversarialness" of child custody proceedings, a result that was decried in previous parts of this paper.

Additionally, it does seem that something important is lost in depriving the court of the potentially important source of relatively neutral information that can come from child attorneys' statements of issues and contentions.[269] Alas, as has been pointed out previously, too often parents enmeshed in hotly contested custody disputes lose sight of their children's best interests.[270] In such circumstances, the court really is in a position to benefit from a relatively neutral, yet thorough examination of the issues and evidence in the case. California law does provide for input from a wide variety of such non-party sources in custody litigation including custody evaluators, psychologists, and parenting coordinators. However, as

267 MODEL RULES OF PROF'L CONDUCT R. 3.7 (2007). Rule 3.7 provides:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.
>
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

268 The essential conflict is between the lawyer's obligation as an advocate to advance the interests of their client with the lawyer's obligation as a witness to be completely candid with the court, even if the resulting testimony will be adverse to the client's objectives. *See, e.g.*, Douglas R. Richmond, *Lawyers as Witnesses*, 36 N.M. L. REV. 47, 48–49 (2006).

269 Pellman, *A Child-Centered Response*, *supra* note 41, at 116–17.

270 *See supra* notes 152–65 and accompanying text.

mentioned above, the economic realities of private party custody litigation are such that the availability of such independent evaluations is likely to be strictly limited in most cases.[271]

Indeed, the value of a statement of issues and contentions is consistent with the availability of evaluative mediation in California custody cases. While this paper was critical of evaluative mediation earlier,[272] that criticism was based upon: (1) the incompatibility of the mediator's role as a facilitator of agreements and the role of recommending counselor, and (2) the limitations on the mediator's ability to engage in reliable fact-finding in support of her recommendations. Relating to the latter, because the mediator has no authority to engage in fact-finding, other than through the unsworn statements of the parties during a single, short mediation session, the factual findings relied on by mediators in making their recommendations are particularly suspect. By contrast, children's attorneys writing statements of issues and contentions had a much greater opportunity, and indeed an obligation, to interview witnesses, review documents, and engage in a wide variety of other fact finding activities that made the basis for their recommendations much more reliable than those relied on by mediators in making their recommendations.[273]

Still, the incompatibility of the child attorney's role with that of a GAL makes clear to me that the change away from statements of issues and contentions is proper. Yet, in order to make up for what was lost in making that change, the *Elkins* legislation should have simultaneously created the authority on the part of the family court to appoint a non-lawyer GAL in instances where it would be beneficial to do so. That way, the court would still have the benefits of a statement of issues and contentions, without bringing about the conflicts inherent in having the child's attorney prepare such a report. As outlined above, resource limitations will probably make it unlikely that in many cases courts will appoint both a GAL and an attorney for the child, but the *Elkins* legislation should have established the possibility to do so, where such a result would serve the best interests of the child, and resources will allow for it.

Establishing the ability to appoint a GAL in limited circumstances would also have allowed the *Elkins* legislation to abandon best interests representation, and bring California law into line with the emerging consensus among legal scholars and

271 *See supra* notes 249–50 and accompanying text.
272 *See supra* notes 179–85 and accompanying text.
273 *See* CAL. FAM. CODE § 3151(a) (West 2006).

children's advocates that such representation is inappropriate.[274] I have more confidence in attorneys' ability to engage in best interests representation in a professionally appropriate manner than most of the critics of best interests representation.[275] Indeed, there is evidence that attorneys who represent children in practice actually engage in something of a hybrid between best interests and child's preference representation regardless of the label placed on their appointment.[276] Nonetheless, the availability of a GAL where appropriate would allow California to move from best interests representation to child preference, thus rendering the child's attorney's role to be more in line with the move away from statements of issues and contentions and toward traditional attorney advocacy. In cases where the child is too young or is unwilling to express a preference to direct her lawyer's performance, the court could appoint a non-lawyer GAL, either with or without a lawyer to represent the child/GAL. Similarly, the court could also appoint a GAL for an older child if there was reason to believe that the child's preference being advocated by the child's attorney was potentially adverse to the child's best interests. Thus, the *Elkins* legislation should have provided for GALs in family law cases and abandoned best interests attorney representation in favor of child preference advocacy where the child is mature enough to state a reasoned preference.

iii. Increased Use of Child Testimony in Custody Cases

Though not part of the *Elkins* legislation itself, AB 1050 was enacted around the same time as the *Elkins* legislation, and clearly furthers the Elkins Commission's objective of giving children a greater "voice" in child custody proceedings. Prior to its amendment via AB 1050, section 3042 of the California Family Code, did provide that "[i]f a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making an order granting or modifying custody."[277] The statute also granted the court considerable latitude to determine the manner in which the child's preference would be ascertained, so as to best protect the interests of the child.[278]

274 *See supra* notes 255–57 and accompanying text.

275 *Accord* Atwood, *Best Interests*, *supra* note 44, at 412–13.

276 *See, e.g.*, Leary v. Leary, 627 A.2d 30, 36–42 (Md. Ct. Spec. App. 1993) (child's attorney properly balanced child advocacy and reporting roles in custody litigation).

277 FAM. § 3042(a) (amended 2010).

278 FAM. § 3042(b).

As amended, section 3042 mandates: "If the child is 14 years of age or older and wishes to address the court regarding custody or visitation, the child *shall* be permitted to do so, unless the court determines that doing so is not in the child's best interests."[279]

If the court determines that allowing the child to address the court with regard to her preference is not in the child's best interests, the court must state its reasons for that finding on the record.[280] The revised statute goes on to make clear that nothing in the above-quoted provision shall be construed to prevent a child who is less than fourteen years of age from addressing the court with regard to custody or visitation.[281]

There is nearly universal agreement that the views of children who are mature enough to have an opinion regarding the custody arrangements that will affect them at a minimum should be considered in determining those custody arrangements.[282] Indeed, the widely-ratified United Nations Convention on the Rights of the Child recognizes a right of participation on the part of children in legal proceedings affecting their interests.[283] After all, it is the child who must live with decisions that are made regarding where the child will reside, which parent the child will spend the bulk of her time with, where the child will go to school, etc. However, consensus is much more elusive when it comes to questions of the weight that should be placed on the child's preference regarding custody arrangements, as well as the manner in which the child's input into the custody proceedings should be obtained.

There is also widespread agreement, at least among psychologists, if not among lawyers and children's rights advocates, that placing children "in the middle" of custody disputes between their parents may subject the children to significant psychological harm.[284] Placing significant weight on

279 FAM. § 3042(c) (West 2011) (emphasis added).

280 FAM. § 3042(c).

281 FAM. § 3042(d).

282 *See* Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573, 575 (2008); Elrod, *Client-Directed Lawyers*, *supra* note 36, at 870; Cynthia Starnes, *Swords in the Hands of Babes: Rethinking Custody Interviews After* Troxel, 2003 WIS. L. REV. 115, 123 (2003).

283 Appell, *supra* note 282, at 575 & nn.3–4 (noting that the United States is one of only two countries that have failed to ratify the treaty).

284 *See, e.g.*, EMERY, MARRIAGE, DIVORCE, *supra* note 48, at 20; Robert E. Emery, *Children's Voices: Listening—and Deciding—is an Adult Responsibility*, 45 ARIZ. L. REV. 621, 623 (2003) [hereinafter Emery, *Children's Voices*]; Richard A. Warshak, *Payoffs and Pitfalls of Listening to Children*, 52 FAM. REL. 373, 374–76 (2003); Firestone & Weinstein, *supra* note 148, at 206–07; Weinstein, *supra* note 141, at 126.

the child's preference places the child at risk of being manipulated or pressured, intentionally or unintentionally, by one or both of the parents.[285] A variety of tactics may be employed by a parent to corrupt a child's view of the other parent.[286] The damage that may result to the child's relationship with the other parent may be difficult to undo.[287] Further, a child's preference as to custody may be influenced by fear of a parent, in the event the child chooses to reside with the other parent, or excessive concern for the welfare of a parent who may feel abandonment if the child chooses to live with the other parent.[288] And, of course, children are susceptible to being "bribed" by a parent in the form of gifts, excessively lenient household rules, etc.[289] Even absent any form of undue influence being exerted on the child, the mere fact of having to choose between two parents that the child loves places an enormous burden on the child, that most would wish to avoid.[290]

Two factors seem likely to exacerbate the potential harm caused to children through involvement in their parents' custody disputes. The first relates to the weight to be accorded to the child's preference. The second relates to the manner in which the child's preference will be ascertained and presented to the court for consideration. As to the first, it stands to reason that the more weight that will be placed upon a child's preference in deciding custody proceedings, the more pressure the child will feel in stating their preference, and the more susceptible the child will be to manipulation and other tactics that may cause long-term detriment to the child.

As to the second, there are a number of possible ways that a child's preference may be introduced for consideration by the court in reaching a decision with regard to a custody dispute. For example, the child's preference could be solicited by minor's counsel, a GAL, a mediator/recommending counselor, a custody evaluator, or by the judge herself *in camera*. Alternatively, the child's preference may be elicited through testimony in open court, with the child subject to cross-examination by the parties' attorneys, and perhaps by minor's counsel as well. Common sense suggests that the more private and non-coercive means used to elicit the child's preference, the less pressure these

285 Warshak, *supra* note 284, at 375.

286 *Id.*; *see, e.g.*, Kathleen Nemechek, Note, *Child Preference in Custody Decisions: Where We Have Been, Where We Are Now, Where We Should Go*, 83 IOWA L. REV. 437, 462 (1998).

287 Warshak, *supra* note 284, at 375.

288 *Id.*

289 Nemecheck, *supra* note 286, at 462.

290 Starnes, *supra* note 282, at 124.

procedures are likely to place on the child, and the less damage that is likely to be incurred. On the other hand, the more public and coercive the means used to elicit the child's preference, the more harmful such proceedings are likely to be to the child's long-term psychological interests. Indeed, the legal literature is replete with accounts of the damage caused to adult witnesses, often ones with little stake in the outcome of the proceedings, caused by rigorous cross-examination.[291] One can only imagine the harm to a child of being rigorously cross-examined, potentially by three separate lawyers, in a proceeding that is going to determine the future course of the child's life.

It is thus possible to imagine a continuum of possibilities for incorporating a child's voice into a custody dispute. On the most advantageous side, concerned parents would delicately and privately seek information relating to the child's preference with regard to a custody determination. Such an information gathering process might not even directly raise the issue of custody with the child, but rather would seek out the child's views indirectly, through questions that would not directly threaten or place the child in the middle of the custody dispute.[292] The parents would then privately reach agreement as to a custody arrangement that would give consideration to the child's preferences, along with other factors relating to the child's best interests.[293]

On the other hand, we can also imagine a scenario where parents involved in high-conflict litigation might solicit the child's input through interviews with each parent's retained counsel, and place implicit or explicit pressure on the child to express a preference in favor of that parent. The child's preference will then be presented to the court through live testimony, subject to rigorous cross-examination by the non-favored parent's attorney.

Naturally, one would conclude that the first scenario is preferable in terms of incorporating the child's voice into custody disputes. As stated by Professor Andrew Schepard:

> Even the most vigorous advocates of considering a child's preference in a custody dispute do not suggest that the child should be sworn as a witness and cross-examined by his or her parents' lawyers in front of

291 *See supra* note 193 and accompanying text.

292 *See, e.g.*, Emery, *Children's Voices*, *supra* note 284, at 622–26 (describing a case study and an example to illustrate ways to communicate with children to lessen their burden).

293 *Id.* at 626.

> his or her parents. They recognize that a courtroom confrontation of this sort could irreparably poison the parent-child relationship.[294]

However, I fear that the changes to section 3042 of the California Family Code move us precisely in that direction. It is true that even as amended, section 3042 does not require a child to express a preference as to custody, nor does it require any preference to be presented through child testimony. However, the legislative changes significantly increase the likelihood of both occurrences.

The former section 3042 was broad enough to allow for a child's preference to be considered in custody proceedings, and for that preference to be expressed through child testimony where appropriate. However, the new section 3042 clearly increases the likelihood that the child will be drawn into the middle of custody litigation by expressing a preference on the record. Now, the court cannot deny the right of a child fourteen years of age or older to state a preference in the case, unless the court makes written findings as to why it would not be in the best interests of the child to do so—a significant deterrent to trial judges who are often loathe to take the time and effort to make such written findings. Further, the clear legislative intent behind the changes was to increase the consideration of child preference in custody proceedings, otherwise there would have been no point in amending the statute to begin with. Judges are likely to get the message of the point behind the statutory change in applying their authority regarding the consideration of child preference in custody litigation. Further, subsection (e) of the amended statute requires the court to provide alternative means of soliciting input from the child as to the child's preference should the court preclude calling the child as a witness.[295] This provision seems to set up live testimony as the default mechanism for receiving input from the child, with all other means offered as second alternatives. It is almost certain to have the effect of causing more children to testify in their parents' custody cases.[296]

Drawing children further into the middle of their parents' custody disputes seems particularly problematic in light of the other previously discussed changes from the *Elkins* legislation that are likely to increase the adversarial nature of custody litigation. Increasing the acrimony of custody battles, and then placing children squarely in the middle of them, runs precisely counter to the findings of a generation of scholars who have

294 SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 140–41.
295 CAL. FAM. CODE § 3042(e) (West 2011).
296 *See* Pellman, *A Child-Centered Response*, *supra* note 41, at 113–14.

studied the harms to children that result from their involvement in such proceedings.

V. RECOMMENDATIONS

The legislative changes that are the focus of this article are misguided because they run directly counter to the salutary, decades-long trend in family law away from reliance on traditional, adversary litigation as the primary means of resolving family law disputes. Adversary litigation has been shown, in many instances, to be costly and damaging to the relationships of the parties involved in family law cases, and particularly harmful to children who are dragged into the vortex of their parents' disputes, and then subject to the continuing effects of the strain placed upon the parents' ability to cooperate in raising the children into the future. Yet the increased use of live testimony in family law motion hearings, the redefinition of the role of minor's counsel in custody cases to more closely resemble that of adversarial advocates, and the increased reliance on child testimony in custody cases will all have the effect of moving California back in the direction of adversarialism in family law litigation.

The goals of the California Supreme Court in the *Elkins* decision, and the corresponding task force, could have been achieved through other measures that would not have had the negative consequence of increased adversarialism. Here are some recommendations.

A. Eliminate Evaluative Mediation in Custody Cases

There is virtually universal agreement that except in rare cases involving domestic violence or other gross disparities in capacity between spouses, negotiated agreements in family law cases benefit both the parties to the dispute, the court system as a whole, and the children who are the subject of the dispute.[297] Parties are more likely to be satisfied with agreements that they play a central role in creating than orders generated by a judge who is less knowledgeable about the circumstances of the parties then they are themselves. Negotiated settlements also free up court time to address cases that are resistant to settlement. Thus, steps that will result in more settlements of family law disputes are generally viewed as being positive.

Eliminating evaluative mediation will result in more settlements in family law cases. As pointed out above, requiring

297 *See, e.g.*, Schepard, *Kramer*, *supra* note 153, at 682.

neutrals to play the conflicting roles of mediator and evaluator reduces their effectiveness in the former role, thus decreasing the likelihood of mediated agreements.[298] Also, parties must approach mediation in an adversarial stance, prepared to communicate all information that might help them obtain a favorable recommendation from the counselor, thus greatly increasing their likelihood of success before the court should the mediation session fail to produce an agreement. Yet such an adversarial stance is inimical to the kind of cooperative stance that is most likely to result in a successful outcome in mediation.

B. Live Testimony Should Remain Limited in Family Law Motion Hearings

For reasons stated above, the increased use of live testimony in family law motion hearings is unlikely to achieve better results in such proceedings, will increase adversarialness in family law litigation with its corresponding costs, and will further contribute to backlogs and delays in the family law department at this time of unprecedented budget pressures in California. [299] Moreover, the change will not achieve the *Elkins* reforms' primary goal of making the courts more accessible to self-represented litigants, because such litigants are no more likely to successfully present their cases through live testimony than they would through written submissions.

Rather than placing the entire burden for solving the challenges presented by the explosion of self-representation in family court on trial judges who will preside over evidentiary hearings, the burden of addressing these challenges should be shared equally by the bench, the bar, and court administrators. The Judicial Council, counties, courts, and other drafters of procedural rules must do a better job of drafting court rules in a manner that will be comprehensible to self-represented litigants, and will serve as effective guides in helping litigants present their issues to the court in a manner that will assist the court in reaching a proper result, whether those presentations will take place in oral or written form. New, revised, and simplified court forms can play a role in assisting litigants in these tasks. Such rules and forms should be made widely available to litigants via the internet, and other technologies for those who do not have easy internet access.

More assistance must also be provided to self-represented litigants in preparing their cases, both inside and outside the

298 *See supra* notes 179–85 and accompanying text.
299 *See supra* Part IV(B)(i).

courthouse. In addition to free assistance through court based and other pro bono programs, the private bar should continue to consider means for providing limited legal assistance to self-represented litigants in preparing their cases to present to the court. Though there has been an increase in the provision of such "unbundled" legal services,[300] more can be done. Though it is true that many self-represented litigants are too poor to afford to pay for any legal services whatsoever, it is clear that many self-represented litigants have the means to pay for at least some legal services,[301] but choose not to do so, either because they don't want to invite the additional adversarialness engendered by traditional, full-blown adversary legal representation, or because they don't see the value added in paying for legal services.[302] However, providing limited assistance in preparing cases for court might mutually serve both the courts' and litigants' interests in effective presentation of cases, and attorneys' interests in obtaining business from segments of the population who have traditionally declined to employ their services. Paralegal and other non-attorney assistance may also be appropriate in helping self-represented litigants to prepare their cases to be presented effectively in court, to the extent that appropriate regulation and quality assurance can be provided for such services.[303]

Together, these steps should avoid the need for live testimony in many motion hearings. And, retaining the right to present any and all necessary testimony should the family law dispute require a full trial on the merits, will address the due process concerns raised by the California Supreme Court in *Elkins.*

C. Adopt Traditional Attorney Representation for Children in Custody Cases Along with Explicit Recognition of a GAL Role

The *Elkins* legislation offers an incoherent role for children's counsel by recasting the role of counsel as a traditional adversary advocate in all respects except the most fundamental one, advancing the lawful objectives of the client. California should have gone all the way toward allowing "lawyers to be lawyers" in custody disputes by eliminating best interests representation. On the other hand, California should expressly recognize a role of

300 *See, e.g.*, Feitz, *supra* note 31, at 202.

301 *See, e.g.*, SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 40.

302 *See, e.g.*, Swank, *supra* note 236, at 1573–74.

303 *See, e.g.*, Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 885–86 (2009) (discussing steps that could be taken to allay "concerns about unqualified or unethical lay assistance").

GAL in custody disputes. While it will be the rare case where both minor's counsel and a GAL will be employed, authorization to appoint a GAL will preserve the opportunity to have an adult present the best interests of the child, when the child herself is either unable, or unwilling to do so, or there is a serious risk that the expressed preference of an older child presents a serious risk of harm to the child. Additionally, the ability of a court to appoint a GAL will make up for the elimination of "statements of issues and contentions" from the current legislation and present the opportunity to provide courts with a thoroughly researched, yet relatively objective presentation of the important facts relating to the custody determination, in a manner that neither the parties' attorneys, nor the court itself, would otherwise be able to provide.

D. Child Testimony Should Be a Last, Not a First Resort in Custody Litigation

Few would dispute that on the witness stand, testifying in one's parents' custody case is one of the last places a child would want to be. Legislation that makes it more likely, rather than less likely that children will be placed in exactly that position is misguided. While it will certainly be appropriate, indeed even necessary in some cases, to have a child testify in custody proceedings, the goal should be to limit those instances, rather than to increase them. Pre-existing California law was adequate to give judges, parents, lawyers, other professionals, and the children themselves, the flexibility to make sure that children have an opportunity to be heard regarding custody decisions that will have an enormous impact upon their lives, and to determine the appropriate manner in which the child's views will be presented. What is needed is for the involved persons to exercise that discretion appropriately, rather than to place a thumb on the scale in favor of child testimony.

CONCLUSION

Only time will tell if the latest set of family law reforms in California will catch on in the rest of the country as has happened so many times in the past. However, it is this author's hope that they do not. The recent steps back in the direction of increased adversarialism in family law litigation mark a mistaken reversal of course by a state that led the path away from such adversarialism over the past few decades. Does anyone really want to return to the days when custody disputes

were a legal "battle to the death,"[304] with little concern for the casualties created along the way? Hopefully, other states will answer this question "no," and decline to follow California's lead in family law this time around.

304 SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 12 (discussing the film *Kramer v. Kramer* and the manner in which custody cases were determined around the time (1979) the film was released).

Public Nuisance at the Crossroads: Policing the Intersection Between Statutory Primacy and Common Law

Richard O. Faulk[*] *and John S. Gray*[**]

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INTRODUCTION

In a previous article, we examined recent attempts to transmute the traditional tort of public nuisance from its traditional elements into an expansive remedy that subsumes the law of product liability.[1] Only a few months after that article was published, the Rhode Island Supreme Court rejected the expansive use of public nuisance as a substitute for traditional product liability litigation regarding lead-based paints.[2] In so holding, Rhode Island joined other state high courts that previously reached the same conclusion.[3] Of the original public nuisance claims filed in the massive controversy regarding lead paints, only those in California remain pending—and they face an exacting review under a jurisprudence with unique history and traditions.

Public nuisance, therefore, is at a "crossroads" in California. The California lead paint litigation may be the end—or a new beginning—of mass tort proceedings against product manufacturers based upon public nuisance, as opposed to traditional strict product liability. The controversy lies squarely at the intersection of statutory and common law—an interchange that has grown increasingly more complex since California's laws were codified in 1850, and since public nuisance was codified as a tort in 1872. The dispute is framed by this singular legal history and the complex jurisprudence the state has developed to simultaneously empower and restrain the creativity of common law courts in such cases. As a result, those historical perspectives and contexts must be appreciated and studied before honest prognostications can be made.

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1 Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941 (2007).

2 State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 456 (R.I. 2008).

3 *See, e.g.*, *In re* Lead Paint Litigation, 924 A.2d 484, 494 (N.J. 2007) (recognizing that if it were to "permit these complaints to proceed, [it] would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance"); City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110, 112–13 (Mo. 2007).

The California litigation represents the resurgence—or the ebbing—of a tide of public nuisance litigation that has swept the nation over the past decades. In those years, private citizens, cities, counties, states, and other public authorities have increasingly asked courts—as opposed to the Legislature—to solve large societal problems by characterizing problems as "public nuisances." In the 1970s, lawyers began the movement to breathe life into the ancient tort as a tool to resolve problems, which adversely affected large numbers of people, as opposed to distinct individuals.[4] Specifically, they invoked public nuisance to sue manufacturers for making and selling products allegedly responsible for creating public health and safety problems. Their first—and unsuccessful—attempts were filed against manufacturers of products that caused air pollution[5] and manufacturers of asbestos products.[6] Their efforts finally gained momentum during the tobacco litigation of the late 1990s, where it was asserted that public nuisance claims played a role in forcing the tobacco industry to the settlement table.[7]

Since then, state and local governmental authorities have increasingly championed public nuisance as a vehicle to pursue mass tort suits against manufacturers of products believed to cause harm to vast numbers of citizens.[8] With each new lawsuit, creative attorneys have retooled and refined their legal

4 Up until the 1970s, the tort of public nuisance was largely consigned to the footnotes of casebooks. Faulk & Gray, *supra* note 1, at 954 (noting that public nuisance was not even included in the *Restatement (First) of Torts* when it was published in 1939 and that it was being replaced by new legislatively created "tools more suited to large-scale solutions"). During the late 1960s, however, environmental activists seized upon the idea of using public nuisance as a tool to combat pollution and successfully sought to expand its applicability through the *Restatement (Second) of Torts*. *Id.* at 955–56.

5 The court dismissed this case after finding that it could not simply abolish air pollution as a public nuisance and concluding that this societal problem was best resolved through the Legislature. *See* Diamond v. Gen. Motors Corp., 97 Cal. Rptr. 639, 645 (Cal. Ct. App. 1971) (noting that they were not dealing with a simple dispute between a person breathing the air and a person contaminating it, and acknowledging that the real question of how to control air pollution is best left to the state and federal legislatures).

6 Governmental authorities claimed that asbestos products, by their very existence, were a public nuisance that interfered with the public health "because '[t]he stream of commerce can carry pollutants every bit as effectively as a stream of water.'" City of San Diego v. U.S. Gypsum, 35 Cal. Rptr. 2d 876, 882 (Cal. Ct. App. 1994) (quoting Tioga Pub. Sch. Dist. #15 v. U.S. Gypsum, 984 F.2d 915, 921 (8th Cir. 1993)). After acknowledging the breadth of circumstances in which California law permitted recovery in public nuisance, the court declined to turn this ancient doctrine into a super tort by holding that California law does not allow for "recovery for a defective product under a nuisance cause of action." *Id.* at 883. The court went so far as to state that "under City's theory, nuisance 'would become a monster that would devour in one gulp the entire law of tort . . . .'" *Id.* (quoting *Tioga Pub. Sch. Dist. #15,* 984 F.2d at 921); *see also* Faulk & Gray, *supra* note 1, at 957–58.

7 Faulk & Gray, *supra* note 1, at 958.

8 *Id.* at 960–61; *see also* Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and* Parens Patriae *Product Litigation*, 49 B.C. L. REV. 913, 914 (2008).

arguments—seeking ways to overcome precedents against holding manufacturers of lawful products liable for creating public nuisance for simply marketing and selling a product.[9] Over the past decade, public entities in California have attempted to use public nuisance as a means to address diverse and complex societal problems, such as:

- urban violence by suing gun manufacturers;[10]
- childhood lead poisoning caused by deteriorating paint in older housing stock by suing lead pigment manufacturers that supplied the lead used in lead paint more than thirty years ago;[11] and
- climate change by suing automobile manufacturers and energy-related companies whose products emit greenhouse gases.[12]

Admittedly, most citizens would like to eliminate, or at least mitigate, these problems—but that concern does not necessarily justify judicial intervention. To date, the California Supreme Court has yet to decide whether public nuisance is an appropriate vehicle for governmental authorities to redress societal harms allegedly created by product manufacturers,[13] although it is increasingly likely that the court will have the opportunity to do so in the lead paint litigation.[14]

9 The repackaging of this ancient tort is being done using the same sympathetic reasoning that convinced common law courts to develop strict product liability. *See* William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1122 (1960) (landmark article advocating the demise of fault-based causes of action in favor of strict products liability).

10 *In re* Firearm Cases, 24 Cal. Rptr. 3d 659, 663 (Cal. Ct. App. 2005); Ileto v. Glock Inc., 349 F.3d 1191, 1194 (9th Cir. 2003).

11 Cnty. of Santa Clara v. Atlantic Richfield Co., 40 Cal. Rptr. 3d 313, 319 (Cal. Ct. App. 2006).

12 Cal. v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871, at *5 (N.D. Cal. Sept. 17, 2007). Although the State voluntarily dismissed its appeal on June 19, 2009, Unopposed Motion to Dismiss Appeal at 2, Cal. v. General Motors Corp., No. C06-05755 MJJ (N.D. Cal. Sept. 17, 2007), http://www.globalclimatelaw.com/uploads/file/California%20v%20GM%20dismissal.pdf, the initial pursuit of the action suggests the Attorney General's potential interest in public nuisance as a vehicle to redress widespread harms. *See also* Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009), *appeal filed*, No. 09-17490 (9th Cir. Nov. 5, 2009).

13 The court had the opportunity to decide the issue in *County of Santa Clara v. Atlantic Richfield Co.*, but elected to forego review, perhaps because the issue was framed in the context of a motion to dismiss on the pleadings, as opposed to a complete factual record. In any event, the court's denial left the matter open for later challenges. *Atlantic Richfield Co.*, 40 Cal. Rptr. 3d at 331.

14 Recently, the California Supreme Court cleared the way for the lead paint litigation to proceed after a lengthy appellate challenge to the propriety of the use of contingent fee counsel by public entities to pursue public nuisance cases. Cnty. of Santa Clara v. Superior Court, 235 P.3d 21, 41 (Cal. 2010).

The attraction of public nuisance as a new remedy is superficially understandable, but fundamentally elusive. Perhaps private and governmental attorneys believe that public nuisance is a uniquely appropriate candidate for "remolding" into a "super tort"—appropriate because it is a nebulous, ill-defined, "catch all" tort that can be raised in virtually any situation where defendants are alleged to have engaged in broadly injurious or offensive behavior. Perhaps they believe that this vagueness makes the tort more malleable than traditional product liability claims, and hence more adaptable and flexible to meet society's needs.[15] Whatever these advocates may surmise, they should not presume that California nuisance law is not constrained by significant precedents. Any California Supreme Court decision regarding the tort's utility and applicability certainly will not be written on a "blank slate." Indeed, public nuisance has a long and colorful history in California, and California courts have been resolving public nuisance disputes since the early days of statehood.

This Article chronicles the use and development of the tort of public nuisance in California, focusing on the types of circumstances in which its use was approved.[16] It discusses the historical foundations of California's jurisprudence and the impact of that history on the construction and application of "common law" remedies such as public nuisance. It reviews the nature and elements of public nuisance,[17] and then frames and substantiates the unique position in which California courts find themselves regarding public nuisance, particularly when product claims are involved.[18] California, the state viewed by many as the origin of strict product liability, must now decide whether its courts will preside over the dissolution of its principles. Those courts stand as gatekeepers for a new mass tort theory, and they must decide whether they will—or will not—admit a transmuted cause of action that has been specifically engineered to displace long-established rules that govern the liabilities of product manufacturers.

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15 The redefining of this malleable tort began after these same counsel endured decades of defeat in courts as a result of traditional common law product liability rules. *See* Faulk & Gray, *supra* note 1, at 957–59; *see also* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 745 (2003) [hereinafter Gifford]; Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 542–43 (2006).

16 *See infra* Part I.

17 *See infra* Part II.

18 *See infra* text accompanying notes 185–203.

I. THE JURISPRUDENTIAL FOUNDATIONS OF PUBLIC NUISANCE

The law of public nuisance is ancient, as are the confusion and debates regarding its meaning. The tort can be traced to the feudalism of the Middle Ages and was transported to America by the earliest English settlers.[19] Despite its persistent viability, the tort has always been difficult to understand and apply. Predictably, when Horace Wood published the first American treatise on nuisance in 1875, he described public nuisance as a "wilderness of law."[20] Later, William Prosser, reporter for the *Restatement (Second) of Torts*, described nuisance law as an "impenetrable jungle," and as a "'legal garbage can' full of 'vagueness, uncertainty and confusion.'"[21]

Some jurists tried to dispel this confusion. For example, United States Supreme Court Justice George Sutherland once described a public nuisance as "merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard."[22] His observation is consistent with the legal maxim "*sic utere tuo ut alienum non laedas*," which means that property is held subject to the condition that its use should not injure others or impair the public right and interests of the community.[23] This principle is the foundation of the common law of nuisance,[24] and, significantly, it was so recognized by California in 1872. At that time, California's Legislature enshrined it in state law by declaring that "[o]ne must so use his own rights as not to infringe upon the rights of another."[25] Since then, the California Supreme Court has held that the maxim "implies that one may make any use which he pleases of his own [property] so long as he does not injure others."[26]

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19 Faulk & Gray, *supra* note 1, at 953; Gifford, *supra* note 15, at 745, 800–01.

20 Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. ENVTL. AFF. L. REV. 89, 90 (1998).

21 *Id.*

22 Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

23 Locklin v. City of Lafayette, 867 P.2d 724, 743 (Cal. 1994); *see also* Brendale v. Confederated Tribes & Bands of Yakima the Indian Nation, 492 U.S. 408, 433–34 (1989); *Vill. of Euclid*, 272 U.S. at 387; Camfield v. United States, 167 U.S. 518, 522 (1897).

24 LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 246 (1987); CEEED v. Cal. Coastal Zone Conservation Comm'n, 118 Cal. Rptr. 315, 324 (Cal. Ct. App. 1974); Hulbert v. Cal. Portland Cement Co., 118 P. 928, 930–31 (Cal. 1911); Woodruff v. North Bloomfield Gravel Mining Co., 18 F. 753, 801 (C.C.D. Cal. 1884) (stating that this maxim "is one of the fundamental maxims of the common law, more frequently cited and enforced, perhaps, than any other in the law").

25 CAL. CIV. CODE § 3514 (Sumner Whitney & Co. 1872).

26 Reclamation Dist. No. 833 v. American Farms Co., 285 P. 688, 690 (Cal. 1930) (citing Galbreath v. Hopkins, 113 P. 174 (Cal. 1911)); *see also* People v. Gold Run Ditch & Mining Co., 4 P. 1152, 1159 (Cal. 1884) ("Every business has its laws, and these require of those who are engaged in it to so conduct it as that it shall not violate the rights that belong to others. Accompanying the ownership of every species of property is a

Despite this maxim, the California Supreme Court has not entirely avoided the complications that have plagued the tort for centuries. For example, it described a "public or common nuisance . . . [as] a species of catch-all criminal offense, consisting of an interference with the rights of the community at large."[27] Moreover, it recently stated that the "doctrine is aimed at the protection and redress of *community* interests and, at least in theory, embodies a kind of collective ideal of civil life."[28] Descriptions such as these, along with the unusually wide variety of cases in which judges have applied the law of public nuisance, have led scholars to describe this doctrine as "notoriously contingent and unsummarizable."[29] Notwithstanding this bleak observation, and despite a host of other articles that have described the development of public nuisance,[30] it is still useful—indeed necessary—to review its history and, for the purposes of this article, examine how California's Legislature has established public nuisance in its civil code, and to study how California's courts have applied this ancient tort.

A. Origins in England

It is generally agreed that English common law courts created the tort of nuisance during the twelfth century.[31] Originally, it was only available to the Crown and was utilized to stop people from encroaching on the King's land or blocking a public road or waterway.[32] The sheriff prosecuted it as a crime,

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corresponding duty to so use it as that it shall not abuse the rights of other recognized owners.") (citing CAL. CIV. CODE §§ 3479, 3514 (West 1997)); Barrett v. S. Pac. Co., 27 P. 666, 667 (Cal. 1891) ("It is a maxim of the law that one must so use and enjoy his property as to interfere with the comfort and safety of others as little as possible consistently with its proper use.").

27 People *ex rel.* Clancy v. Superior Court 705 P.2d 347, 353 (Cal. 1985).

28 People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 603 (Cal. 1997).

29 Halper, *supra* note 20, at 90.

30 *See, e.g.*, Faulk & Gray, *supra* note 1, at 948–51; C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 3–5 (1949); Gifford, *supra* note 15, at 743; Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After* Boomer, 54 ALB. L. REV. 359, 361–62 (1990); Schwartz & Goldberg, *supra* note 15, at 541–42; J.R. Spencer, *Public Nuisance—A Critical Examination*, 48 CAMBRIDGE L.J. 55, 59 (1989); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 571 (1941); Eric L. Kintner, Note, *Bad Apples and Smoking Barrels: Private Actions for Public Nuisance Against the Gun Industry*, 90 IOWA L. REV. 1163, 1190–91 (2005).

31 Faulk & Gray, *supra* note 1, at 951 (citing FIFOOT, *supra* note 30, at 3–5); *see also Acuna*, 929 P.2d at 603 (recognizing that "[t]here are few 'forms of action' in the history of Anglo-American law with a pedigree older than suits seeking to restrain nuisances").

32 *See* RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (1979); Faulk & Gray, *supra* note 1, at 951 (citing Abrams & Washington, *supra* note 30, at 361–62); *see also* Philip L. Judson, *Unlawful Agricultural Working Conditions as Nuisance or Unfair Competition*, 19 HASTINGS L.J. 398, 401 (1968) (citing James v. Hayward, (1631) 79 Eng. Rep. 761 (K.B.)

and consequently, the tort has always been closely tied to the government's use of its police powers. The majority of early nuisance cases were brought to remedy violations of property rights.[33] On rare occasions, however, early nuisance cases were brought to remedy offensive activities not tied to property (for example, "helping a 'homicidal maniac' to escape, being a common scold, . . . selling rotten meat, [and] embezzling public funds").[34] Accordingly, the authority to commence public nuisance actions was not derived from a private "tort" concept, but rather from what is now known as the sovereign's "police power."[35]

Between the twelfth and sixteenth centuries, public nuisance remained a "criminal" tort reserved for the King. Citizens were not allowed to bring nuisance claims in their own names to recover for harms inflicted by others against them and their neighbors.[36] This limitation ended in the sixteenth century, after a dissenting justice opined that ordinary citizens should be allowed to sue and recover damages caused by public nuisances in certain situations.[37] As a result, private citizens were given the right to sue for public nuisance, but only if they could prove that they "suffered a 'particular' or 'special' injury that was not common to the public."[38] To be special, the injury had to be "different in kind," not just more severe than that suffered by the

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and W. PROSSER, TORTS §§ 87, 89 at 593, 606 (3d ed. 1964)); *Acuna*, 929 P.2d at 603 (stating that a public nuisance was originally an offense against the crown).

33 People v. Lim, 118 P.2d 472, 474 (Cal. 1941). Property-related activities prosecuted as "public nuisances" included: digging up a wall of a church, keeping a tiger in a pen next to a highway, leaving mutilated corpses on doorsteps, keeping treasure troves, and subdividing houses which "become hurtful to the place by overpestering it with poor." Abrams & Washington, *supra* note 30, at 362.

34 Abrams & Washington, *supra* note 30, at 362.

35 *Lim*, 118 P.2d at 474 (noting that it was "an extremely rare case, and may be considered, if it ever happened, as an anomaly, for a court of equity to interfere at all . . . to put down a public nuisance which did not violate the rights of property, but only contravened the general policy.'").

36 Opponents to a private cause of action for public nuisance argued that, if allowed, a defendant would be brought into court multiple times to defend against a single offense. Faulk & Gray, *supra* note 1, at 952 (citing Gifford, *supra* note 15, at 800).

37 The source of this change is uniformly credited to a dissenting opinion in an "anonymous" King's Bench decision. *Id.* In that case, Justice Fitzherbert opined that when a person suffers an injury that is different-in-degree (as compared to different-in-kind) from the general public, then he should be allowed to bring his own public nuisance claim. Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 792–93 (2001). For his hypothetical, he used the example of a person riding on a public highway at night and coming across a man-made ditch. *Id.* If he is merely delayed or inconvenienced the same as everyone else, then he does not have a private public nuisance cause of action. *Id.* But, if he and/or his horse are physically injured because they fell into the trench, then he should have a personal public nuisance cause of action against the person who dug the trench across the public road. *Id.*

38 Faulk & Gray, *supra* note 1, at 952.

general public.[39] Another important distinction between public nuisance actions brought by the Crown and those brought by the general public was the remedy available. Private citizens were limited to seeking monetary damages because injunctive relief or abatement remedies were solely reserved for the Crown.[40] As a result, the law of nuisance began to subsume elements of criminal law, real property law, and tort law.[41]

Gradually, English common law courts allowed persons other than the Crown to bring public nuisance actions to address public concerns, such as "the right to safely walk along public highways, to breathe unpolluted air, to be undisturbed by large gatherings of disorderly people and to be free from the spreading of infectious diseases."[42] During this period, many public nuisance cases involved people blocking highways, encroaching on highways, or dumping all sorts of garbage on them.[43] They also addressed the blockage of waterways and flooding, as well as the pollution of streams and ponds used as a source of water for people and livestock, and problems created by allowing diseased animals to roam.[44] Finally, they also dealt with activities not directly related to property violations, such as the selling of unfit food stuffs, short-selling food or ale, inappropriate hunting practices (for example, catching immature game or hunting out of season), closing bawdy-houses and disorderly ale-houses, night-walkers, and eavesdroppers.[45] In medieval times, public nuisance was used to address conflicts between land use and social welfare because it provided judges (who lacked guidance from legislative bodies on what society deemed to be unreasonable behavior) with a flexible judicial cause of action that allowed them wide latitude and discretion to adapt their rulings to remedy wrongs.[46] It would be another couple of hundred years before the extraordinary power held by judges to use the common law tort of public nuisance to address some of society's more pressing problems was curtailed, constrained, and limited by legislative enactments.[47]

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39 *Id.* at 952–53.

40 *Id.* at 950 (citations omitted). Conversely, governmental authorities are not allowed to seek damages for a public nuisance. *Id.*

41 Halper, *supra* note 20, at 99.

42 Schwartz & Goldberg, *supra* note 15, at 543–44.

43 Faulk & Gray, *supra* note 1, at 951.

44 *Id.*

45 *Id.* at 951 n.46 (citing Spencer, *supra* note 30, at 59–60).

46 State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 444 (R.I. 2008).

47 Edwin S. Mack, *The Revival of Criminal Equity*, 16 HARV. L. REV. 389, 391–92 (1903) (suggesting that the use of injunctions to enjoin public nuisances lapsed between about 1650 and 1800 because a general distrust by the people of English courts existed).

B. Entry into American Jurisprudence

As citizens of English ancestry began colonizing America during the sixteenth and seventeenth centuries, they brought with them the English system of justice. This included the common law tort of public nuisance, which was generally adopted in Colonial America without change.[48] Early American nuisance cases typically fell into one of two categories: either dealing with people blocking highways or waterways, or stopping perceived invasions of public morals.[49] Over time, as America expanded westward and the industrial revolution took hold, our society gradually shifted from agrarian to industrial.[50] This change did not always come smoothly. While new inventions brought with them efficiency, speed, and opened new horizons, they also brought noise, air and water pollution, and many other less desirable consequences.[51] Given the fact that noxious trades, and unsanitary and smelly conditions were historically treated as public nuisances in England, it is not surprising that this remedy was adopted in America to address similar conditions.

It should be remembered that before the onset of the twentieth century, there was very little state legislation regulating or prohibiting pollution or otherwise governing the activities of most businesses. Without such regulations, people engaged in business generally were free to run their operations and facilities as they pleased, and most health and safety-related restrictions were viewed by businessmen as unnecessary and unwanted restrictions that put them at a competitive disadvantage. Consequently, the only redress often available to citizens and/or governmental authorities was a public nuisance lawsuit.

Increasingly in recent times, however, legislatures, with their unique ability to weigh and balance the public interest, have sidestepped the need for public nuisance litigation. They have employed their investigative resources and diverse deliberative resources to enact a vast tapestry of statutes and regulations—provisions that set forth and define minimum

48 Gifford, *supra* note 15, at 800.

49 Faulk & Gray, *supra* note 1, at 953 (citing Gifford, *supra* note 15, at 800–01). The cases involving public morals and welfare involved lotteries and other forms of gambling and wagering, keeping a disorderly house or tavern, enabling prostitution, and using profane language. Gifford, *supra* note 15, at 800–01 (citations omitted).

50 Faulk & Gray, *supra* note 1, at 953.

51 *Id.* (citing Halper, *supra* note 20, at 101) (discussing some notable nuisance cases during this period such as: Chenowith v. Hicks, 5 Ind. 224, 224 (1854) (water pollution from a slaughterhouse); Commonwealth v. Brown, 54 Mass. 365, 368 (1847) (air pollution); Smiths v. McConathy, 11 Mo. 517, 519 (1848) (distillery vapors and hog waste); and Luning v. State, 2 Pin. 215, 218–19 (Wis. 1849) (damming a waterway)).

societal norms outside of the common law process.[52] These new laws not only set forth conduct expected from the business community and general citizenry, but also outlined comprehensive solutions to an extraordinarily wide variety of conflicts between land use and social welfare, including but not limited to pollution and public health concerns.[53] In many of these enactments, legislatures even specified the activities and behaviors that constituted nuisances.[54] These laws limited the judiciary's "common law" discretion because they required judges to consider whether, and to what degree, legislatures approved of an activity when determining the existence of the nuisance.[55] As we will see below, this is particularly true in California where the Legislature's role in defining public nuisances is well established.[56]

C. Historical Roots of Public Nuisance Litigation in California

i. Early Days

California grew from diverse peoples and cultures—and it did so perhaps more quickly and violently than any other American state.[57] Those influences, which profoundly affected California's government and legal systems, persist today in the interactions between codified laws and the common law process—particularly regarding the law of public nuisance.

Prior to the Mexican-American War, California was a remote northern Spanish province, sparsely populated by a series of missions dedicated to spreading Christianity to the local natives.[58] When the war ended in 1848, Mexico ceded all land north of the Rio Grande River to the United States (including what is now California) in return for fifteen million dollars.[59]

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52 Faulk & Gray, *supra* note 1, at 954.

53 *Id.* at 954–55.

54 *Id.* at 954.

55 *See infra* Part II(C).

56 *See* People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 606 (Cal. 1997).

57 *See* Lewis Grossman, *Codification and the California Mentality*, 45 HASTINGS L.J. 617, 622–25 (1994) (discussing problems with maintaining order and lack of intellectual and cultural resources in early days of statehood).

58 *See* CALIFORNIA MISSIONS FOUNDATION, http://www.missionsofcalifornia.org/foundation/index.html (last visited Oct. 9, 2011); CALIFORNIA HISTORY ONLINE, http://www.californiahistoricalsociety.org/timeline/chapter4/001.html (last visited Oct. 9, 2011); CALIFORNIA HISTORY ONLINE, MEXICAN CALIFORNIA: THE HEYDAY OF THE RANCHOS, http://www.californiahistoricalsociety.org/timeline/chapter5/index.html (last visited Oct. 9, 2011).

59 The Mexican-American War ended on February 2, 1848 with the signing of the Treaty of Guadalupe Hidalgo. The treaty was later ratified by the United States Senate. The Library of Congress, *The Treaty of Guadalupe Hidalgo*, http://www.loc.gov/rr/hispanic/ghtreaty (last updated Feb. 14, 2011).

California then became an official territory of the United States with a population estimated between 7300 and 14,000.[60] The Treaty of Guadalupe Hidalgo, under which Mexico ceded California to the United States, guaranteed the protection of property interests vested previously under Mexican law.[61]

During this period, California's only source of governmental authority was the American military, which proved wholly inadequate after gold was discovered at Sutter's Mill on the American River in 1848.[62] Because of the gold rush, California's population jumped to more than 90,000 people by the end of 1850, and then leaped to more than 300,000 by 1854 as people from around the world rushed to California.[63] This dramatic influx of settlers, coupled with the extreme wealth to be made, resulted in violence and ethnic conflicts—as well as hosts of disputes regarding mineral interest claims and property interests.[64] As a result, Congress was urged to establish a civilian government.[65] Californians held a constitutional convention in Monterey in 1849 to draft a constitution establishing the state's government.[66] Shortly thereafter, Congress agreed to admit California as the thirty-first state on September 9, 1850.[67] Shortly thereafter, the property interest guarantees provided by the Treaty of Guadalupe Hidalgo were finally implemented by the California Land Act of 1851, which provided a commission to resolve private land claims regarding titles "derived from the Spanish or Mexican government"[68] using,

60 *See California Becomes the 31st State in Record Time*, HISTORY.COM, http://www.history.com/this-day-in-history/california-becomes-the-31st-state-in-record-time (last visited Oct. 9, 2011); Andrea Franzius, *California Gold—Migrating to California: Overland, Around the Horn, and via Panama* (Nov. 1997), http://www.duke.edu/~agf2/history391/migration.html.

61 Treaty of Peace, Friendship, Limits, and Settlement, U.S.-Mex., art. VIII, Feb. 2, 1848, 9 Stat. 22.

62 Steve Wiegand, *A Zigzag Path Led to Statehood*, SACRAMENTO BEE (Jan. 18, 1998), http://www.calgoldrush.com/lb_sets/04statehood.html; JANELLE WISE & LARISA SOMSEL, STAY EAST YOUNG MAN: CALIFORNIA GOLD RUSH LETTER SHEETS, CALIFORNIA HISTORICAL SOCIETY 6 (1999), *available at* http://www.californiahistoricalsociety.org/programs/pdf/stay_east.pdf (describing the Gold Rush, which began on January 24, 1848).

63 WISE & SOMSEL, *supra* note 62, at 7.

64 *See* California History Online, Diversity and Conflict (last visited Oct. 9, 2011), http://www.californiahistoricalsociety.org/timeline/chapter6/c001.html (detailing the ethnic conflicts that existed during the gold rush). To deal with this lawlessness, citizens sometimes banded together forming vigilance committees to impose justice as they saw fit. *See* WISE & SOMSEL, *supra* note 62, at 11–12 (describing the activities of California's Committees of Vigilance).

65 WANDERINGLIZARD.COM, http://www.inn-california.com/articles/history/californiastatehood.html (last visited Oct. 9, 2011) (discussing the establishment of a civilian government).

66 *Id.*

67 *Id.*; *see also* California History Online, *supra* note 64.

68 Act of March 3, 1851, ch. 41, § 8, 9 Stat. 631, 632 (1851).

among other authorities, "the laws, usages, and customs of the government from which the claim is derived."[69]

ii. Creating a Legal System

One of the first issues Californians faced was deciding upon a foundation for their legal system. With its historical ties to Mexico, the Civil Code system was familiar to many citizens—but others, especially newly arrived citizens who emigrated to the United States, were acclimated to English common law systems.[70] Since there were—and still are—important differences between the civil law and common law systems, uniformity was essential to ensure personal, property and financial stability.[71] The civil law relies on codes to establish controlling principles, while the common law derives its precepts from decisions by judges.[72] Another fundamental divide concerns the rights to confront witnesses and jury trials, which are guaranteed in most common law nations.[73] By contrast, juries are generally not used in civil law and evidence is regularly presented to the court in written statements.[74]

After some debate, Californians decided to adopt the English common law,[75] partially because they believed there was insufficient time to create and enact a codified system of laws.[76] Despite this concern, however, California's first Legislature actually codified substantial portions of the common law,

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69 *Id.* at 633; *see also* Peter L. Reich, *Western Courts and the Privatization of Hispanic Mineral Rights Since 1850: An Alchemy of Title*, 23 COLUM. J. ENVTL. L. 57, 65 (1998).

70 *See* René D. Zentner, Comment, *Positive and Natural Law in California*, *1846–1849*, 45 CALIF. L. REV. 59, 61–62 (1957).

71 *The Common Law and Civil Law Traditions*, THE ROBBINS COLLECTION, http://law.berkley.edu/library/robbins/pdf/CommonLawCivilLawTraditions.pdf (last visited Oct. 19, 2011).

72 Richard O. Faulk, *Armageddon Through Aggregation? The Use and Abuse of Class Actions in International Dispute Resolution*, 10 MICH. ST. U. DET. C.L.J. INT'L L. 205, 212, 222 (2001); MALCOLM EBRIGHT, LAND GRANTS AND LAWSUITS IN NORTHERN NEW MEXICO 69 (1994) (comparing and contrasting civil and common law systems).

73 EBRIGHT, *supra* note 72, at 69.

74 *Id.*

75 The Mexican system of justice in place in California was superseded by the adoption of the common law on April 13, 1850. People *ex rel.* Vantine v. Senter, 28 Cal. 502, 505 (1865).

76 "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State." CAL. CIV. CODE § 22.2 (Deering 2008) (the predecessor of this section, section 4468 of the California Political Code, was adopted in 1850); *see also* Stiles v. Laird, 5 Cal. 120, 122 (1855) (noting that the "rules of the common law were so far adopted in this State as to supply any defect which might exist in the statute laws by furnishing additional remedies for the correction of wrongs"); Ralph N. Kleps, *The Revision and Codification of California Statutes 1849–1953*, 42 CALIF. L. REV. 766, 766 (1954).

creating a framework that, to a greater or lesser extent, appeared to constrain judicial creativity with legislative definitions and guidance. Laws were enacted regarding crimes,[77] criminal procedure,[78] civil procedure,[79] probate procedure,[80] and corporations,[81] "with the result that substantial portions of the law were in effect codified for the time being."[82] The complex codes provided detailed standards that were intricately divided into parts, titles, and chapters, and consisted of hundreds of sections.[83] As a result, California's new "common law" courts were not entirely "free" to derive and circumscribe new "common law" rights and remedies in all areas of the law; instead, they could only do so when the codes were silent.[84] Although California courts have departed from this rule in certain contexts over the years,[85] this deferential tradition has persisted in California's jurisprudential history regarding public nuisance.[86]

Although the first Legislature's reasoning is not documented thoroughly,[87] it is tempting to speculate that the codifications reflected a reluctance to entirely abandon the certainty of firm legal rules—which characterized the Mexican Civil Code—to the discretion of common law courts informed by the principles of *stare decisis*.[88] Perhaps because of that reluctance, they rushed

77 1850 Cal. Stat. 229.

78 *Id.* at 275.

79 *Id.* at 428. The 1850 procedural statutes "were based almost entirely on the 1848–1849 FIELD CODES OF CIVIL PROCEDURE AND CRIMINAL PROCEDURE," American products prepared in New York. *See* Kleps, *supra* note 76, at 766 n.4; *see also* Rosamond Parma, *The History and the Adoption of the Codes of California*, 22 LAW. LIBR. J. 8, 12 (1929).

80 1850 Cal. Stat. 377.

81 *Id.* at 332.

82 Kleps, *supra* note 76, at 766.

83 *Id.* at 766 n.4.

84 Sesler v. Montgomery, 21 P. 185, 185 (Cal. 1889).

85 *See generally* Izhak Englard, Li v. Yellow Cab Co.—*A Belated and Inglorious Centennial of the California Civil Code*, 65 CALIF. L. REV. 4 (1977) (analyzing historical basis for common law creativity in comparative negligence cases).

86 *See infra* Part II(A).

87 *See generally* Kleps, *supra* note 76, at 766–67. The primary document substantiating the decision is a report by the California Senate Committee on the Judiciary. *See* CALIFORNIA SENATE COMMITTEE ON THE JUDICIARY, REPORT ON CIVIL AND COMMON LAW, 1 Cal. 588, 588–604 (1850). Although Kleps interpreted the report as a "stirring defense of the common law system," Kleps, *supra* note 76, at 766, another authority viewed the report as a "vehement dismissal" of the civil law that evinced an intent to create a "cultural barrier." Susan Scafidi, *Native American and Civic Identity in Alta California*, 75 N.D. L. REV. 423, 439 (1999).

88 In view of the need for firm and settled legal principles in the difficult days of early statehood, it is not unreasonable to speculate that even those who advocated "common law" systems preferred codification. In that sense, they became *de facto* advocates of statutory primacy—and adopted a "civil law" perspective for the "common law" principles they valued. Indeed, if, as Professor Scafidi opines, the Senate majority's intent was to create "cultural barriers" by rejecting the civil law system, the codification of common law rules might be construed as an attempt to ensure the continued

to replace the abandoned Civil Code with statutes enshrining many common law principles they valued from the United States and its territories. Unlike common law nations,[89] civil law systems[90] generally eschew judicial discretion. Common law legal principles reflect a "preference for pluralism" and the "prominence of 'reasonableness'"—qualities that are largely foreign to civil law jurisprudence.[91] Unlike the civil law, the common law does not always insist on the "right answer"; instead, only a reasonable approach is required, defined as an approach that accepts that a problem may have "many reasonable answers" depending on a controversy's facts.[92] Civil law systems, on the other hand, primarily depend upon specific statutes, regulations and rules—principles adopted in the parliamentary process and enforced by a relatively inflexible judiciary.[93] Whatever their reasoning, the first Legislature decided to give the "common law" a framework that, to a greater or lesser extent, appeared to *guarantee* the applicability of certain legal rules, rather than depending on the courts to recognize them on a case-by-case basis.

Although the Mexican Civil Code did not officially survive in California, the primacy of codified laws regarding certain issues nevertheless persisted after its demise, and led to the creation of a "hybrid" system that was neither fully codified nor completely "common law."[94] Despite the decision to adopt a common law

prominence of the majority's traditions. Scafidi, *supra* note 87, at 439.

89 Common law systems exist today in Australia, Canada, Great Britain, Ireland, New Zealand, and the United States, and have "substantial influence on the law of many nations in Asia and Africa." JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITIONS: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 4 (1969). The traditional date marking the beginning of the common law is 1066 A.D., the year of the Norman Conquest. *Id.*

90 The civil law tradition is the dominant legal structure in most of Western Europe, all of Central and South America, substantial portions of Asia and Africa, and "a few enclaves in the common law world (Louisiana, Quebec, and Puerto Rico)." *Id.* at 3. It dates back to at least 450 B.C., the approximate date when the XII Tables of Roman Law were published. *Id.* at 2–3.

91 George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683, 699 (1998).

92 *Id.*; *see also* George C. Christie, *Some Key Jurisprudential Issues of the Twenty-First Century*, 8 TUL. J. INT'L & COMP. L. 217, 230 (2000).

93 MERRYMAN, *supra* note 89, at 23–24 (noting that, consistent with Roman and French legal traditions, written constitutions, specific statutes and decrees, criminal, civil and commercial codes, as well as international treaties, generally constitute the *exclusive* sources of law in civil law nations, as opposed to judicial precedents).

94 Scafidi, *supra* note 87, at 440; *see also* Gordon Morris Bakken, *Mexican and American Land Policy: A Conflict of Cultures*, 75 S. CAL. Q. 237, 237 (1993); Iris H.W. Engstrand, *The Legal Heritage of Spanish California*, 75 S. CAL. Q. 205, 231 (1993); Iris H.W. Engstrand, *California Ranchos: Their Hispanic Heritage*, 67 S. CAL. Q. 281, 281–90 (1985); Myra Ellen Jenkins, *Spanish Land Grants in the Tewa Area*, 47 N.M. HIST. REV. 113 (1972).

system, the banishment of the Mexican legal system was "neither absolute nor immediate,"[95] and "fragments of civil law penetrated the 1850 common-law barrier, at least in the area of property law."[96] For example, although the Mexican-American War threw the Mexican "Alcalde system" of local administration into disarray, the system was restored by the American military government.[97] Wherever a population of Americans assembled, an American Alcalde was formed.[98] Significantly, the California Supreme Court recognized these Alcaldes and melded them into the state's legal system using common law techniques.[99] The court also applied civil law principles to resolve disputes.[100] Hence, aspects of the civil law persisted "by preference and legal necessity for some time after California" adopted a common law system.[101]

iii. The Interpretation of California's Codes

The first Legislature's initial codification was quickly deemed imperfect. Less than two years after the first session, state officials began calling for "an entire revision" of the code,[102] and the debate raged almost continuously throughout California's first twenty years of statehood.[103] During those

95 *See* Scafidi, *supra* note 87, at 439.

96 *Id.* at 428.

97 *Id.* at 440.

98 "On every bar, and in every gulch and ravine, where an American crowd was collected, there an American Alcalde was elected." Scafidi, *supra* note 87, at 440. The American Alcaldes imitated their Hispanic predecessors by resolving disputes informally and assigning land grants. *Id.* The system was described as "'inartificial and rude' but 'wonderfully efficient.'" *Id.*

99 *See, e.g.*, Reynolds v. West, 1 Cal. 322, 328 (1850) (affirming land grant as part of Alcalde functions); Mena v. LeRoy, 1 Cal. 216, 220 (1850) (recognizing judicial powers of Alcaldes).

100 *See* Sunol v. Hepburn, 1 Cal. 254, 255–56 (1850) (applying both Mexican and common law to resolve property disputes).

101 Scafidi, *supra* note 87, at 440. Civil law principles, therefore, continued to permeate California law, even though community property rights, as a component of marital relationships, were the only element of the civil law expressly preserved by California legislators. *See generally* Dana V. Kaplan, *Women of the West: The Evolution of Marital Property Laws in the Southwestern United States and Their Effect on Mexican-American Women*, 26 WOMEN'S RTS. L. REP. 139, 153–54 (2005) (discussing importance of retaining civil law community property rules to ensure stability of property rights and avoiding political problems associated with depriving women of property vested under Mexican law).

102 Kleps, *supra* note 76, at 767.

103 In 1863, Governor Leeland Stanford delivered a particularly colorful plea for reform, remarking that:

> [c]itizens not versed by constant familiarity with their contents, and desirous of investigating the laws, stand aghast as they survey the fourteen ponderous tomes that constitute the statutes of this youthful state, and young aspirants to professional fame tremble as they cross the threshold that leads into this intricate abyss.

years, all attempts to revise the early codes were unsuccessful, but eventually an agency was created in 1870 to revise and codify all of California's laws.[104] Ultimately, a comprehensive code was enacted in 1872, and it was hailed as "an example which will be speedily followed by all her sister states, adding new laurels to the fame which she has already so justly acquired."[105] Thus began California's extended affair with comprehensive codification—an affair whose long and tortured history has already been chronicled by others in masterful detail.[106]

It is important to note that the tension between California's codifications and traditional "common law" ideas has produced a unique jurisprudence—one which, in the context of public nuisance, creatively accommodates both statutory primacy and the common law. The intersection between statutory and common law, which has been decisive in resolving attempts to transmute public nuisance principles in other states,[107] is even more critical in California. Previously, we have written about the great legal "tapestry" that exists in America, woven with strands of legislative enactments, administrative regulations, and the common law.[108] All modern courts construing this network of principles are necessarily influenced by their interrelationships,[109] but no American courts have a longer history of working within the tapestry than those of California. California was the very *first* state in America to codify its laws comprehensively.[110] In California, unlike many other common law jurisdictions, codes have *always* been an essential part of the legal system. As a result, the interaction between California's codes and common law principles has more than historical interest.[111] Indeed, the dynamic interplay between codified and common law is so compelling that "[i]t is difficult, if not impossible, to find another topic in American legal history with

Kleps, *supra* note 76, at 769; *see also* Parma, *supra* note 79, at 13.

104 *See* Kleps, *supra* note 76, at 768–72.

105 3 APPENDIX TO JOURNALS OF SENATE AND ASSEMBLY OF THE NINETEEN SESSION OF THE LEGISLATURE OF THE STATE OF CALIFORNIA 8 (Sacramento, T.A. Springer 1872).

106 *See generally* Aniceto Masferrer, *The Passionate Discussion Among Common Lawyers About Postbellum American Codification: An Approach to Its Legal Argumentation*, 40 ARIZ. ST. L.J. 173, 245–56 (2008); Kleps, *supra* note 76, at 766; Parma, *supra* note 79, at 12.

107 State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 445–47, 455–56 (R.I. 2008).

108 Faulk & Gray, *supra* note 1, at 952, 1014.

109 *Id.* at 1010–13.

110 Masferrer, *supra* note 106, at 246.

111 *See* Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435, 502–06, 511–13 (2000).

so many and different implications and consequences for the development of American law and jurisprudence."[112]

Although California plainly intended that its early codifications should control over common law principles to the extent of a conflict, the codes were plagued by uncertainties, vagueness, and incompleteness.[113] They were severely criticized for those conditions, but the Legislature generally failed to revise and correct them promptly and adequately.[114] For this reason, promoters of the codes advocated a compromise between statutory primacy and the common law. The compromise suggested that courts could, for the time being, cure the codes' deficiencies by construing them, when possible, consistently with common law principles. As John Norton Pomeroy, one of the compromise's architects,[115] stated:

> We thus reach the conclusion that the element of certainty should not be attained in a code by a sacrifice of all these other peculiar features which belong to the common law; but on the contrary, these distinguishing excellencies of the common law should be preserved and maintained in connection with the "certainty" which, it is claimed, accompanies statutory legislation.[116]

Pomeroy, a professor at the University of California Hastings College of the Law, was one of the greatest advocates of codification,[117] and he clearly believed that the common law and the codes were compatible.[118] He was concerned, however, that the authors of California's Civil Code had not sufficiently defined and retained many material aspects of the common law.[119] To

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112 Masferrer, *supra* note 106, at 173. Although other states may not share California's lengthy history of codifications, most jurisdictions have woven their own complex "tapestries" as legislative, executive and judicial branches have become more interactive over the past century. For that reason, the California model may provide insights into how the judiciary can maintain the traditional "separation of powers" while accommodating the necessary influences of statutory and regulatory law.

113 *See id.* at 247.

114 *See id.*

115 *Id.* at 248–49.

116 JOHN NORTON POMEROY, LL.D., THE "CIVIL CODE" IN CALIFORNIA 54 (New York, Bar Association Building 1885).

117 *See* David Dudley Field, *Codification—Mr. Field's Answer to Mr. Carter*, 24 AM. L. REV. 255, 265 (1890) (stating that Pomeroy was one of the "most pronounced advocates of the codification of private law, and continued to be so to the end of [his life]").

118 POMEROY, *supra* note 116, at 52–59 ("All the really able jurists of the highest authority in England and in this country, who have advocated the system of codification, have expressly recognized and fully admitted this peculiar excellence of our common law. They have insisted that the same excellence *can* be preserved in a code; and that a national code, in order to accomplish its beneficial design, should be drawn up by its authors, and interpreted by the courts, so as to preserve this distinctive feature of the common law, *in connection with the element of certainty belonging especially to codification*.") (second emphasis added); *see also* Masferrer, *supra* note 106, at 249 n.439.

119 POMEROY, *supra* note 116, at 58–59 ("[The Code] does not purport to embody the

cure this problem, he proposed that the courts interpret the codes consistently with the common law, "regarding the code[s] as being declaratory of the common law's definitions, doctrines and rules."[120]

Pomeroy's compromise therefore incorporated *both* statutory primacy and common law principles as a means to interpret and, if necessary, develop and clarify the Code's provisions. Clearly, in the Code's incomplete and ambiguous state, courts could not regard the text alone as the only authority.[121] He therefore derived a "fundamental proposition" that provided:

> Except in comparatively few instances where the language is so clear and unequivocal as to leave no doubt of an intention to depart from, alter, or abrogate the common law rule concerning the subject-matter, the courts should avowedly adopt and follow without deviation the uniform principle of interpreting all the definitions, statements of doctrines, and rules contained in the code in complete conformity with the common law definitions, doctrines, and rules, and as to all the subordinate effects resulting from such interpretation.[122]

In this manner, the power of the Code as a statute guaranteeing "certainty" was maintained—together with the flexibility of common law courts to construe "new, hitherto unused, and ambiguous phraseology" as not intended to change existing rules "unless the intent to work such a change was clear and unmistakable."[123] Since the new California Code contained many departures from the common law,[124] Pomeroy's thesis

entire jurisprudence of the State; it contains only portions of that jurisprudence, and even those portions are given in a fragmentary manner."). This was a "clear defect" of the Code, which required "constant support from the courts." Masferrer, *supra* note 106, at 250 n.444.

120 Masferrer, *supra* note 106, at 250.

121 *Id.* at 252.

122 POMEROY, *supra* note 116, at 51. This idea was not especially novel or revolutionary. David Dudley Field proposed a comparable interpretative approach for his New York codification in 1865. *See* DAVID DUDLEY FIELD, THE CIVIL CODE OF THE STATE OF NEW YORK xix (Albany, Weed, Parsons & Co. 1865) ("[I]f there be an existing rule of law omitted from this Code, and not inconsistent with it, that rule will continue to exist in the same form in which it now exists . . . and if new cases arise, as they will, which have not been foreseen, they may be decided, if decided at all, precisely as they would now be decided, that is to say, by analogy to some rule in the Code, or to some rule omitted from the Code and therefore still existing, or by the dictates of natural justice."). Pomeroy, like Field, clearly insisted on statutory primacy whenever the Code's language required it, and deferred to the common law when the Code's language necessitated it.

123 POMEROY, *supra* note 116, at 50; *see also* Masferrer, *supra* note 106, at 252–53.

124 Indeed, the Code's many alterations of common law rules made it a "radical" instrument to some observers. *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960, at 118 (1992); *see also* Lewis Grossman, *Codification and the California Mentality*, 45 HASTINGS L.J. 617, 620 n.15 (1994) ("It is important to note that there were more than a few departures from the common law in the California Civil Code, reflecting substantive innovations contained in the Field Code (which served as the Californians' model) and in previous California statutes and case law.").

elegantly empowered the Code's new ideas, guaranteed the stability of surviving common law principles, and provided guidance to courts entrusted with interpreting and applying its rules.[125] His reasoning proved so persuasive that California courts explicitly adopted it in 1888.[126] As a result, the compromise between statutory primacy and common law was formally enshrined in California's jurisprudence, where it remains today as a declaration of democratic priorities and a guide for judicial discretion.

Since 1901, history has demonstrated that California's codes are no less dynamic than the common law itself. As Kleps so aptly observed, "[i]f any rule is to be deduced from California's one hundred years of statutory revision, it is that change is the condition of our existence and that a continuous modification of our statutes must be expected."[127] Because of this dynamism, and because of the state's historic roots in statutory primacy, California's judiciary is continuously refreshed, informed and guided by the people's representatives regarding codified concerns—perhaps more so than the courts of any other state. Indeed, as we have seen with recent decisions, the people may even instruct them directly by propositions.[128]

As a result of these situations, California courts seldom truly wear a pure "common law" hat. Instead, depending on the issue and the degree to which it has been clearly stated in the Code, courts operate as an integrated part of a collaborative system of justice—a system that is "separate" in terms of their exclusive power to decide cases and controversies within their jurisdiction, but not "distinct" because their "common law" creativity and

125 "Pomeroy's reputation as the man who killed the California Civil Code" and as the "chief enemy of the California codification movement" is unwarranted, principally because his compromise *saved* Californians from excessively rigid and uninformed applications of an otherwise incomplete and dangerously vague codification. Grossman, *supra* note 124, at 619–20 (noting Pomeroy's reputation as the Code's "greatest nemesis," among other misleading titles).

126 Sharon v. Sharon, 16 P. 345, 350, 354–55 (Cal. 1888); *see also* CAL. CIV. CODE § 5 (1876) ("The provisions of this Code, so far as they are substantially the same as existing statutes or common law, must be construed as continuations thereof, and not as new enactments.").

127 Kleps, *supra* note 76, at 802.

128 *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384, 453 (Cal. 2008) (holding that statutes defining marriage as between a man and a women are unconstitutional), *abrogated by* Strauss v. Horton, 207 P.3d 48, 59, 120, 122 (Cal. 2009) (upholding constitutionality of Proposition 8, a ballot initiative adding section 7.5 to article one of the California Constitution, providing that "[o]nly marriage between a man and a woman is valid or recognized in California"). Nonetheless, a Federal District Court in San Francisco overturned Proposition 8 holding that it violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 991, 995, 1003 (N.D. Cal. 2010). This case is currently on appeal in the Ninth Circuit Court of Appeals.

flexibility is informed and influenced by legislative and regulatory provisions, and at times, directed by legislative primacy.

iv. The Intersection of Statutes and the Common Law

Although the "common law" may have originated within the judiciary, citizens have increasingly imposed legislative and regulatory policies to guide and regulate its discretion. These began as early as the Magna Carta, proceeded through the industrial revolution, and matured into today's complex legislative and regulatory environment. In today's legal landscape where conduct and business activities are thoroughly regulated by statutes and administrative rules, there are comparatively few areas where a "common law" court is free to act without legislative influence.[129] Over the last century, common law and codification systems began to converge. To a greater or lesser extent, codified systems departed from their rigidity and became more "fact-specific" in their approaches, and common law systems increasingly stressed the advantages and importance of "structure, coherence, and predictability" in judicial administration.[130] Today, scholars recognize that societies and economies are so "complex and interrelated" that jurists need to draw upon the universe of common law and statutory codifications to administer justice effectively.[131] Accordingly, the influence of statutory primacy in California's judicial system may be distinctive, but it would be a mistake to presume that it is a completely unique phenomenon.

In California, statutory priorities were incorporated into the very foundations of the state's legal system, and there literally is no point in the state's history when judicial discretion has been governed exclusively by common law traditions. When the legislative and executive branches act to codify or modify common law rules by defining expectations, the judiciary cannot

129 *See* Arthur T. von Mehren, *Some Reflections on Codification and Case Law in the Twenty-First Century*, 31 U.C. DAVIS L. REV. 659, 660 (1998) ("Codification and case law embody two contrasting, yet complimentary, principles of justice. . . . In every legal system, regardless of where it falls on the spectrum between a pure system of codified law and a pure system of case law, the principles of these two approaches are in tension.").

130 *Id.* at 667.

131 *Id.* at 670 ("The experience of the twentieth century makes clear that, as societies and economies become increasingly complex and interrelated, legal orders need to draw on both the civil-law and the common-law traditions in thinking about law and its administration. . . . The twenty-first century will doubtless witness a continuation of this tendency."); *see also* Lewis A. Grossman, *Langdell Upside-Down: James Coolidge Carter and the Anticlassical Jurisprudence of Anticodification*, 19 YALE J.L. & HUMAN. 149, 163 (2007) ("Modern civil law theorists . . . have assumed an increasingly flexible attitude toward traditional civil law principles.").

ignore the impact of these statutes and regulations merely because the plaintiff's cause of action originated at "common law." More so in California than anywhere else in America, the common law does not operate in a vacuum, but rather exists within a dynamic and interactive democracy that informs, guides and, at times, constrains its creativity.

As early as 1908, Roscoe Pound was convinced that judges should take a more responsive attitude toward legislation.[132] Pound demonstrated that antiquated ideas, such as "statutes in derogation of the common law are to be construed strictly," were inappropriate, and that courts should refer to the principles set forth by legislators when applying the common law.[133] As he stated:

> Courts are fond of saying that they apply old principles to new situations. But at times they must apply new principles to situations both old and new. The new principles are in legislation. The old principles are in common law. The former are as much to be respected and made effective as the latter—probably more so as our legislation improves.[134]

Justice Harlan Stone demonstrated the continuity of this view in 1936 when he concluded: "I can find in the history and principles of the common law no adequate reason for our failure to treat a statute much more as we treat a judicial precedent, as both a declaration and a source of law, and as a premise for legal reasoning."[135]

Since California's broad codifications in 1850, the opportunity to use statutes as a basis for "legal reasoning"—as opposed to narrow prescriptive or proscriptive devices—has proliferated as a source for adjusting, maintaining, contracting, or eliminating rights and obligations at common law. As we shall see below, public nuisance has been a fertile field for exploring these ideas.[136] Historically, legislative and regulatory enactments have been used to inform and guide the judiciary in the context of property rights, especially those involving expectations that landlords should be responsible for maintaining property in a healthy condition. For example, even

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132 Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 383–84 (1908) (noting with disdain, even at that early date, the "indifference, if not contempt, with which [legislation] is regarded by courts and lawyers.").

133 *Id.* at 387.

134 *Id.* at 406–07.

135 Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 13–14 (1937) ("Apart from its command, the social policy and judgment, expressed in legislation by the lawmaking agency which is supreme, would seem to merit that judicial recognition which is freely accorded to the like expression in judicial precedent.").

136 *See infra* Part II.

Justice Cardozo stressed the importance of legislative policies, such as housing codes. Although the common law imposed no duty to repair, and required tenants to pay rent even when housing was unsuitable, the widespread adoption of housing codes led courts to discard those principles. In one of the first cases to do so, then-Judge Cardozo held that the Code "changed the measure of [the landlord's] burden," and used the statute to guide and inform his decision regarding whether to reform a common law doctrine.[137] Other common law developments regarding the duties landlords owed to tenants adopted the same approach. For example, in allowing tenants to sue landlords for injuries caused by defective premises, Judge Bazelon recognized that legislatively established duties reflect contemporary community values and that "[t]he law of torts can only be out of joint with community standards if it ignores the existence of such duties."[138]

When an alleged public nuisance is involved, and there are legislative and regulatory policies that define and deal with the issue, those policies must be considered before determining who, if anyone, is responsible for creating and, ultimately, for abating a public nuisance on the owner's premises.[139] Such a decision is fundamentally one of public policy, and in the judicial sphere, it can only be explained if it can be plausibly derived from policies that originate outside the courtroom. As Justice Linde explained in his critical article: "[T]he explanation must identify a public source of policy outside the court itself, if the decision is to be judicial rather than legislative. A court may determine some facts as well or better than legislators, but it cannot derive public policy from a recital of facts."[140] According to Justice Linde:

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137 Altz v. Leiberson, 134 N.E. 703, 703–04 (N.Y. 1922).

138 Whetzel v. Jess Fisher Mgmt. Co., 282 F.2d 943, 943–46 (D.C. Cir. 1960)*; see also* Pines v. Perssion, 111 N.W.2d 409, 412–13 (Wis. 1961) ("[T]he legislature has made a policy judgment—that it is socially (and politically) desirable to impose these duties on a property owner—which has rendered the old common law rule obsolete. To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards."); Boston Hous. Auth. v. Hemmingway, 293 N.E.2d 831, 840 (Mass. 1973) ("Thus, we are confronted with a situation where the legislation's 'establishment of policy carries significance beyond the particular scope of each of the statutes involved.'" (quoting Moragne v. States Marine Lines, Inc., 398 U.S. 375, 390 (1970))).

139 *See* People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 614–15 (Cal. 1997) (discussing legislative efforts to address gang activity); State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 438–39 (R.I. 2008) (discussing the legislative response to childhood lead poisoning); *In re* Lead Paint Litig., 924 A.2d 484, 491–94 (N.J. 2007) (reviewing legislative efforts to address childhood lead poisoning).

140 Hans A. Linde, *Courts and Torts: "Public Policy" Without Public Politics?*, 28 VAL. U. L. REV. 821, 852 (1994).

> Style shapes how a court functions as well as how it is perceived. The decisive difference, to repeat, is that legislation is legitimately political and judging is not. Unless a court can attribute public policy to a politically accountable source, it must resolve novel issues of liability within a matrix of statutes and tort principles without claiming public policy for its own decision. Only this preserves the distinction between the adjudicative and the legislative function.[141]

Consistent with this observation, "common law" courts must fully and fairly consider the complete "matrix" of the jurisdiction's statutes, regulations and common law principles before rendering their judgments. In such a complex and interactive environment, courts cannot appropriately rest their decisions solely on "common law" grounds. Courts are not "free" to disregard legislative choices and create their own "common law" remedies merely because the Legislature does not expressly forbid public nuisance liability in a particular context. Especially in California, where judicial creativity in public nuisance cases is restrained by legislative definitions, courts are required to evaluate claims within the context of priorities previously declared by California's elected representatives—and to consider the extent to which those policies would be impacted by its decision.[142]

If such an inquiry is made under California law, the search should predictably result in judicial deference—not wholesale and unilateral "common law" reform. Such questioning will typically expose

> the limits within which courts, lacking the tools of regulation and inspection, of taxation and subsidies, and of direct social services, can tackle large-scale problems of health care for injured persons, of income replacement, of safe housing and products and medical practices, of insurance, of employment, and of economic efficiency.[143]

If, as Justice Holmes counsels, the development of the common law should be "molar [and] molecular,"[144] the wholesale

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141 *Id.* at 855.

142 *See* Harvey S. Perlman, *Thoughts on the Role of Legislation in Tort Cases*, 36 WILLAMETTE L. REV. 813, 859 (2000) ("If a statute was enacted to protect a class of persons from a specified risk, courts should not assume from legislative silence that the legislature meant to reject private liability any more than courts should imply a legislative intent to create liability. Such a protective statute calls for formulation of a principled response, taking into account the respective roles and competencies of the court and the legislature.").

143 *See* Linde, *supra* note 140, at 853.

144 *See* S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) ("I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."); *see also* BENJAMIN N. CARDOZO, LL.D., THE NATURE OF THE JUDICIAL PROCESS 113 (1921) (stating that courts make law only within the "gaps" and "open spaces of the law"). Neither Holmes nor

transmutation of "public nuisance" concepts to authorize, for example, a massive judicially-created, maintained, and controlled public health and environmental bureaucracy—answerable only to a single judge—requires more rumination and digestion than the judiciary alone can prudently provide.

Moreover, when California's historical respect for the primacy of statutory law in public nuisance cases is considered, together with the corresponding deference of the California judiciary in such disputes, such a judicially-created bureaucracy is neither supplemental nor complimentary. If created by judicial fiat, it would effectively displace and usurp the Legislature's prerogative to define the scope and applicability of public nuisance. In such a situation, the "intersection" between statutory and common law, which has been controlled by the Legislature, would be equally patrolled by both the Legislature and the Judicial Branch—an unpredictable and perilous conflict that the founders of California's legal system wisely intended to avoid. As we will see in detail below, to avert this collision, California courts consistently have deferred to the supremacy of the Code in deciding the nature, elements, and application of public nuisance. As discussed more fully below, the California courts should continue to do so.

II. PUBLIC NUISANCE UNDER CALIFORNIA LAW

A. The Civil Code

The beginning point for any study of public nuisance in California must be the Civil Code. Between 1850 and 1872, none of California's statutes addressed the issue of public nuisance. After 1872, however, public nuisance became a creature of statute. Although California's first effort in 1872 to codify the common law of nuisance lasted only two years,[145] the revised

Cardozo can be cited to support deliberate, large-scale reversals of doctrine in the name of public policy.

145 The California Civil Code of 1872 codified and defined nuisance as follows:

> A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either:
>
> 1. Annoys, injures, or endangers the comfort, repose, health, or safety of others; or,
>
> 2. Offends decency; or,
>
> 3. Unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake, or navigable river, bay, stream, canal, or basin, or any public park, square, street, or highway; or,
>
> 4. In any way renders other persons insecure in life, or in the use of property.

CAL. CIV. CODE § 3479 (Sumner Whitney & Co. 1872) (amended 1874); *see also* Kelps, *supra* note 76, at 772–73. Through this language, the California legislature adopted,

1874 law remains essentially unchanged.[146] Today, California's Civil Code defines a nuisance broadly as:

> Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.[147]

The Code further states that a nuisance is a *public* nuisance only if it "affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."[148] It then provides that every nuisance that does not qualify as a "public" nuisance is statutorily deemed to be a "private" nuisance.[149] Both at common law and by statute, a public nuisance is also a criminal offense.[150] The Code provides that "[t]he remedies against a public nuisance are: (1) [a criminal] [i]ndictment or information; (2) [a] civil action; or, (3) [a]batement."[151]

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almost verbatim, New York's Field Code. Jamee Jordan Patterson, *California Land Use Regulation Post Lucas: The History and Evolution of Nuisance and Public Property Laws Portend Little Impact in California*, 11 UCLA J. ENVTL. L. & POL'Y 175, 188–89 (1993).

146 The 1874 Code was amended in 1901, but that amendment was declared unconstitutional and void. 1901 Revisions Act, ch. 157, § 366; *see also* Lewis v. Dunne 66 P. 478, 482 (Cal. 1901). It was successfully amended in 1996 to insert the phrase "including, but not limited to, the illegal sale of controlled substances." 1901 Revisions Act, ch. 658 (A.B. 2970), § 1 (amended 1996) (emphasis omitted).

147 CAL. CIV. CODE § 3479 (Deering 2005). The 1872 Code was amended in 1874. Am. 1873–74, ch. 612, § 284.

148 CIV. § 3480. This section of the 1872 code was amended in 1874 to its current language. The common law also distinguishes between private and public nuisances. The *Restatement (Second) of Torts* defines a public nuisance as "an unreasonable interference with a right common to the general public." RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979); *see also*, Faulk & Gray, *supra* note 1, at 962. The key difference between a public and private nuisance claim is whether the "inconvenience," "damage" or "interference" being complained about is harming the public or private individual. *Id.*

149 CIV. § 3481 ("Every nuisance not included in the definition of the last section [CAL. CIV. CODE § 3480] is private.").

150 People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 607 (Cal. 1997) (noting that "a public nuisance is always a criminal offense"); *see also* CAL. PENAL CODE § 372 (Deering 2008) (stating that it is a misdemeanor to maintain a public nuisance).

151 CIV. § 3491. In civil jurisprudence, these have been the only remedies allowed to address a public nuisance in California since 1880. This section of the Code was enacted in 1872 and amended in 1880. *See* Code Am. 1880, ch. 11, § 1 (adding the remedy of information). An indictment is used to abate the public nuisance and to punish the offenders, while an information is used to "redress the grievance by way of injunction." *Acuna*, 929 P.2d at 603–04 (citing 2 JOSEPH STORY, EQUITY JURISPRUDENCE § 1250 (14th ed. 1918) (1835–36)). In criminal matters, anything that "interfere[s] with the . . . enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons" may be prosecuted as a public nuisance. PENAL § 370.

As can be seen, California's general public nuisance statute retains some of the vagueness that plagued the original common law remedy. It uses terms such as "injurious to health" and "indecent or offensive to the senses" and "any considerable number of persons" when describing a public nuisance.[152] This terminology is problematically imprecise—especially for jurists and fact-finders. What exactly do these terms mean? Just how "injurious," "indecent," or "offensive" does something have to be to be deemed a nuisance? Just how many people need to be affected to be deemed "considerable?" Without legislative clarification, these vague terms seem—at first blush—to be the "gaps" and "open spaces" in which Justice Cardozo noted that courts make law; thus, delegating substantial discretion to judges and juries to find and award relief against persons who create a broadly subjective array of offensive conditions.[153] In a jurisdiction with a different tradition, such a broad statute might serve as an invitation and inspiration for judicial creativity, and it might also encourage creative attorneys and governmental authorities to advocate expansive interpretations and applications.[154] California jurisprudence, however, took a different path.

Consistent with California's traditions, the Legislature has declared and codified many specific forms of conduct to be public nuisances *per se*,[155] thereby illustrating the Legislature's original intent and informing the judiciary regarding how public nuisance claims should be defined. These codified public nuisances generally fall into the following broad categories:

- violating community moral standards;[156]

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152 CIV. § 3479.

153 *See* Cardozo, *supra* note 144, at 113.

154 But even then, every appellate court that has addressed the issue outside of California has refused to accept arguments seeking to creatively expand public nuisance as a common law remedy outside of its traditional limits. *See* State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 455 (R.I. 2008) (agreeing with the New Jersey Supreme Court that if it were "to permit these complaints to proceed, [it] would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance").

155 An activity is a nuisance *per se* when a competent legislative body decides to exercise its police powers by expressly declaring "a particular object or substance, activity, or circumstance, to be a nuisance." Beck Dev. Co. v. S. Pac. Transp. Co., 52 Cal. Rptr. 2d 518, 549 (Cal. Ct. App. 1996).

156 *See, e.g.*, PENAL § 186.22a(a) (West 1999) (buildings or places used to further specified gang activities or criminal conduct are nuisances); PENAL § 11225(a) (operating buildings or places used for illegal gambling, lewdness, assignation, or prostitution); PENAL § 11305 (gambling ships); CAL. GOV'T CODE § 39561 (West 2008) (allowing weeds to grow upon streets, sidewalks, or private property in cities or allowing rubbish, refuse, and dirt to accumulate on parkways, sidewalks, or private property in cities); GOV'T § 61002(g) (graffiti); CAL. HEALTH & SAFETY CODE § 11570 (West 2007) (a "building or place used for

- using or maintaining buildings and/or real property in a manner that threatens the public health or safety;[157]
- possessing or using personal property or improvements in a manner that threatens the public health or safety;[158]
- polluting the environment;[159]
- possessing or using dangerous goods;[160]
- businesses unlawfully operating or violating rules and regulations;[161] and

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the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance" (*i.e.*, drugs)); CAL. VEH. CODE § 22659.5 (West 2000) (authorizing local governmental authorities to adopt pilot program-ordinances declaring vehicles used to solicit prostitution to be public nuisances).

157 *See, e.g.*, PENAL § 11225(b) (operating a bathhouse (*i.e.,* a business that provides spa services, "whirlpool, communal bath, sauna, steam bath, mineral bath, mud bath, or facilities for swimming") that allows conduct that can transmit AIDS); CAL. PUB. RES. CODE § 4171 (West 2001) (conditions that create a fire hazard in building); HEALTH & SAFETY § 2002(j) (unnatural property condition that allows mosquitoes or other vectors to develop, attract, or find harbor); HEALTH & SAFETY § 17060 (substandard labor camp housing); GOV'T § 50485.1 (declaring any structure, tree, or use of land which interferes with airspace required to land or takeoff from an airport to be a public nuisance); GOV'T § 50231 (abandoned excavations); CAL. WATER CODE § 8608 (West 1992) (violating standards established for maintaining and operating levees, channels, and other flood control works); WATER § 8598 (diverting the water from streams in a manner that increases the flow of water in the Sacramento or San Joaquin Rivers); WATER § 305 (uncapped artesian wells); CAL. FOOD & AGRIC. CODE § 5551 (West 2001) (neglected or abandoned crops that pose a menace because of pests, ability to host pests or other condition).

158 *See, e.g.*, FOOD & AGRIC. § 12642 (produce with excess pesticide residue levels and its containers); CAL. STS. & HIGH. CODE § 723 (West 2005) (an encroachment (*i.e.*, building, sign, tower, pole pipe, or fence) over or under a public street or highway); HEALTH & SAFETY § 4762 (the continued use of cesspools in an area being serviced by a sewage treatment system); WATER § 13950-51 (same for Lake Tahoe Basin); PUB. RES. § 4170 (any uncontrolled outdoor fire started without proper precaution to prevent spreading).

159 *See, e.g.*, WATER §§ 31143.2, 31144.2(a) (violating onsite wastewater disposal systems regulations in certain water districts); HEALTH & SAFETY § 5411 (discharging sewage or other waste in any manner which creates contamination, pollution or a nuisance); HEALTH & SAFETY § 5411 (violating on-site wastewater disposal zone regulations); HEALTH & SAFETY § 41700 (allowing detrimental air pollution of any type); HEALTH & SAFETY § 116670 ("[a]nything done, maintained, or suffered as a result of failure to comply with any primary drinking water standard.").

160 *See, e.g.*, PENAL § 12307 (the possession or use of destructive device (*i.e.*, bombs, grenades, explosive missiles, rockets and/or launchers, and weapons of a caliber greater than 0.60 caliber)).

161 Some examples of this category include: (1) operating certain businesses without the appropriate licenses or permits. *See, e.g.*, CAL. BUS. & PROF. CODE § 25604 (West 1997) (keeping, maintaining, operating or leasing any premises used to sell alcoholic beverages to the public); CAL. PUB. UTIL. CODE § 5133(c) (West 2010) (a household goods carrier operating a motor vehicle to move household goods and personal effects without a permit or operating license); PUB. RES. § 3967 (operating a placer mine (*i.e.*, a type of gold mine) without a permit); CAL. INS. CODE § 1845 (West 2005) (unauthorized acting as a life and disability insurance analyst); (2) packing, storing, delivering for shipment, loading, shipping, transporting or selling honey in violation of state provisions. *See* FOOD & AGRIC. § 29731; *see also* FOOD & AGRIC. § 26733 (stating that honey found to be a public nuisance may be seized, condemned and destroyed); FOOD & AGRIC. § 27601 (stating similar rules

- interfering with the use of solar collectors.[162]

Generally, making such declarations requires the legislative body to "consider[] and balanc[e] . . . a variety of factors."[163] A non-exclusive list of some of the factors to weigh in this balancing process are:

- the character of the community, neighborhood or persons being impacted;
- the nature and characteristics of the activity causing the alleged nuisance;
- the distance between the people being impacted and the alleged nuisance;
- the frequency, duration and permanence of the activity causing the alleged nuisance;
- the nature and extent of the injury;
- the ability to "eliminat[e] or reduc[e] the objectionable aspects of the [offending] activity," short of a complete ban;
- whether a more suitable location exists to perform the activity;
- the role and "importance of the activity to . . . the community";
- the amount of money invested in the activity; and
- the amount of time the activity has been occurring at its current location.[164]

In addition to these specific declarations, the California Legislature granted similar authority to local governments.[165] However, the authority granted to local government authorities is not unlimited. If the state Legislature statutorily allows, or

for eggs deemed to be a public nuisance); FOOD & AGRIC. § 43031 (stating similar rules for fruits, nuts, and vegetables); FOOD & AGRIC. § 25556 (same for poultry meat); FOOD & AGRIC. § 52511 (same for agricultural or vegetable seeds); CAL. FISH & GAME CODE § 9007 (West 1998) (unlawful trapping of finfish and crustaceans); (3) unlawful placement or maintenance of advertising on public property. PENAL § 556.3; STS. & HIGH. § 1460(c); BUS. & PROF. § 5461 (non-conforming billboards and other advertising); (4) unlawful maintenance of a junkyard. STS. & HIGH. §§ 754, 756; and (5) wrongfully placed oil or gas wells. PUB. RES. §§ 3600, 3604, 3608.

162 PUB. RES. § 25982 (allowing no shrub or tree to grow to where it "cast[s] a shadow greater than 10 percent of the [solar] collector absorption area . . . at any one time between the hours of 10 a.m. and 2 p.m.").

163 Beck Dev. Co., Inc. v. S. Pac. Transp. Co., 52 Cal. Rptr. 2d 518, 549 (Cal. Ct. App. 1996).

164 Michael M. Berger, *Nobody Loves an Airport*, 43 S. CAL. L. REV. 631, 638 (1970) (citing ROSS D. NETHERTON, CONTROL OF HIGHWAY ACCESS 142 (1963)).

165 *See, e.g.*, CAL. GOV'T CODE § 25120 (West 2003) (giving counties the right to adopt ordinances); GOV'T § 61060 (giving the same right to community service districts); GOV'T § 38771 (giving city legislative bodies the right to declare nuisances); *see also Ex parte* Mathews, 214 P. 981, 982 (Cal. 1923).

requires, an act, condition, or circumstance to exist or occur, then local authorities cannot declare it to be a public nuisance.[166]

B. The Application of Statutory Primacy in Public Nuisance Cases

Although the law of public nuisance is ancient, its use by governmental authorities to enforce public policy is a relatively recent development.[167] As society developed, courts increasingly found complexities of the industrial revolution to be "public nuisances" that should be abated with injunctive relief. Not surprisingly, courts held that "public and social interests, as well as the rights of property, are entitled to the protection of equity."[168] What followed was a "continuous expansion" of the "public nuisance" definition in the United States—to include activities that were not necessarily criminal, and which did not necessarily implicate property rights or enjoyment.[169]

But this "solution" had its own problems. As public nuisance definitions expanded and as injunctions proliferated in the early 1900s, authorities warned about problems caused by using public nuisance to remedy broad societal problems such as over-reaching monopolies, restraint of trade activities, prevention of criminal acts, and labor controversies such as strikes.[170] They argued that the main reasons used to justify allowing governmental authorities to use public nuisance to enforce public policy—its remarkable effectiveness and "that [otherwise] there [is] no adequate remedy provided at law"—are inadequate and its continued expansion would eventually result in abuses that would weaken the judicial system.[171]

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166 *See* CAL. CIV. CODE § 3482 (West 1997) ("Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.").

167 *See* People v. Lim, 118 P.2d 472, 475 (Cal. 1941) (citing Edwin S. Mack, *The Revival of Criminal Equity*, 16 HARV. L. REV. 389, 392 (1903)); *see also* Henry Schofield, *Equity Jurisdiction to Abate and Enjoin Illegal Saloons as Public Nuisances,* 8 ILL. L. REV. 19, 20 (1913).

168 *Lim*, 118 P.2d at 475 (citations omitted).

169 *Id.* (citations omitted).

170 *See, e.g.*, Edwin S. Mack, *The Revival of Criminal Equity*, 16 HARV. L. REV. 389, 392–93 (1903). Mr. Mack observed that courts of equity during that time period failed to observe their traditional jurisdictional limits because of the ever-expanding boundaries of public nuisance law. *Id.* at 397 (noting that the Supreme Court of Georgia enjoined stealing oysters from public beds and the Supreme Court of Texas "sanctioned an injunction to prevent the alienation of a wife's affections").

171 *Id.* at 400–03. These same arguments are again resurfacing as governmental authorities employ public nuisance litigation to address complex problems such as urban violence and public health issues. *See supra* notes 10–12; *see also* Faulk & Gray, *supra* note 1, at 974.

Not long after this warning was issued, the use of public nuisance as a regulatory tool to redress widespread social issues waned, and Congress and state Legislatures intervened to create the beginnings of a regulated society. They enacted a vast tapestry of statutes, often implemented by regulations issued by the Executive Branch, to define minimum societal norms, and they created remedies for violations of these standards. These statutes and regulations included declarations that specific violations of these standards and norms are deemed public nuisances to be enjoined by courts.[172] As a result of these enactments, the "discretion" of equity courts was both informed and curtailed. Judges were required to consider the range of permissible activities and those deemed unreasonable when determining the existence of the nuisance and when designing a remedy. These laws meant that courts were no longer free to ignore applicable legislative enactments or empowered to create their own "flexible judicial remedies."

Although California's traditional reliance on statutory primacy provided a bulwark against unrestricted expansion of public nuisance, it was not immune from such pressures.[173] Eventually, the California Supreme Court addressed the issue of whether public nuisance could be expanded beyond statutory definitions by the "common law" process. Noting the amorphous, vague, and uncertain nature of the term "nuisance," the court concluded in *People v. Lim* that "it is a proper function of the legislature to define those breaches of public policy which are to be considered public nuisances within the control of equity" because what society deems to be a nuisance may change over time.[174] This is particularly true where the activity can be remedied by applying criminal law, unless the Legislature specifically provides for an equitable remedy.[175]

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172 *See, e.g.*, *supra* Part II(A) (listing examples of statutory public nuisances).

173 *See, e.g.*, *Lim*, 118 P.2d at 475.

174 *Id.* at 476 (noting that "[a]ctivity which in one period constitutes a public nuisance, such as the sale of liquor or the holding of prize fights, might not be objectionable in another"); *see also* Schur v. City of Santa Monica, 300 P.2d 831, 835 (Cal. 1956) ("[U]nless the conduct complained of constitutes a nuisance as declared by the Legislature, equity will not enjoin it even if it constitutes a crime."). In *Lim*, a prosecutor asked the court to enjoin the defendant's gambling operations. The prosecutor did not allege that gambling fell within the general nuisance statute set forth in section 3479 of the California Civil Code, but instead claimed that the court was empowered to look outside of California's nuisance statutes to the common law for its jurisdiction, where gambling was historically considered a public nuisance because it encouraged idle and dissolute habits. *Lim*, 118 P.2d at 473–74.

175 *Id.* at 474. The court stated that it is not impermissible to enjoin criminal activity when a clear case is present. But it was concerned about bypassing a criminal trial, thereby depriving the defendant of the protection of the higher standard of proof and leaving open the possibility that the defendant remain criminally liable for the same

The ideas and principles espoused in *Lim* are not antiquated or outdated. Indeed, they were affirmed by the California Supreme Court in the last major public nuisance opinion it issued in 1997,[176] where the court once again expressly recognized the statutory "supremacy" that has permeated California jurisprudence since it was admitted to the Union in 1850.[177] Under these authorities, once the Legislature decides the condition or activity is a nuisance, a court cannot usurp the legislative power by determining that a violation is insignificant.[178] Instead, courts are bound to only determine "whether a statutory violation in fact exists, and whether the statute is constitutionally valid."[179] Courts are not to expand the scope of the tort beyond the limits prescribed by the statute, and are not to decide for itself that a condition outside the statute's intent constitutes a public nuisance.[180]

As a result of these decisions, public nuisance occupies a unique place in California tort jurisprudence insofar as statutory primacy is concerned. For other codified tort concepts, such as negligence, courts have adopted a more "elastic" attitude.[181] As Professor Van Alstyne observed:

> [The Codes'] incompleteness, both in scope and detail, have provided ample room for judicial development of important new systems of rules, frequently built upon Code foundations. In the field of torts, in particular, which the Civil Code touches upon only briefly and sporadically, the courts have been free from Code restraint in evolving the details of such currently vital rules as those pertaining to last clear chance, the right of privacy, *res ipsa loquitur*, unfair competition, and the "impact rule" in personal injury cases.[182]

As a result, regarding most torts other than public nuisance, the Code was interpreted to not only permit, but also *encourage* appropriate common law development:

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activity. *Id.* at 476.

176 People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 606 (Cal. 1997) (stating that "[t]his lawmaking supremacy serves as a brake on any tendency in the courts to enjoin conduct and punish it with the contempt power under a standardless notion of what constitutes a 'public nuisance'").

177 *See Acuna*, 929 P.2d at 606 (discussing the role of the Legislature to "declare a given act or condition a public nuisance" and the Judiciary's need to defer to the Legislature's supremacy to declare the law).

178 City of Bakersfield v. Miller, 410 P.2d 393, 398 (Cal. 1966).

179 *Id.*

180 *Lim*, 118 P.2d at 476 (citation omitted).

181 *See, e.g.*, Li v. Yellow Cab Co., 532 P.2d 1226, 1234–39 (Cal. 1975) (establishing a common law system of comparative negligence in California notwithstanding the Code's provision of contributory negligence defense); Englard, *supra* note 85, at 8.

182 ARVO VAN ALSTYNE, THE CALIFORNIA CIVIL CODE 36–37 (West 1954).

> In short, the Civil Code has not, as its critics had predicted, restricted the orderly development of the law in its most rapidly changing areas along traditional patterns. That this is true is undoubtedly due in large measure to the generality of Code treatment of its subject matter, stress being placed upon basic principles rather than a large array of narrowly drawn rules. In addition, the acceptance of Professor Pomeroy's concept of the Civil Code as a continuation of the common law created an atmosphere in which Code interpretation could more easily partake of common law elasticity.[183]

Relying on this reasoning, statutory primacy generally has not been afforded significant deference in tort cases outside the public nuisance context. For example, the codification of contributory negligence as an "all or nothing" affirmative defense did not prevent the California Supreme Court from creating a common law system of comparative negligence—even though the Code's provisions regarding negligence actions were entirely silent on the subject.[184] It is, therefore, important to understand why, of all torts, the California Supreme Court has chosen to defer to the Code's "statutory supremacy" in refusing to extend the tort of public nuisance.

C. The Relevance of Concerns Regarding "Standardless" Liability

Although no California court has elaborated on the issue, it seems clear that the importance of statutory primacy in public nuisance cases arises from California's aversion to "standardless" liability.[185] According to the California Supreme Court the purpose of the tort of public nuisance is to protect "the public interest in tranquility, security, and protection" from individuals.[186] Citing Montesquieu, John Locke, and James Madison, the court recognized that, with respect to public nuisances, courts are required to balance and reconcile the competing rights of a community's desire for security and protection with individual freedoms.[187] Ultimately, the court said, a principal use of the law of public nuisance is to maintain public order "when the criminal law proves inadequate."[188] It "is

183 *Id.* at 37.

184 *See Li*, 532 P.2d at 1232–33.

185 People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 606 (Cal. 1997).

186 *Id.* at 602–03 (discussing the trade off between the public interest and individual liberty and noting that "[l]iberty unrestrained is an invitation to anarchy"). The court also said that states "not only [have] a right to 'maintain a decent society,'" they have an obligation to maintain one. *Id.* (citing Jacobellis v. Ohio, 378 U.S. 184, 199 (1964)).

187 *Id.* at 603.

188 *Id.* (citing CHARLES DE MONTESQUIEU, THE SPIRIT OF THE LAWS 151 (Thomas Nugent trans., 1975) (1748); JOHN LOCKE, TWO TREATISES OF GOVERNMENT §§ 122, 140, 211, 227 (Peter Laslett ed., 2d ed. 1967) (1689); JAMES MADISON, THE FEDERALIST NO. 51,

a species of catch-all criminal offense, consisting of an interference with the rights of the community at large."[189] This use is reflected in section 370 of the California Penal Code which prohibits any act that is "injurious to health . . . *or* is indecent, *or* offensive to the senses" which interferes "with the comfortable enjoyment of life *or* property" by "an entire . . . neighborhood or a considerable number of persons."[190]

Nevertheless, California's general public nuisance statute seeks to accomplish those ends in extraordinarily vague terms—terms which, because of their fluidity, could create unpredictable liability risks if an unrestrained common law approach is applied. Those risks are exacerbated by the statute's quasi-criminal nature, under which many traditional defenses to private tort claims do not apply. For example, the fact that others are similarly situated, performing the same or a similar activity, or even contributing to create the same nuisance, does not preclude a court from enjoining a defendant to abate the activity that is contributing to the nuisance.[191] Likewise, an established custom or practice may, over time, become unreasonable by threatening public safety or threatening to destroy public rights, thereby creating a public nuisance that cannot be lawfully continued.[192] When this occurs, the

324–25 (Clinton Rossiter ed., 1961) (1788)).

189 People *ex rel.* Clancy v. Superior Court, 705 P.2d 347, 353 (Cal. 1985) (quoting WILLIAM L. PROSSER & W. PAGE KEETON, THE LAW OF TORTS § 86 (W. Page Keeton et al. eds., 5th ed. 1984)).

190 *Acuna*, 929 P.2d at 604 (citing People *ex rel.* Busch v. Projection Room Theater, 550 P.2d 600, 608 (Cal. 1976)); *In re* Englebrecht, 79 Cal. Rptr. 2d 89, 93 (Cal. Ct. App. 1998) (noting the similarity between section 370 of the Penal Code and section 3479 of the Civil Code) (emphasis added).

191 People v. Gold Run Ditch & Mining Co., 4 P. 1152, 1157–58 (Cal. 1884) (stating that just because the court could not say that defendant's operations alone materially contribute to the public nuisance does not preclude the court from abating that defendant's contribution to the public nuisance). It is not a defense to claim "that a great many others are committing similar acts of nuisance. Each and every one is liable to a separate action, and to be restrained." *Id.* at 1158; *see also* Patterson, *supra* note 145, at 191 (describing the importance of *People v. Gold Run Ditch & Mining Co.*). Of course, as the lead paint controversy has revealed in other states, merely providing a legal and useful product does not justify, "create" or "cause" a public nuisance if the condition to be abated is caused by another party's neglect. *See* State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 449–50 (R.I. 2008) (noting that "although defendants need not control the nuisance at all times, they must have, minimally, controlled the nuisance at the time of the damage"); City of Bloomington, Ind. v. Westinghouse Elec. Corp., 891 F.2d 611, 614 (7th Cir. 1989) (noting the absence of cases "holding manufacturers liable for public or private nuisance claims arising from the use of their product subsequent to the point of sale"); *In re* Lead Paint Litig., 924 A.2d 484, 499 (N.J. 2007) (holding that control at the time of the damage is a "time-honored element[] of the tort of public nuisance"); *see also* State *ex rel.* Dresser Indus., Inc. v. Ruddy, 592 S.W.2d 789, 792 (Mo. 1980); Town of Hooksett Sch. Dist. v. W.R. Grace & Co., 617 F. Supp. 126, 133 (D.C.N.H. 1984).

192 Woodruff v. N. Bloomfield Gravel Mining Co., 18 F. 753, 777 (C.C.D. Cal. 1884) ("Mere failure to act—failure to prohibit the acts complained of—is an entirely different

traditional defenses of custom, prescription, and statute of limitations are not available.[193] In this way, the rights of the community may take priority over the rights of individuals—but they do so in ominous ways that override the significance of individual considerations traditionally litigated in private tort actions.[194]

To avoid this jurisprudential minefield, the California Supreme Court wisely chose to defer to statutory primacy:

> [S]ubject to overriding constitutional limitations, the ultimate legal authority to declare a given act or condition a public nuisance rests with the Legislature; the courts lack power to extend the definition of the wrong or to grant equitable relief against conduct not reasonably within the ambit of the statutory definition of a public nuisance. *This lawmaking supremacy serves as a brake on any tendency in the courts to enjoin conduct and punish it with the contempt power under a standardless notion of what constitutes a "public nuisance*."[195]

Hence, in dealing with these quasi-criminal actions, judges are "not wholly free . . . to innovate at pleasure."[196] Indeed, the vagueness of California's general definition of public nuisance raises serious questions regarding whether defendants have "fair warning" regarding whether their conduct is tortious.[197] Additionally, the indefiniteness of the general public nuisance statute—as opposed to the many specific provisions enacted to address particular situations—"creates opportunities for

thing from affirmative action authorizing them. And a failure to prohibit the nuisance and impose penalties does not prevent its being a public nuisance.").

193 CAL. CIV. CODE § 3490 (West 2011) ("No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right."); Eaton v. Klimm, 18 P.2d 678, 680–81 (Cal. 1933) (noting that where a neighborhood has built up around a business, the business must eventually "give way to the rights of the public"); *Gold Run Ditch & Mining Co.*, 4 P. at 1158–59. Even the Legislature's failure to adequately regulate or outlaw the custom does not preclude the court from abating the custom as a nuisance. *Id.* at 1159 (noting that "neither state nor federal legislatures could, by silent acquiescence, or by attempted legislation, . . . divest the people of the state of their [public] right[s] . . . ."); *see also Ex parte* Taylor, 25 P. 258, 259 (Cal. 1890) (citing Hoadley v. San Francisco, 50 Cal. 265 (1875)); *North Bloomfield Gravel Mining Co*., 18 F. at 787 ("[A]t common law, no right could be acquired by prescription to commit, or continue, a public nuisance."); *Id.* at 798 (rejecting the defense of laches because each day the public nuisance exists "affords new grounds for equitable relief"); *Id.* at 800–02 (rejecting the defense of custom).

194 *See* Gifford, *supra* note 15, at 788–89 (discussing the impact of vagueness as exacerbated by other tort doctrines forfeiting traditional defenses in public nuisance cases, particularly when public authorities are plaintiffs).

195 People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 606 (Cal. 1997) (emphasis added).

196 *Cf.* Gifford, *supra* note 15, at 786 (citing CARDOZO, *supra* note 144, at 141) (observing limitations regarding judicial abilities to "create" or "discover" law).

197 *Cf. id.* (citing HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 568–69 (William N. Eskridge & Philip P. Frickley eds., 1994)) (discussing general importance of "fair warning" in jurisprudence).

inconsistent and arbitrary" interpretations—not only by courts, but increasingly by "state attorneys general who file recoupment actions against mass product manufacturers."[198]

In addition to these jurisprudential concerns, judges presiding over a "catch-all criminal offense," such as public nuisance in California, may be constrained, or at least informed and influenced, by concerns that the general statute may be unconstitutionally vague. As the United States Supreme Court has held:

> Vague laws offend several important values. First, because we assume that a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.[199]

Although these vagueness arguments generally apply only in criminal proceedings, their fundamental rationale is also implicated in public nuisance litigation, where generalities may obscure the borders of permissible enforcement.[200] These concerns are especially applicable when public officials file public nuisance claims that target industries in massive recoupment actions.[201]

As a quasi-criminal tort that deals with "community" interests, public nuisance entails problems that, if unrestrained, threaten the democratic process. It is one thing for citizens, through their elected legislators, to define and declare that specified conduct or conditions are public nuisances before the injurious conduct occurs. It is quite another thing, however, for a

198 *Cf. id.* (remarking on difficulties regarding public nuisance litigation generally).

199 Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972); *see also* Rubin v. City of Santa Monica, 823 F. Supp. 709, 713 (C.D. Cal. 1993) (public nuisance ordinance held unconstitutionally vague under *Grayned* standards); Gifford, *supra* note 15, at 787 (quoting and citing Grayned v. City of Rockford, 408 U.S. 104 (1972)).

200 *See, e.g.*, State *ex rel.* Rear Door Bookstore v. 10th Dist. Ct. of App., 588 N.E.2d 116, 120–21 (Ohio 1992) (noting that the test for providing "sufficiently definite warning" in a public nuisance case as "measured by common understanding and practices . . . is particularly applicable in a civil case where the state is granted wider latitude than may be applicable in a criminal case").

201 *See* Gifford, *supra* note 15, at 787 ("When, however, a state's attorney general, a state official, selects an industry and files a massive legal action seeking recoupment for hundreds of millions of dollars against a defendant alleging liability under a particularly vague tort, the principles behind the void for vagueness doctrine are implicated.").

single "common law" judge to declare and impose liability for public nuisances retrospectively. When the Legislature acts, the "community" has spoken in its most authoritative manner, and its enactments necessarily provide "fair notice" to citizens that proscribed conduct will result in liability. When a court rules in a private dispute, however, even with the assistance of a jury, the scope and scale of democratic guarantees are diminished substantially.

An individual judge is not a comparable substitute for a body of elected representatives. There is no meaningful assurance that a court's creative declaration in a controversy framed solely by litigants truly reflects the democratic will of the "community" of citizens—a guarantee that is essential for the promulgation of quasi-criminal standards, such as public nuisance. Unlike legislation, lawsuits are framed by records generated by private litigants, and those records are necessarily limited to disputes between the particular parties, not broad community concerns. The records of such proceedings are constrained by the parties' resources—reserves typically dwarfed by the collective assets of legislative bodies—and courts lack the authority and assets to supplement that record with their own inquiries.[202]

Unless courts are informed by legislation that defines the proscribed conduct, there are serious questions regarding whether they can constitutionally or practically assess "community" interests sufficiently to declare the existence of an unprecedented nuisance, evaluate the causal connections necessary to hold particular parties responsible, or implement abatement orders requiring the cooperation of absent parties.[203] Moreover, as we have seen, there are serious fairness and notice problems associated with imposing quasi-criminal liability for conduct that was previously lawful. As a result, there are powerful reasons for "common law" courts to be cautious about imposing liability in public nuisance cases in contexts where the Legislature has failed to provide adequate definitions of the offensive behavior, especially when liability is imposed retrospectively. These concerns fully justify the California judiciary's profound reluctance to base public nuisance liability on "standardless" behavior, and they strongly support its corresponding deference to statutory primacy in lieu of common law creativity.

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202 *See* Faulk & Gray, *supra* note 1, at 1016 n.353.

203 In Rhode Island, for example, any abatement order dealing with lead paint removal or remediation necessarily would have required the cooperation of property owners who were not parties. Without such cooperation, which could not be constitutionally compelled, any abatement order would be ineffective. *Id.* at 990–92.

CONCLUSION

As this Article has shown, California jurisprudence has carefully policed the intersection between the common law and the legislative sphere throughout its history, particularly in the area of public nuisance. The tort of public nuisance has an extensive track record in California—and that record demonstrates an aversion to collective liability under "standardless" notions of what constitutes a public nuisance. The California Supreme Court has consistently insisted that public nuisances involve specific issues affecting specified properties, not generalized concerns affecting more nebulous interests.[204]

Consistent with this narrow focus, and in line with the State's legal history, the California Supreme Court made a unique commitment to "statutory supremacy" in interpreting and applying public nuisance—a decision designed to *restrain* common law discretion in this vague area—not to encourage it. Accordingly, before a public nuisance may be declared judicially, the impacted properties must be clearly delineated, and the proscribed conduct must be defined primarily by legislative standards—not solely by common law creativity.

Even if these principles are not necessarily voiced in every public nuisance decision, their deferential spirit should inspire a cautious approach. Expanding public nuisance to encompass ordinary claims against product manufacturers, for example, displaces a well-defined and manageable tort—strict product liability—with a vague and "standardless" cause of action constrained only by the imagination of advocates and the ingenuity of judges. Literally any product or any course of conduct that allegedly causes some type of "public health problem" or "environmental problem" may be labeled as a "public nuisance"—irrespective of its original legality—allowing attorneys to create mass suits against entire industries.[205]

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204 *See, e.g.*, People v. Gold Run Ditch & Mining Co., 4 P. 1152, 1155 (Cal. 1884) (declaring hydraulic mining a public nuisance, but only in the limited context of a single mining operation's effect on a single river); Woodruff v. N. Bloomfield Gravel Mining Co., 18 F. 753, 794–96 (C.C.D. Cal. 1884) (addressing other instances of hydraulic mining separately). Even when the judiciary held that gang activity created a public nuisance, the court focused on a discrete neighborhood and the activities being carried out on identifiable public streets and sidewalks. *See* People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 614–15 (Cal. 1997).

205 "Going to court has become the 'American Way' to affect social change." John Alan Cohan, *Obesity, Public Policy, and Tort Claims Against Fast-Food Companies*, 12 WIDENER L.J. 103, 130 (2003) (observing that "[t]he goal of social policy torts is to permit ordinary people to change corporate practices"); *see also* John Gray, *Cheeseburger Wars: No Diet in Courtroom Food Fights*, FT. WORTH BUS. PRESS, June 4, 2004, at 37; Jennifer L. Pomeranz et al., *Innovative Legal Approaches to Address Obesity*, 87 MILBANK Q. 185, 200 (2009) (suggesting that "[t]he sale and vigorous promotion of calorie-dense, nutrient-

Even in the "limited" context of a controversy involving a single product or condition, such as lead paint, the issues extend far beyond the courtroom to encompass many sources of harmful exposures, especially when the alleged nuisance arose many years after the product was sold.[206] In most situations involving product manufacturers and sellers, especially those regarding nuisances allegedly arising from deterioration, it is impossible to find meaningful "affirmative acts" by sellers that truly give rise to the nuisance. Regardless of whether "statutory supremacy" is voiced by the courts, its spirit is evident in the judiciaries' reluctance to extend liability in these situations.

Indeed, it is the very vagueness of public nuisance, and the inherent lack of standards by which offensive conduct can be measured at common law, that motivates the courts to defer to statutory guidance.[207] Because litigation is framed by the pleadings—as opposed to the broader perspective of legislative considerations—courts must focus solely on the litigants before it, and it can consider only the record generated by those parties. When "public" concerns are at issue, courts risk imposing liabilities arbitrarily on some persons merely because they are joined as parties, while unnamed persons escape responsibility solely because the dispute is narrowly framed by the "four corners" of the complaint.[208] Such scenarios entail the same potential abuses that often arise when the judiciary attempts to resolve broad societal issues instead of resolving discrete disputes.[209]

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poor foods, especially if the promotion is geared toward a vulnerable group such as children, when combined with the emerging knowledge of the massive harms associated with obesity, can arguably be deemed a nuisance that can and should be controlled by the courts"); Pelman v. McDonald's Corp. (Pelman I), 237 F. Supp. 2d 512, 519–20 (S.D.N.Y. 2003); Pelman v. McDonald's Corp. (Pelman III), 396 F.3d 508, 510 (2d Cir. 2005); Pelman v. McDonald's Corp. (Pelman V), 452 F. Supp. 2d 320, 326 (S.D.N.Y. 2006).

206 *See* Faulk & Gray, *supra* note 1, at 994–95. *See, e.g.*, Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 869 (N.D. Cal. 2009), *appeal filed*, No. 09-17490 (9th Cir. Nov. 5, 2009) (climate change concerns based upon 150 years of greenhouse gas emissions); Conn. v. Am. Elec. Power Co., 582 F.3d 309, 314 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011) (climate change concerns based on greenhouse gas emissions).

207 *See* People *ex rel*. Gallo v. Acuna, 929 P.2d 596, 606 (Cal. 1997) (noting that courts refuse to grant public nuisance-related injunctions unless they are backed by an act of the legislature).

208 John S. Gray & Richard O. Faulk, *"Negligence in the Air?" Should "Alternative Liability" Theories Apply in Lead Paint Litigation?*, 25 PACE ENVTL. L. REV. 147, 185–88 (2008) (discussing the problem of defining the appropriate market).

209 *Id.* at 195–97. In his comments to section 821B, Dean Prosser, the official reporter, warned that "[i]f a defendant's conduct in interfering with a public right does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act, *the court is acting without an established and recognized standard*." RESTATEMENT (SECOND) OF TORTS § 821B cmt. e (1979) (emphasis added). Dean Prosser's concerns were recently reinforced by one of the reporters for the Third Restatement, Professor James A. Henderson, who warned about the "lawlessness"

These realities expose:

> the limits within which courts—lacking the tools of regulation and inspection, of taxation and subsidies, and of direct social services, can tackle large-scale problems of health care for injured persons, of income replacement, of safe housing and products and medical practices, of insurance, of employment, and of economic efficiency.[210]

In contrast, when the Legislature addresses complex societal problems, it has the power to consider *all* the issues and the role of *all* potentially responsible parties before making public policy decisions. The Legislature can make a complete record because, unlike courts, it is not bound by the narrow record developed by the litigants. Instead, it is empowered to consider all facts and circumstances that contribute to the controversy.

In our system of government, the responsibility for addressing broad societal problems has been entrusted to the political branches of government—and the wisdom of that decision is especially evident when the resolution may have major economic consequences.[211] As an institution, the Legislature "is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon . . . complex and dynamic [issues]."[212] Unlike courts, the political branches can consider all pertinent issues in their entirety through either hearings or required notice and comment procedures. As a result, political policy choices can strike fairer and more effective balances among competing interests, because they can be based on broader perspectives and ample information rather than being limited to issues raised only by litigants.[213] Moreover, in contrast to courts, which lose jurisdiction upon rendition of final

of expansive tort liability, including public nuisance litigation. James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 HOFSTRA L. REV. 329, 330 (2005). According to Professor Henderson, these amorphous tort theories have the potential to be lawless not simply because they are non-traditional or court-made, or because the financial stakes are high. *Id.* at 337–38. "Instead, the lawlessness of [these] aggregative torts inheres in the remarkable degree to which they combine sweeping, social-engineering perspectives with vague, open-ended legal standards for determining liability and measuring damages." *Id.*

210 Linde, *supra* note 140, at 852.

211 *See* Faulk & Gray, *supra* note 1, at 1016 n.353.

212 Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 665–66 (1994); *see also* City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 440 (2002) (acknowledging legislative bodies are "in a better position than the Judiciary to gather and evaluate data").

213 *See* Helvering v. Davis, 301 U.S. 619, 642–44 (1937) (noting that instead of just improvising a judgment when confronted with a national problem, legislatures hold hearings to gather "[a] great mass of evidence" considering the problem from many perspectives and ultimately "supporting the policy which finds expression in the act"); *see also* Timothy D. Lytton, *Lawsuit Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247, 1271 (2000).

judgment, political branches have continuing authority to revisit statutes and rules to modify or tailor their provisions.[214]

Under California's singular principle of "statutory supremacy," public authorities must first demonstrate a legislative source for a public nuisance that adequately sets forth standards by which the claim is defined and applied. Hence, governmental entities pursuing novel claims previously unaddressed by the legislative process are obliged to use the political process to ask that the respective legislative body adopt their solution.[215] Such decisions are fundamentally ones of public policy, and in the judicial sphere, they can only be explained if they are plausibly derived from policies that originate outside the courtroom.[216] These extra-judicial sources are an essential part of California's public nuisance jurisprudence. With them, the flow of jurisprudential traffic can be controlled and the intersection between the branches of government can be traversed without incident. Without them, innovative appeals to common law discretion risk uninformed collisions between governmental branches.

214 *See* Bartnicki v. Vopper, 532 U.S. 514, 541 (2001) (Rehnquist, C.J., dissenting).

215 *Cf.* People v. Lim, 118 P.2d 472, 476 (Cal. 1941) ("Such declarations of policy should be left for the legislature.").

216 Linde, *supra* note 140, at 852–54.

Slapping Criminal Speech: How Evolution of the Illegality Exception Has Impacted California's Anti-SLAPP Statute

Orlando J. Villalba[*]

The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.[1]

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INTRODUCTION

For hundreds of years, democracy proponents have emphasized the need to protect speech. Indeed, many of our country's earliest leaders believed protecting speech was so important that they made freedom of speech the first of all of our fundamental rights secured within the Bill of Rights (and likely would not have approved of the Constitution but for the general understanding that a Bill of Rights would be adopted immediately after ratification).[2] And while the limits of free speech have been tested on numerous occasions in our nation's history, it remains among our most cherished freedoms.

In 1992, California, like many other states, affirmed the importance of protecting speech when it adopted legislation

2 Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 869 (1960).

aimed at curbing so-called "SLAPP" lawsuits.[3] SLAPPs ("strategic lawsuits against public participation") are meritless lawsuits filed for the purpose of repressing free speech and petitioning rights.[4] California's anti-SLAPP legislation sought to provide SLAPP defendants, who were essentially being sued for exercising their free speech rights, a means by which to achieve early termination of lawsuits against them.[5] Anti-SLAPP legislation was initially seen as a great victory for free speech.

But free speech is not always so pleasant and appealing and, perhaps more importantly, does not always render itself so attractive to our protective senses. Inevitably, uncomfortable scenarios cause us to question the extent of permissible speech. What should we do when somebody burns our flag? Or, when somebody speaks in discriminatory tones? Or, when somebody's speech borders on (or even crosses the line of) illegality? It is this last question which seems to have posed particular difficulty for California courts of late, especially as such courts have been called upon ever more frequently to interpret the extent of protection provided by anti-SLAPP legislation.

The instant article addresses what has become known in California as the illegality exception to the anti-SLAPP statute: a court-created carve-out to the anti-SLAPP statute which exempts illegal speech from the statute's protections. Part I of this article provides a brief background to California's anti-SLAPP law, reviewing its historical underpinnings as well as its procedural mechanics. Part II details the development and evolution of the illegality exception, with particular attention to the conflicting and sometimes unpredictable use of illegality (and, in more recent times, criminality) as a means to determine application of the exception. Finally, Part III of this article diagnoses the present and future application of the illegality exception and offers ideas for remediation of the most concerning contradictions in the application of the doctrine.

I. AN OVERVIEW OF CALIFORNIA'S ANTI-SLAPP LAW

A. Historical Development

According to sociologists, the term SLAPP litigation refers to "civil lawsuits that are aimed at preventing citizens from exercising their political rights or punishing those who have done

3 Dixon v. Superior Court, 36 Cal. Rptr. 2d 687, 693–94 (Ct. App. 1994).

4 GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 1–3 (1996).

5 *See, e.g.*, Sipple v. Found. for Nat'l Progress, 83 Cal. Rptr. 2d 677, 682 (Ct. App. 1999).

so."[6] SLAPP suits are "brought to obtain an *economic* advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff."[7] Indeed, the motivation of the SLAPP plaintiff is not to win his or her lawsuit; instead, the plaintiff's true desire is to cause "delay and distraction . . . and to punish activists by imposing litigation costs on them for exercising their constitutional right to speak and petition the government for redress of grievances."[8] An oft-referred to example of a prototypical SLAPP suit is one "filed by a well-heeled land developer trying to silence a neighborhood organization that protests the developer's plans."[9] Additional examples of SLAPP suits typically involve alleged causes of action for "defamation, various business torts such as interference with prospective economic advantage, nuisance, and intentional infliction of emotional distress."[10]

In 1992, the California Legislature responded to the escalating numbers of SLAPP suits by enacting section 425.16 of the California Civil Procedure Code (commonly referred to as the anti-SLAPP statute).[11] In adopting the anti-SLAPP statute, the Legislature observed:

> [T]here has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.[12]

Because otherwise meritless SLAPP suits seek to deplete "'the defendant's energy' and drain 'his or her resources' . . . the Legislature sought 'to prevent SLAPPs by ending them early and without great cost to the SLAPP target.'"[13]

With the enactment of the anti-SLAPP statute, SLAPP defendants were empowered with the ability to file a new type of

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6 Wilcox v. Superior Court, 33 Cal. Rptr. 2d 446, 449 (Ct. App. 1994) (quoting Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506, 506 (1988)), *overruled by* Equilon Enters. v. Consumer Cause, Inc., 52 P.3d 685, 694 n.5 (Cal. 2002).

7 *Wilcox*, 33 Cal. Rptr. 2d at 450.

8 *Dixon*, 36 Cal. Rptr. 2d at 693.

9 Visher v. City of Malibu, 23 Cal. Rptr. 3d 816, 819 (Ct. App. 2005).

10 *Wilcox*, 33 Cal. Rptr. 2d at 449.

11 *Dixon*, 36 Cal. Rptr. 2d at 693.

12 CAL. CIV. PROC. CODE § 425.16(a) (West 2011).

13 Varian Med. Sys., Inc. v. Delfino, 106 P.3d 958, 966 (Cal. 2005) (quoting Simmons v. Allstate Ins. Co., 112 Cal. Rptr. 2d 397, 401 (Ct. App. 2001); Equilon Enters. v. Consumer Cause, 52 P.3d 685, 692–93 (Cal. 2002)).

"special motion to strike."[14] More specifically, subsection (b) of the statute provides that:

> [a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.[15]

In enacting the anti-SLAPP statute, the Legislature identified four categories of "acts" which are protected by the statute, and thus subject to the special motion to strike:

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law,
>
> (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law,
>
> (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or
>
> (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.[16]

Aside from the above general categories of protected acts, the Legislature did not limit application of the provision to any specific types of actions, "recognizing that all kinds of claims could achieve the objective of a SLAPP suit—to interfere with and burden the defendant's exercise of his or her rights."[17] Indeed, "[n]othing in the statute itself categorically excludes any particular type of action from its operation."[18] As a result, the anti-SLAPP statute has been found applicable to a wide range of actions, including breach of contract and fraud claims,[19] defamation claims,[20] malicious prosecution claims,[21] abuse of process claims,[22] and even petitions for injunctive relief.[23]

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14 CIV. PROC. § 425.16(b)(1).

15 *Id.*

16 *Id.* at § 425.16(e).

17 Church of Scientology of Cal. v. Wollersheim, 49 Cal. Rptr. 2d 620, 634 (Ct. App. 1996).

18 Navellier v. Sletten, 52 P.3d 703, 711 (Cal. 2002).

19 *See, e.g.*, *id.* at 713; Midland Pac. Bldg. Corp. v. King, 68 Cal. Rptr. 3d 499, 501 (Ct. App. 2007); Philipson & Simon v. Gulsvig, 64 Cal. Rptr. 3d 504, 507 (Ct. App. 2007).

20 *See, e.g.*, Nygard, Inc. v. Uusi-Kerttula, 72 Cal. Rptr. 3d 210, 213 (Ct. App. 2008); Gilbert v. Sykes, 53 Cal. Rptr. 3d 752, 757 (Ct. App. 2007); McGarry v. Univ. of San Diego, 64 Cal. Rptr. 3d 467, 488 (Ct. App. 2007); Computerxpress, Inc. v. Jackson, 113 Cal. Rptr.

B. Procedural Mechanics

The anti-SLAPP statute seeks to protect SLAPP defendants by providing them a procedure to obtain early dismissal of meritless claims and insulating them from the costs and intrusions of discovery prior to dismissal.[24] This aim is accomplished through several mechanisms provided in the statute.[25]

Initially, the statute limits discovery once a special motion to strike is filed, providing that "[a]ll discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section."[26] This discovery stay generally remains in effect until the court rules on the defendant's special motion to strike.[27] A plaintiff can move for relief from this stay in order to conduct limited and specified discovery, but whether such relief is allowed is subject to the trial court's finding of good cause.[28]

As for the procedure of the motion itself, a special motion to strike allows the trial court to "evaluate[] the merits of the lawsuit using a summary judgment-like procedure at an early stage of the litigation."[29] To encourage this early resolution, the statute allows a defendant to bring its special motion to strike "within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper."[30] Oral argument on the motion "shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing."[31]

2d 625, 632, 649 (Ct. App. 2001); Sipple v. Found. for Nat'l Progress, 83 Cal. Rptr. 2d 677, 685 (Ct. App. 1999).

21 *See, e.g.*, Jarrow Formulas, Inc. v. LaMarche, 74 P.3d 737, 739 (Cal. 2003); Daniels v. Robbins, 105 Cal. Rptr. 3d 683, 688 (Ct. App. 2010); Drummond v. Desmarais, 98 Cal. Rptr. 3d 183, 186–87 (Ct. App. 2009); Sycamore Ridge Apartments, LLC v. Naumann, 69 Cal. Rptr. 3d 561, 567 (Ct. App. 2007).

22 *See, e.g.*, Booker v. Rountree, 66 Cal. Rptr. 3d 733, 735 (Ct. App. 2007); Ramona Unified Sch. Dist. v. Tsiknas, 37 Cal. Rptr. 3d 381, 384 (Ct. App. 2005).

23 *See, e.g.*, City of L.A. v. Animal Def. League, 37 Cal. Rptr. 3d 632, 635 (Ct. App. 2006); Thomas v. Quintero, 24 Cal. Rptr. 3d 619, 621 (Ct. App. 2005); Bernardo v. Planned Parenthood Fed'n of Am., 9 Cal. Rptr. 3d 197, 203 (Ct. App. 2004).

24 *See, e.g.*, *Sipple*, 83 Cal. Rptr. 2d at 682.

25 *Id.*

26 CAL. CIV. PROC. CODE § 425.16(g) (West 2011).

27 *Id.*

28 *Id.*

29 Varian Med. Sys., Inc. v. Delfino, 106 P.3d 958, 966 (Cal. 2005).

30 CIV. PROC. § 425.16(f).

31 *Id.*

In determining whether to strike a claim under the anti-SLAPP statute, the court engages in a two-step analysis.[32] In the first step, "the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity."[33] "A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in [section 425.16] subdivision (e)."[34] If the court finds that defendant has made a satisfactory showing on the first step, the court then must determine "whether the plaintiff has demonstrated a probability of prevailing on the claim."[35] "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute."[36]

In considering the defendant's burden on the first prong, it is important to recognize that "[s]ection 425.16 applies to a cause of action arising from an act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue."[37] Therefore, the most important consideration in the first prong analysis "is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity."[38]

Moreover, the "definitional focus" of this inquiry "is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning."[39] As such, an anti-SLAPP defendant need not necessarily establish its actions are constitutionally protected under the First Amendment as a matter of law.[40] Rather, the

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32 *See* Navellier v. Sletten, 52 P.3d 703, 708 (Cal. 2002); Equilon Enters. v. Consumer Cause, Inc., 52 P.3d 685, 694 (Cal. 2002); Ramona Unified Sch. Dist. v. Tsiknas, 37 Cal. Rptr. 3d 381, 387 (Ct. App. 2005).

33 *Navellier*, 52 P.3d at 708; *Equilon*, 52 P.3d at 694.

34 *Navellier*, 52 P.3d at 708; Braun v. Chronicle Publ'g Co., 61 Cal. Rptr. 2d 58, 61 (Ct. App. 1997).

35 *Navellier*, 52 P.3d at 708; *Equilon*, 52 P.3d at 694. *See also* Computerxpress, Inc. v. Jackson, 113 Cal. Rptr. 2d 625, 632 (Ct. App. 2001) ("[T]he burden shifts to the plaintiff to establish a probability of prevailing, by making a prima facie showing of facts which would, if proved, support a judgment in plaintiff's favor.").

36 *Navellier*, 52 P.3d at 708.

37 Governor Gray Davis Comm. v. Am. Taxpayers Alliance, 125 Cal. Rptr. 2d 534, 540 (Ct. App. 2002).

38 *Navellier*, 52 P.3d at 709.

39 *Id.* at 711. *See also* Church of Scientology of Cal. v. Wollersheim, 49 Cal. Rptr. 2d 620, 634 (Ct. App. 1996).

40 Wilcox v. Superior Court, 33 Cal. Rptr. 2d 446, 449 (Ct. App. 1994). *See also* Oasis W. Realty, LLC v. Goldman, 250 P.3d 1115, 1126 (Cal. 2011); *Navellier*, 52 P.3d at 713;

statute merely requires a defendant to make "a prima facie showing [that] the plaintiff's suit arises 'from any act of [defendant] in furtherance of [defendant's] right of petition or free speech under the United States or California Constitution in connection with a public issue.'"[41] And, in determining whether this showing has been made, a court should emphasize substance over form; it is the "principal thrust or gravamen of a cause of action [that] determines whether the anti-SLAPP statute applies."[42] Indeed, "[t]he anti-SLAPP statute does not apply where protected activity is only collateral or incidental to the purpose of the transaction or occurrence underlying the complaint."[43]

As noted, "the Legislature did not intend that in order to invoke the special motion to strike the defendant must first establish [that his or] her actions are constitutionally protected under the First Amendment as a matter of law."[44]

> Instead, under the statutory scheme, a court must generally presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis, and then permit the parties to address the issue in the second step of the analysis, if necessary. . . . Otherwise, the second step would become superfluous in almost every case, resulting in an improper shifting of the burdens.[45]

Thus, where a defendant meets his burden as to the first prong, the court then proceeds to evaluate the plaintiff's burden on the second prong.[46] In this phase of the analysis, "the trial court must consider facts so as to make a determination whether plaintiffs can establish a prima facie probability of prevailing on their claims."[47] Though the court does not weigh the evidence

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Fox Searchlight Pictures, Inc. v. Paladino, 106 Cal. Rptr. 2d 906, 916 (Ct. App. 2001).

41 *Wilcox*, 33 Cal. Rptr. at 452 (quoting CAL. CIV. PROC. CODE § 425.16(b) (West 2011) (second and third alterations in original). *See also* Paul for Council v. Hanyecz, 102 Cal. Rptr. 2d 864, 870 (Ct. App. 2001), Equilon Enters. v. Consumer Cause, Inc., 52 P.3d 685, 694 n.5 (Cal. 2002); *Wollersheim*, 49 Cal. Rptr. 2d at 630.

42 Cal. Back Specialists Med. Grp. v. Rand, 73 Cal. Rptr. 3d 268, 272 (Ct. App. 2008). *See also* Wang v. Wal-Mart Real Estate Bus. Trust, 63 Cal. Rptr. 3d 575, 585 (Ct. App. 2007); Ramona Unified Sch. Dist. v. Tsiknas, 37 Cal. Rptr. 3d 381, 388 (Ct. App. 2005); Martinez v. Metabolife Int'l, Inc., 6 Cal. Rptr. 3d 494, 499 (Ct. App. 2003).

43 *Rand*, 73 Cal. Rptr. 3d at 272. *See also* Baharian-Mehr v. Smith, 117 Cal. Rptr. 3d 153, 159 (Ct. App. 2010); *Wang*, 63 Cal. Rptr. 3d at 585; Scott v. Metabolife Int'l, Inc., 9 Cal. Rptr. 3d 242, 249 (Ct. App. 2004); Martinez v. Metabolife Int'l, Inc., 6 Cal. Rptr. 3d 494, 499 (Ct. App. 2003).

44 *Paladino*, 106 Cal. Rptr. 2d at 916.

45 Chavez v. Mendoza, 114 Cal. Rptr. 2d 825, 830 (Ct. App. 2001).

46 *See* Oasis W. Realty, LLC v. Goldman, 250 P.3d 1115, 1120 (Cal. 2011); Zamos v. Stroud, 87 P.3d 802, 806 (Cal. 2004); Navellier v. Sletten, 52 P.3d 703, 708 (Cal. 2002); *Equilon Enters.*, 52 P.3d at 694.

47 Blanchard v. DIRECTV, Inc., 20 Cal. Rptr. 3d 385, 398 (Ct. App. 2004) (emphasis omitted).

presented, "it must determine whether plaintiffs have demonstrated evidence which, if credited, would justify their prevailing at trial."[48]

In determining whether the plaintiff has met her burden on the second prong, the court considers whether the plaintiff has "demonstrate[d] that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."[49] However, several cases have held that a plaintiff need only show that her case has "minimal merit" to meet this burden.[50] Despite the statistical confusion this standard might create,[51] upon such a showing of minimal merit, the defendant's motion to strike will be denied and the case will proceed forward in litigation.[52]

II. EVOLUTION OF THE ILLEGALITY EXCEPTION

While litigants pursuing and opposing anti-SLAPP motions must be prepared to address both prongs of the anti-SLAPP analysis, the remainder of this article, with a few exceptions, focuses primarily upon the first prong. A compelling development has taken place over the past ten years with respect to how courts are applying the anti-SLAPP statute to speech and petitioning activity that straddles and sometimes crosses the lines of illegality. California courts have lacked consistency in determining how much protection the anti-SLAPP statute should provide in these instances. As shown below, while California courts initially applied a wide-ranging exclusion to these types of speech and activity, that exclusion appears to be retracting and taking on an air of uncertainty.

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48 *Id*. (emphasis omitted).

49 Matson v. Dvorak, 46 Cal. Rptr. 2d 880, 886 (Ct. App. 1995).

50 *See, e.g.*, *Goldman*, 250 P.3d at 1120; Soukup v. Law Offices of Herbert Hafif, 139 P.3d 30, 51 (Cal. 2006); Jarrow Formulas, Inc. v. LaMarche, 74 P.3d 737, 745 (Cal. 2003); *Navellier*, 52 P.3d at 712.

51 It is true that few ever accuse attorneys of being mathematicians. Judicial adoption of the "minimal merit" standard in anti-SLAPP cases might help explain why. After all, section 425.16(b)(1) provides that an action arising from one's right to petition or exercise free speech will be stricken unless the plaintiff can establish "a probability" of prevailing on the claim in question. CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2011). Merriam-Webster defines "probability" as "the quality or state of being probable," and in turn, defines "probable" as both "supported by evidence strong enough to establish presumption but not proof" and "likely to be or become true or real." ENCYCLOPEDIA BRITANNICA, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 989 (Frederick C. Mish et al. eds., 11th ed. 2008). Something that is probable (or, by extension, presumed or likely) would therefore seem to be of greater reliability than mere "minimal merit." *Id.*

52 *Soukup*, 139 P.3d at 51; *Jarrow Formulas*, 74 P.3d at 745; *Navellier*, 52 P.3d at 712.

A. The Birth of the Anti-SLAPP Statute's Illegality Exception

The first major development in the life of the anti-SLAPP statute's illegality exception occurred in the California Court of Appeal's 2001 decision *Paul for Council v. Hanyecz*.[53] *Paul* involved a political action committee (the plaintiff), which had been formed to assist Paul Christiansen in his bid for reelection to the Laguna Niguel City Council.[54] Defendants were three individuals, whom the plaintiff alleged had wrongfully interfered with Christiansen's candidacy by influencing the election with illegal campaign contributions to Christiansen's opponent.[55] Plaintiff's complaint alleged that defendants' actions amounted to a violation of the Political Reform Act of 1974.[56]

In response to plaintiff's complaint, defendants filed a special motion to strike under the anti-SLAPP statute.[57] In their motion, defendants acknowledged that they did, in fact, engage in actions to subvert the political contribution rules.[58] They did this by having certain family members make contributions to various candidates, then reimbursing their family members for such contributions.[59] Thus, as the court considered the defendants' anti-SLAPP motion, there was no dispute among the parties that defendants had violated the Political Reform Act.[60]

Nonetheless, defendants claimed they were entitled to protection under the anti-SLAPP statute because their actions were done in furtherance of their political speech rights.[61] More specifically, defendants claimed their money laundering was "in furtherance of their constitutional rights of free speech," and arose "out of acts in furtherance of their constitutionally protected conduct."[62] The trial court agreed with defendants and granted their special motion to strike.[63] Plaintiffs appealed, and the court of appeal framed the question on appeal as:

> [W]hether a defendant can properly claim that an action filed against it is a SLAPP suit for which it is entitled to section 425.16 protection, when its conduct involved actions which violate the law; or to put it

53 *See Flatley*, 139 P.3d at 12 (discussing Paul for Council v. Hanyecz, 102 Cal. Rptr. 2d 864 (Ct. App. 2001)).

54 *Paul*, 102 Cal. Rptr. 2d at 867.

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

59 *Id.*

60 *Id.* at 871.

61 *Id.* at 867.

62 *Id.*

63 *Id.* at 868.

> another way, can a defendant successfully assert that although the acts in which it engaged, and which are the subject of the plaintiff's complaint, were illegal, they were done in furtherance of the constitutional rights of free speech or petition for redress of grievances in connection with a public issue and therefore the plaintiff is required, under section 425.16, to meet the predicate showing mandated by that statute?[64]

The court of appeal answered this question by concluding that, "in such circumstances, defendants are not entitled to protection under section 425.16."[65] In reaching this result, the court considered this issue to exist solely within the context of the first prong, noting: "we need not address the second step of section 425.16's two-step motion to strike process because we hold, *as a matter of law*, that defendants cannot meet their burden on the first step."[66]

In engaging in the first prong's "arising from" analysis, the *Paul* court emphasized the policy of the statute in protecting the valid exercise of the constitutional rights of speech and petition. The court acknowledged defendants' contention that their campaign money laundering activity was taken "in furtherance" of their constitutional right of free speech, and that "it is technically true that laundering campaign contributions is an act in furtherance of the giving of such contributions, that is, in furtherance of an act of free speech."[67] However, the court "reject[ed] the notion that section 425.16 exists to protect such illegal activity" as money laundering.[68] As such, defendants had failed to show the court that "plaintiff's suit was brought primarily to chill a *valid* exercise . . . of free speech or petition," and thus had failed to satisfy their burden regarding the first prong's "arising from" requirement.[69]

In the course of reaching its holding, the *Paul* court was remarkably careful in framing how its decision should be understood by future parties and courts.[70] The court made a point to emphasize that its decision "involve[d] a factual context in which the defendants have effectively conceded the illegal nature of their election campaign finance activities for which they claim constitutional protection."[71] As such,

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64 *Id.*
65 *Id.*
66 *Id.* at 870.
67 *Id.* at 871.
68 *Id.*
69 *Id.*
70 *See id.*
71 *Id.*

> there was no dispute on the point and we have concluded, as a matter of law, that such activities are *not* a valid exercise of constitutional rights as contemplated by section 425.16. However, had there been a factual dispute as to the legality of defendants' actions, then we could not so easily have disposed of defendants' motion.[72]

The court warned that, in future cases, where a plaintiff

> contests [the] point [of illegality], and unlike the case here, cannot demonstrate as a matter of law that the defendant's acts do not fall under section 425.16's protection, then the claimed illegitimacy of defendant's acts is an issue which [the] plaintiff must raise *and* support in the context of the discharge of the plaintiff's burden to provide a prima facie showing of the merits of the plaintiff's case.[73]

The *Paul* court further referred to this showing as

> an *additional* burden" which the plaintiff must meet "in the same manner the plaintiff meets the burden of demonstrating the merits of its causes of action: by showing the defendant's purported constitutional defenses are not applicable to the case as a matter of law *or* by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses.[74]

Though the *Paul* court made these final points "[i]n order to avoid any misunderstanding as to the basis for [its] conclusions,"[75] it may have instead created more confusion and uncertainty by its parting words than it would have otherwise. As the court acknowledged, its case was an easy one because the issue of illegality was not contested.[76] Rather than limiting its opinion to the facts before it, however, the *Paul* court continued to opine as to how courts should proceed in the event they encountered different and more difficult facts.[77] Where future cases involve disputed illegality, the court professed, an "additional burden" shifts to the plaintiff to show that defendant is not entitled to the constitutional protections it seeks.[78] By referring to this burden as "additional" to the one already faced by the plaintiff in the context of the second prong, the *Paul* court seemingly created a *third prong* for cases specifically involving speech and petitioning activities which potentially cross the line of illegality.[79] However, given the court's ambiguity as to plaintiff's "additional burden," the third prong is at best amorphous under *Paul*.

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72 *Id.*
73 *Id.* at 871–72.
74 *Id.*
75 *Id.* at 871.
76 *Id.*
77 *Id.* at 871–72.
78 *Id.* (emphasis omitted).
79 *See id.* at 872.

In the years following, *Paul*'s illegality exception was acknowledged and accepted by other appellate courts in California.[80] Indeed, in 2002, California's Fifth Appellate District was faced with an appeal where the plaintiff sought application of the illegality exception.[81] In *Kashian v. Harriman*, a prominent businessman and civic leader (Kashian) sued an attorney (Harriman) for claims of unfair business practices and defamation in connection with several environmental lawsuits filed by Harriman, as well as a letter written by Harriman and later published by the Fresno Bee newspaper.[82]

In response to Kashian's complaint, Harriman filed an anti-SLAPP motion, contending that his litigation activities and letter were absolutely privileged.[83] Kashian opposed the motion primarily on second prong grounds, submitting evidence in support of the claims and arguing that the actions of Harriman were not privileged.[84] The trial court granted the motion, and Kashian appealed.[85] On appeal, Kashian shifted his focus, and argued that, under *Paul*, Harriman was not entitled to relief under the anti-SLAPP statute because the statute does not protect illegal activity.[86] The appellate court, however, noted that the facts in *Paul* were distinguishable because, here, "the legality of Harriman's litigation activities is a matter of considerable dispute."[87] The court went on to add that "conduct that would otherwise come within the scope of the anti-SLAPP statute does not lose its coverage . . . simply because it is *alleged* to have been unlawful or unethical. If that were the test, the statute (and the privilege) would be meaningless."[88] The court, therefore, directed its attention to the second prong before ultimately affirming the trial court's decision.[89]

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80 *See, e.g.*, City of L.A. v. Animal Def. League, 37 Cal. Rptr. 3d 632, 644 (Ct. App. 2006); Huntingdon Life Scis., Inc. v. Stop Huntingdon Animal Cruelty U.S.A., Inc., 29 Cal. Rptr. 3d 521, 535 (Ct. App. 2005); 1-800 Contacts, Inc. v. Steinberg, 132 Cal. Rptr. 2d 789, 801–02 (Ct. App. 2003); Yu v. Signet Bank/Va., 126 Cal. Rptr. 2d 516, 529 n.3 (Ct. App. 2002); Governor Gray Davis Comm. v. Am. Taxpayers Alliance, 125 Cal. Rptr. 2d 534, 541–42 (Ct. App. 2002); Chavez v. Mendoza, 114 Cal. Rptr. 2d 825, 830 (Ct. App. 2001).

81 Kashian v. Harriman, 120 Cal. Rptr. 2d 576, 589 (Ct. App. 2002).

82 *Id.* at 581–84.

83 *Id.* at 584.

84 *Id.*

85 *Id.* at 585.

86 *Id.* at 589.

87 *Id.* at 590.

88 *Id.*

89 *Id.* at 591, 609. Interestingly, though the case involved a disputed allegation of illegality regarding Harriman's petitioning activity, the court did not appear to engage in any "third prong" type of analysis contemplated by *Paul*.

Later in 2002, California's First Appellate District similarly encountered an appeal involving a special motion to strike opposed on the basis of illegal petitioning activities.[90] In *Governor Gray Davis Committee v. American Taxpayers Alliance*, a group supporting the reelection of Governor Gray Davis filed an action against a taxpayers group ("taxpayers") responsible for a television commercial critical of Davis, claiming the taxpayers violated the Political Reform Act's reporting requirements.[91] Taxpayers responded by filing a special motion to strike the complaint, characterizing Davis' claims as "a classic SLAPP suit."[92] After the trial court denied the motion, the court of appeal reviewed the matter *de novo*.[93] In addressing the illegality issue under the first prong analysis, the court observed that this case was again unlike *Paul* in that illegality had not been conceded by the defendant taxpayers, and the evidence did not otherwise conclusively establish illegality.[94] Therefore, the court concluded that the defendant taxpayers had met its burden under the first prong, and the burden shifted to plaintiff Davis to establish a probability of prevailing on the merits.[95]

Interestingly, in turning the matter over to the second prong analysis, the court referenced *Paul*'s guidance in handling matters of disputed illegality.[96] Citing *Paul*, the *Davis* court observed that the "asserted violation of the Political Reform Act by appellant is an issue we must examine in the context of the discharge of the respondent's burden to construct a prima facie showing of the merits of its case."[97] The court then analyzed the scope of the Political Reform Act in the face of the speech protections under the First Amendment.[98] Concluding that the Political Reform Act must be read narrowly to preserve free speech rights, the court found that the plaintiff failed to establish a likelihood of prevailing on the merits.[99] The court's analysis in this respect negated *Paul*'s "additional burden" prophecy, engaging in the continued illegality analysis strictly through the second prong's underlying merits examination. As shown below,

90 *See* Governor Gray Davis Comm. v. Am. Taxpayers Alliance, 125 Cal. Rptr. 2d 534 (Ct. App. 2002).

91 *Id.* at 538.

92 *Id.* at 539.

93 *Id.*

94 *Id.* at 542.

95 *Id.* ("[W]ith the legality of appellant's exercise of a constitutionally protected right in dispute in the action, the threshold element in a section 425.16 inquiry has been established.").

96 *Id.* at 541–42.

97 *Id.* at 542.

98 *Id.* at 551.

99 *Id.* at 551–52.

the *Davis* court's deviation from *Paul* in this manner served as an early example of the inconsistent manner in which the illegality exception would be applied by California courts.[100]

B. The California Supreme Court Endorses the Illegality Exception in *Flatley v. Mauro*

In 2006, the California Supreme Court decided *Flatley v. Mauro*,[101] the landmark case on the illegality exception. With *Flatley*, the court gave even greater legitimacy to the exception, endorsing *Paul*'s analysis and application of the doctrine.[102]

Flatley involved a dispute between an entertainer, Michael Flatley, and an attorney, Dean Mauro, who represented Tyna Marie Robertson (a former paramour of Flatley's).[103] Following a tryst between Robertson and Flatley, Mauro sent a letter to Flatley accusing him of sexually assaulting Robertson.[104] The letter included a draft of an unfiled civil complaint against Flatley for the assault, and further demanded a settlement payment of $100 million.[105] Mauro threatened that if settlement was not reached between the parties, Mauro would disclose various details of the incident and various other personal details about Flatley to the press and several governmental and law enforcement agencies.[106] Mauro continued to make similar demands in several telephone calls with Flatley's attorneys following this letter, where the settlement amount was described as at least "seven figures."[107]

Flatley did not pay Mauro, and Mauro subsequently filed the complaint against Flatley.[108] Mauro and Robertson then appeared on television, recounting the allegations that Flatley had raped Robertson.[109] Robertson later dismissed her claims against Flatley.[110]

Meanwhile, Flatley filed suit against Mauro, alleging civil extortion, intentional infliction of emotional distress, and wrongful interference with economic advantage.[111] The claims

100 *See infra* Parts II(B), II(C), & II(D).
101 Flatley v. Mauro, 139 P.3d 2 (Cal. 2006).
102 *Id.* at 13–14.
103 *Id.* at 5.
104 *Id.* at 6–7.
105 *Id.* at 7–8.
106 *Id.*
107 *Id.* at 8–9.
108 *Id.* at 5, 9.
109 *Id.* at 5.
110 *Id.* at 5 n.2.
111 *Id.* at 5.

were based upon the demand letter Flatley received from Mauro, as well as the telephone calls Mauro made to Flatley's attorneys.[112] Mauro responded to the complaint by filing a special motion to strike under the anti-SLAPP statute.[113] Mauro argued that his communications were "prelitigation settlement offer[s]," and as such, Flatley's claims arose from Mauro's protected right of petition.[114] Though he did not deny sending the letter in question nor did he contest the nature of the telephone calls as described by Flatley, Mauro nonetheless maintained that his activity on behalf of Robertson "amounted to no more than the kind of permissible settlement negotiations that are attendant upon any legal dispute or, at minimum, that a question of fact exists regarding the legality of his conduct," which he claimed precluded a finding of illegality.[115]

Predictably, Flatley opposed the motion.[116] Flatley argued "Mauro's communications constituted criminal extortion and were therefore not protected by the anti-SLAPP statute," and that Flatley "could demonstrate a probability of prevailing on the merits."[117] The trial court denied the motion, and the court of appeal affirmed.[118] "The Court of Appeal held that, because Mauro's letter and subsequent telephone calls constituted criminal extortion as a matter of law, and extortionate speech is not constitutionally protected, the anti-SLAPP statute did not apply."[119] Mauro then appealed to the California Supreme Court.[120]

In an opinion drafted by Justice Moreno, the supreme court relied heavily on *Paul*, devoting five pages of its opinion toward specifically reviewing and analyzing the *Paul* opinion.[121] In the end, the court endorsed *Paul*'s application of the illegality exception:

> We agree with *Paul* that section 425.16 cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition. A contrary rule would be inconsistent with the purpose of the anti-SLAPP statute as revealed by its language.[122]

112 *Id.*
113 *Id.*
114 *Id.* at 9.
115 *Id.* at 21.
116 *Id.*
117 *Id.* at 6.
118 *Id.* at 5.
119 *Id.*
120 *Id.*
121 *See id.* at 10–14.
122 *Id.* at 13.

The supreme court went on to encapsulate the illegality exception as follows:

> [W]here a defendant brings a motion to strike under section 425.16 based on a claim that the plaintiff's action arises from activity by the defendant in furtherance of the defendant's exercise of protected speech or petition rights, but either the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action.[123]

The court also made clear its position that determination of the illegality exception is strictly a first prong matter:

> [W]e emphasize that the question of whether the defendant's underlying conduct was illegal as a matter of law is *preliminary, and unrelated to the second prong* question of whether the plaintiff has demonstrated a probability of prevailing, and the showing required to establish conduct illegal as a matter of law—either through defendant's concession or by uncontroverted and conclusive evidence—is not the same showing as the plaintiff's second prong showing of probability of prevailing.[124]

In turning to the specific facts before it, the court applied the illegality exception to Mauro's detriment. The court noted case law establishing the proposition that extortion is not a constitutionally protected form of speech.[125] The court further observed that the facts establishing extortion were not in dispute since Mauro did not deny sending the letter or engaging in the telephone calls.[126] Therefore, evaluating Mauro's conduct, the court concluded that "the letter and subsequent phone calls constitute[d] criminal extortion as a matter of law."[127] The court relied upon sections 519(2) and (3) of the California Penal Code in emphasizing that "[t]hese communications threatened to 'accuse' Flatley of, or 'impute to him,' 'crime[s]' and 'disgrace' unless Flatley paid Mauro."[128] That the threats were half-couched in legalese, the court noted, does not disguise their essential character as extortion.[129] Because Mauro's actions amounted to extortion as a matter of law, and were therefore not constitutionally protected nor entitled to anti-SLAPP protection,

123 *Id.* at 15.
124 *Id.* (emphasis added).
125 *Id.* at 21.
126 *Id.*
127 *Id.* at 2.
128 *Id.* (quoting CAL. PENAL CODE § 519(2), (3) (West 2011)).
129 *Id.*

the supreme court affirmed the denial of Mauro's special motion to strike.[130]

Notably, although the supreme court's decision was unanimous, Justice Werdegar drafted a concurring opinion in *Flatley*, deviating sharply from the reasoning employed by Justice Moreno and the majority, and strongly cautioning against the adoption of an illegality exception.[131] For one, he argued that such an exception is better left to the Legislature than the Judiciary.[132] He pointed to the Legislature's amendment of section 425.18(h), where it limited "SLAPPback" motions brought by parties whose actions in the underlying case were "illegal as a matter of law."[133] If the Legislature wanted a similar exception with respect to section 425.16, it could have adopted one statutorily.[134]

Justice Werdegar also questioned the breadth of the majority's illegality exception.[135] He feared that, by precluding lawsuits based upon "illegal" actions, perhaps the exception would swallow the entire rule: "[s]ince by definition all conduct sued upon is alleged to be illegal, the majority's assurances that the 'narrow circumstance' . . . for plaintiffs' invoking an illegal-as-a-matter-of-law defense to an anti-SLAPP motion will occur only in 'rare cases' . . . are not convincing."[136]

Justice Werdegar also criticized the practicality of treating the illegality exception solely as a first prong issue: "[t]he standard the majority articulates for its new exception . . . is virtually indistinguishable from the standard we previously have articulated for satisfying the statute's second prong."[137] Justice Werdegar referenced the supreme court's prior opinion in *Navellier v. Sletten*, cautioning that the majority's now conflicting guidance is likely to cause confusion among lower courts. He further added that the similarity between application of the illegality exception and the second prong analysis

> may well sow doctrinal confusion among courts previously given to understand that "any claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise *and* support in the context of the

130 *Id.* at 24.

131 *Id.* at 24–26 (Werdegar, J., concurring).

132 *Id.*

133 *Id.* As discussed more fully below, a "SLAPPback" motion is essentially an anti-SLAPP motion seeking to dismiss a malicious prosecution action brought in response to an earlier action previously dismissed by an anti-SLAPP motion.

134 *Id.*

135 *Id.* at 25–26.

136 *Id.* at 25 (quoting *Flatley*, 139 P.3d at 12, 15).

137 *Id.* at 26.

> discharge of the plaintiff's [secondary] burden to provide a prima facie showing of the merits of the plaintiff's case."[138]

In the end, however, Justice Werdegar agreed that Mauro was not entitled to relief under the anti-SLAPP statute.[139] He concluded that Mauro failed to show that the lawsuit arose from protected speech or petitioning activity.[140] In other words, while the majority concluded Mauro was not entitled to protection because his speech and petitioning activity was illegal, Justice Werdegar found that the lawsuit was not based upon speech or petitioning activity in the first place.[141] The gravamen of Flatley's claims was Mauro's attempt to extort money from him, and, according to Werdegar, such an action does not arise from protected speech or petitioning.[142]

The Werdegar concurrence raised several red flags concerning the application of *Flatley*, *Paul*, and the illegality exception in future cases. Notably, should the judiciary expand on developing this doctrine when the Legislature has not specifically incorporated the doctrine into the anti-SLAPP statute (despite having done so with respect to section 425.18)? And, what exactly does "illegality as a matter of law" mean? Is it not true that every lawsuit potentially involves allegations of illegality? Finally, is the illegality exception truly a first prong issue, or does *Flatley*'s pronouncement of the exception render it identical to the analysis called for under the second prong? As shown below, while some cases have applied *Flatley* and *Paul* with little difficulty or confusion, others seem to fall directly into the pitfalls Justice Werdegar raised, rendering future application of these doctrines inconsistent and perhaps unpredictable.[143]

C. Applying the Illegality Exception Immediately After *Flatley*

i. *Soukup v. Law Offices of Herbert Hafif*

It did not take long to see *Flatley*'s direct impact on other cases. In a companion case to *Flatley*, the California Supreme Court rendered its decision in *Soukup v. Law Offices of Herbert Hafif*,[144] on the same day it announced its decision in *Flatley*. Though *Soukup*'s facts differ from *Flatley*, its decision sheds

138 *Id.* (alteration in original) (quoting Navellier v. Sletten, 52 P.3d 703, 712 (Cal. 2002)).

139 *Id.* at 24.

140 *Id.*

141 *Id.*

142 *Id.*

143 *See infra* Part II(C).

144 Soukup v. Law Offices of Herbert Hafif, 139 P.3d 30 (Cal. 2006).

further clarification on the reasoning and intent underlying the *Flatley* decision.

In *Soukup*, the plaintiff (Peggy Soukup) was a former employee of defendant (Law Offices of Herbert Hafif or "LOHH").[145] LOHH had previously sued Soukup and others for malicious prosecution, among other claims, in an underlying action.[146] Soukup moved to strike that action based upon the anti-SLAPP statute, and the court granted her motion and dismissed LOHH's claims against Soukup.[147]

Following the dismissal of LOHH's claims in the underlying action, Soukup filed a new action against LOHH and others, claiming abuse of process and malicious prosecution.[148] In turn, LOHH and the other defendants moved to strike Soukup's claim based upon the anti-SLAPP statute.[149] LOHH's anti-SLAPP motion created a "SLAPPback" scenario, but, at the time this motion had been filed, the California Legislature had not yet adopted the SLAPPback legislation that exists today.[150] Soukup opposed LOHH's motion, arguing that the underlying activity upon which her suit was based is, by definition, not protected speech because she had already achieved its dismissal by way of her prior anti-SLAPP motion.[151] The trial court ultimately denied LOHH's motion.[152] LOHH appealed and the court of appeal reversed, leading to an appeal to the California Supreme Court.[153]

During the time after the trial court denied LOHH's motion to strike and before the supreme court made its decision, the California Legislature enacted new legislation regarding SLAPPbacks.[154] This legislation sought to protect litigants who had previously been successful in dismissing claims by use of the anti-SLAPP statute and who subsequently filed malicious prosecution actions against their SLAPPers (an action known as

145 *Id.* at 35.
146 *Id.* at 38.
147 *Id.* at 39.
148 *Id.* at 40.
149 *Id.*
150 *Id.* at 35.
151 *Id.* at 40.
152 *Id.* at 41.
153 *Id.* The appellate court first affirmed, but was directed to reconsider its ruling in light of the California Supreme Court's decisions in *Jarrow Formulas, Inc. v. LaMarche*, 74 P.3d 737 (Cal. 2003), and *Navellier v. Sletten*, 52 P.3d 703 (Cal. 2002). *Soukup*, 139 P.3d at 42. Upon reconsideration in light of *Jarrow* and *Navellier*, the court of appeal reversed, leading to Soukup's petition for review to the California Supreme Court. *Id.*
154 *Soukup*, 139 P.3d at 35.

a "SLAPPback").[155] As part of the new legislation, the Legislature incorporated its own illegality exception with respect to special motions to strike SLAPPback suits: "A special motion to strike may not be filed against a SLAPPback by a party whose filing or maintenance of the prior cause of action from which the SLAPPback arises was illegal as a matter of law."[156]

In light of the newly enacted SLAPPback legislation, Soukup argued to the supreme court that LOHH is not entitled to anti-SLAPP relief given the SLAPPback statute's illegality exception.[157] She argued that LOHH's underlying lawsuit was a violation of state and federal law, namely section 1102.5 of the California Labor Code and 29 U.S.C. § 1140.[158] The supreme court disagreed with Soukup insofar as it concluded that she could not establish a violation of these statutes as a matter of law.[159] Both of the statutes were forms of retaliation/whistleblower regulations, which required that she prove the existence of an employer-employee relationship between LOHH and herself.[160] Because Soukup was not an employee at the time the actions had been filed, she could not establish violations of these statutes as a matter of law.[161] Accordingly, the court concluded the first prong of the analysis had been satisfied and the matter would hinge upon a determination under the second prong's probability of prevailing analysis.[162]

Though *Soukup* differentiates itself from *Flatley* in the sense that its decision hinges upon its application and interpretation of section 425.18 of the California Civil Procedure Code, rather than section 425.16, several notable aspects of the opinion shed light upon the court's intention behind *Flatley*. For one, it is interesting to note that Soukup sought to employ the illegality exception based upon two non-criminal statutes.[163] In other words, Soukup's argument completely avoided the question of whether illegality requires criminality in this context. And even though the Supreme Court ultimately disagreed with Soukup's application of the illegality exception, it did so on grounds other than criminality.[164] It would appear to have been much easier for

155 *Id.* at 42–43.
156 CAL. CIV. PROC. CODE § 425.18(h) (West Supp. 2011).
157 *Soukup*, 139 P.3d at 45.
158 *Id.*
159 *Id.* at 48.
160 *Id.* at 48–49.
161 *Id.*
162 *Id.* at 50–51.
163 *Id.* at 45.
164 *Id.* at 49.

the court to dispose of Soukup's argument by noting that the statutes she relied upon were not criminal statutes, and thus she was not entitled to the illegality exception. The fact that the court did not do so may be persuasive support for those who believe that the illegality exception does not necessarily require a showing of criminality.

While the court did not discuss or address criminality, it did bring a new concept into the discussion: specificity.[165] In the process of discussing the meaning and impact of the illegality exception contained in section 425.18(h), the court noted that one aspect of plaintiff's burden in establishing illegality is to identify the illegality with specificity.[166] The court advised that "the plaintiff must identify with particularity the statute or statutes violated by the filing and maintenance of the underlying action."[167] The court further added:

> [A]s part of the plaintiff's burden of demonstrating illegality as a matter of law, the plaintiff must show the specific manner in which the statute or statutes were violated with reference to their elements. A generalized assertion that a particular statute was violated by the filing or maintenance of the underlying action without a particularized showing of the violation will be insufficient to demonstrate illegality as a matter of law.[168]

Therefore, following *Soukup*, a plaintiff who intends to invoke the illegality exception need not necessarily show that the actions in question were criminal, but must provide the particular law establishing the illegality, and the specific manner in which the law was violated.[169]

Finally, on a larger scale, one must question whether *Soukup*'s reasoning even applies to the development of the illegality exception in the context of section 425.16. After all, *Soukup*'s decision is dependent upon its interpretation of the legislatively-provided illegality exception in section 425.18.[170] As Justice Werdegar noted in *Flatley*, if the Legislature wanted this same type of analysis applied in section 425.16, it would have amended the statute to reflect this desire, much the way it implemented the exception in section 425.18(h).[171] On the other hand, *Soukup*'s analysis and reasoning regarding how section 425.18(h) should be interpreted and implemented is largely based

165 *Id.* at 48.
166 *Id.*
167 *Id.*
168 *Id.*
169 *Id.* at 48. *See also* Hutton v. Hafif, 59 Cal. Rptr. 3d 109, 119–20 (Ct. App. 2007).
170 *Soukup*, 139 P.3d at 47–48.
171 Flatley v. Mauro, 139 P.3d 2, 25 (Cal. 2006) (Werdegar, J., concurring).

upon its reading of the *Paul* and *Davis* opinions, both of which were entirely based upon section 425.16.[172] Because those cases shaped the court's interpretation of the legislatively-created illegality exception in section 425.18(h), it seems only natural to use that same interpretation as it applies to the judicially-created illegality exception to section 425.16.

ii. *Novartis Vaccines and Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*

In the months following the *Flatley* decision, potential confusion as to how to apply the illegality exception began to show among California appellate courts.[173] One particular case, *Novartis Vaccines and Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, involved an advocacy group (defendant) who was formed as part of an effort to "expose the abusive treatment of animals" by Huntingdon Life Sciences, a biomedical testing lab.[174] Plaintiff, Novartis Vaccines and Diagnostics, Inc., a biopharmaceutical company, used Huntingdon in testing some of its products.[175] Defendant engaged in a campaign against plaintiff in which it carried out "home visits" to plaintiff's employees, during which defendant's agents terrorized plaintiff's employees by breaking their windows, vandalizing their cars, and setting off alarms in their yards, among other tactics.[176] Plaintiff filed suit against defendant seeking an injunction against those acts.[177]

In response to the complaint, defendant filed a special motion to strike under the anti-SLAPP statute.[178] Defendant did not deny that it engaged in the actions complained of, but rather, claimed that its actions were protected activity under the anti-SLAPP statute because they centered around speech made in a public forum in connection with a matter of public interest.[179] The trial court denied the motion, however, concluding that defendant "had not met its burden."[180]

On appeal, California's First Appellate District relied upon *Flatley* in articulating the application of the illegality exception.

172 *Soukup*, 139 P.3d at 46–47.

173 *See, e.g.*, Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc., 50 Cal. Rptr. 3d 27, 34–36 (Ct. App. 2006); Guzzetta v. City of Desert Hot Springs, No. D049595, 2007 WL 549828, at *6 (Cal. Ct. App. Feb. 23, 2007).

174 *Id.* at 29.

175 *Id.*

176 *Id.*

177 *Id.*

178 *Id.*

179 *Id.* at 30.

180 *Id.* at 35.

Quoting *Flatley*, the *Novartis* court noted that "section 425.16 cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition."[181] With that principle in mind, the court then turned to the facts at hand.

It was at this point the court's analysis began to reveal confusion in applying *Flatley*.[182] The court engaged in a thorough analysis of whether the conduct of defendant amounted to illegality.[183] The court noted that the evidence of defendant's acts was not in dispute, and that defendant had essentially conceded that the attacks on plaintiff's employees were unlawful.[184] As such, the court concluded, the defendant's statements were "not the sort of speech section 425.16 was designed to protect."[185]

What is perhaps most confusing about the *Novartis* opinion is whether it is applying the illegality exception at all. Clearly there was an apparent intent to apply the exception, given the opinion's thorough review of the *Flatley* decision.[186] As we know from *Paul* and *Flatley*, the plaintiff holds the burden of proof in establishing that defendant's purported protected activity is illegal as a matter of law.[187] However, in *Novartis*, the court held that the trial court was correct in concluding that *defendant* "had failed to show that" the complaint was aimed at speech protected by section 425.16.[188] To this end, it appears that *Novartis*' ruling is based upon a failure by defendant to satisfy its burden. However, under *Paul* and *Flatley*, a defendant would never have had the burden of disproving illegality in the first instance. As such, either the illegality exception was applied incorrectly here (*i.e.*, the court improperly placed the burden on defendant instead of plaintiff), or it was not applied at all (*i.e.*, the court determined that it was not speech in the first instance, rather than speech which lost its protection due to illegality).[189]

181 *Id.* at 34.

182 *Id.* at 35.

183 *Id.* at 35–36.

184 *Id.* at 35.

185 *Id.* at 36.

186 *Id.* at 34.

187 *See* Flatley v. Mauro, 139 P.3d 2, 12 (Cal. 2006); Paul for Council v. Hanyecz, 102 Cal. Rptr. 2d 864, 871–72 (Ct. App. 2001).

188 *Novartis*, 50 Cal. Rptr. 3d at 36.

189 Interestingly, another aspect of *Novartis*' application of the anti-SLAPP statute reveals confusion. Once the court concluded that defendant had failed to satisfy the first prong, the opinion went ahead and analyzed whether plaintiff had satisfied its burden on the second prong. *See id.* at 36–39. However, this second prong analysis is superfluous

iii. *Birkner v. Lam*

A year after the *Novartis* decision, California's First Appellate District again addressed the application of the illegality exception in *Birkner v. Lam*.[190] In this case, the defendant, Lam, appealed the denial of his special motion to strike after the trial court concluded the plaintiffs' causes of action were not based upon petitioning activity.[191] Though the trial court did not find that the activity complained of (the service and refusal to rescind a notice to terminate plaintiffs' tenancy) was illegal, it concluded that it did not arise from petitioning activity.[192]

On appeal, the court considered both the "arising from" and illegality arguments.[193] With respect to the former, the court observed that although the prosecution of an unlawful detainer action itself is protected activity under the anti-SLAPP statute, the termination of a tenancy is generally not protected.[194] However, where the service of a termination notice is a prerequisite for filing an unlawful detainer action, as it was in this case, such service does constitute activity in furtherance of a constitutionally protected right to petition.[195] Therefore, the court ruled, defendant's burden on the first prong had been satisfied.[196]

The plaintiff then argued that the protection of the anti-SLAPP statute should nonetheless be denied in this case because Lam's actions in serving the termination notice (in violation of the San Francisco Administrative Control's rent ordinance regulation) were illegal as a matter of law.[197] The court disagreed, holding that the evidence did not "conclusively establish" Lam's conduct was illegal as a matter of law.[198] Notably, the court's ruling did not reference any need for criminality in this context. Rather, the court simply decided that, because the presented evidence failed to show even a violation of the rent ordinance, the illegality exception did not apply.[199] Again, it would seem to have been much easier for the

and extraneous in that failure to satisfy the first prong should mean immediate denial of the motion. There was no need to engage in second prong analysis.

190 Birkner v. Lam, 67 Cal. Rptr. 3d 190 (Ct. App. 2007).

191 *Id.* at 192.

192 *Id.* at 194.

193 *Id.* at 195–98.

194 *Id.* at 195.

195 *Id.*

196 *Id.* at 197–98.

197 *Id.* at 198.

198 *Id.*

199 *Id.*

court to dispose of defendant's illegality argument by simply pointing to the fact that no criminal violations had been asserted.

iv. *Cohen v. Brown*

California's Second Appellate District rendered its first significant decision on the post-*Flatley* illegality exception in *Cohen v. Brown*.[200] This case involved a dispute among two attorneys who were retained to prosecute a personal injury case on behalf of a person injured in a car accident.[201] Brown had been retained at the outset of the underlying case and filed the complaint.[202] Shortly before trial, Brown contacted Cohen to obtain his services in preparing for and trying the case.[203] Cohen claimed, however, that Brown misrepresented the amount of work required on the case and the level of experience Brown had in trying cases such as this.[204] When the case settled before trial, Brown informed Cohen that he would not be getting any portion of the attorney's fees realized from the settlement.[205] Brown further threatened (and later acted upon his threat) to file a complaint with the State Bar against Cohen, in an effort to force Cohen to authorize the release of funds to the underlying plaintiff (with no funds going to Cohen).[206]

Cohen filed suit against Brown for extortion, among other claims.[207] Brown filed a special motion to strike, claiming his actions in furtherance of the State Bar complaint were protected petitioning activity.[208] The trial court denied Brown's motion, concluding that his actions had an "extortive context," and were therefore illegal as a matter of law.[209] Brown appealed.[210]

On appeal, the appellate court relied upon *Flatley* in observing that "extortion is not constitutionally protected speech and thus cannot constitute the 'valid' exercise of speech and petition that is protected by section 425.16."[211] The court went on to conclude that, as in *Flatley*, Brown's actions amounted to extortion under sections 518, *et seq.* of the California Penal

200 Cohen v. Brown, 93 Cal. Rptr. 3d 24 (Ct. App. 2009).
201 *Id.* at 27–28.
202 *Id.*
203 *Id.* at 28.
204 *Id.* at 29.
205 *Id.* at 30.
206 *Id.* at 30–31.
207 *Id.* at 31–32.
208 *Id.* at 32.
209 *Id.* at 34.
210 *Id.*
211 *Id.* at 36 (quoting Flatley v. Mauro, 139 P.3d 2, 21 (Cal. 2006)).

Code.[212] Having determined that Brown's stated basis for relief under the anti-SLAPP statute was not viable, the court ended the inquiry before reaching the second prong.[213] Therefore, although the court did not explicitly address whether criminality must be shown before the illegality exception is applied, the opinion is notable in that it *did* rely upon the violation of the Penal Code before applying the illegality exception.[214]

D. California Appellate Courts Transform the Illegality Exception into a "Criminality" Exception

i. *Cabral v. Martins*

Perhaps in recognition of Justice Werdegar's concern that the illegality exception would swallow the anti-SLAPP doctrine as a whole, or perhaps as a consequence of the ambiguous scope and meaning of the term "illegal as a matter of law," California appellate courts have begun to deviate from the original reasoning in *Paul* and have started to shape the doctrine into a consideration of criminality more than illegality.[215] Though, as shown above, the criminality question indirectly played into several previous decisions, the first opinion to fully commit to the criminality requirement appears to be *Cabral v. Martins*.[216]

Cabral arose from a divorced couple's ongoing dispute over the ex-husband's unpaid child support.[217] Meanwhile, the ex-husband's mother revised her estate plan to disinherit him from her estate.[218] The ex-wife, having had past difficulty in collecting her judgment against her ex-husband, filed suit against, among others, the attorneys who assisted in revising the mother's estate plan.[219] The ex-wife's claim relied upon a California statute authorizing damages against those who assist a child support obligor in avoiding payment obligations (sections 1714.4 and 1714.41 of the California Civil Code).[220] The attorneys filed a

212 *Id.* at 36–37.

213 *Id.* at 37.

214 *Id.*

215 *See, e.g.*, Gerbrosi v. Gaims, Weil, West & Epstein, LLP, 122 Cal. Rptr. 3d 73, 82 (Ct. App. 2011); Ogunsalu v. Gill, No. D057612, 2011 WL 1457190, at *6 (Ct. App. Apr. 15, 2011); Freisleben v. Riper, No. G042825, 2011 WL 940975, at *4–5 (Ct. App. Mar. 18, 2011); Mendoza v. ADP Screening & Selection Servs., Inc., 107 Cal. Rptr. 3d 294, 303 (Ct. App. 2010); G.R. v. Intelligator, 110 Cal. Rptr. 3d 559, 567 (Ct. App. 2010); Roosen v. Farrell, No. B209873, 2010 WL 3371510, at *10 (Ct. App. Aug. 27, 2010); Cabral v. Martins, 99 Cal. Rptr. 3d 394, 403 (Ct. App. 2009).

216 Cabral v. Martins, 99 Cal. Rptr. 3d 394 (Ct. App. 2009).

217 *Id.* at 398.

218 *Id.*

219 *Id.*

220 *Id.* at 399.

special motion to strike the ex-wife's claims, claiming protection under the anti-SLAPP statute.[221] The trial court granted the motion and the ex-wife appealed.[222]

On appeal, the ex-wife sought to employ the illegality exception by arguing that the attorneys' actions cannot be protected because they violated the child support evasion statute.[223] The appellate court disagreed, concluding that even if the attorneys had violated the statute, the ex-wife's argument was without merit.[224] The court believed that the ex-wife's attempted reliance upon *Flatley* and *Paul* was misplaced.[225] *Flatley*, the court noted, was distinguishable from the ex-wife's case because in *Flatley* the court took caution in limiting its holding "to 'the specific and extreme circumstances of [the] case,' in which the assertedly protected communications, as a matter of law, fell outside the ambit of protected speech."[226] The court distinguished *Paul* by noting, in that case, the allegedly protected actions of the defendants "were admittedly illegal, under the provisions of a statutory scheme specifically aimed at confining otherwise protected political activity within constitutionally valid bounds."[227]

The *Cabral* court further pointed out that, unlike in *Flatley* and *Paul*, in Cabral's case "the attorney respondents' actions in the course of the probate proceedings and the litigation defense were neither *inherently criminal* nor otherwise *outside the scope of normal, routine legal services*."[228] The court went on, noting that "[e]ven if the attorney respondents' actions had the effect of defeating or forestalling [the ex-wife's] ability to execute her judgment for child support, thereby (according to [the ex-wife]) violating the child support evasion statutes, this is not *the kind of illegality* involved in *Flatley* . . . and *Paul* . . . ."[229] In light of these observations, the court went on to hold that the attorneys' actions satisfied the first prong's inquiry of the anti-SLAPP analysis.[230]

Though *Cabral* purported to rely upon and apply the reasoning behind *Paul* and *Flatley*, a closer review of the *Cabral*

221 *Id.* at 399–400.
222 *Id.* at 400.
223 *Id.* at 402.
224 *Id.*
225 *Id.*
226 *Id.* (quoting Flatley v. Mauro, 139 P.3d 2, 24 n.16 (2006)).
227 *Id.* at 403.
228 *Id.* (emphasis added).
229 *Id.* (emphasis added).
230 *Id.* at 404.

opinion against the backdrop of *Paul* and *Flatley* reveals a marked deviation from the prior cases. Indeed, as emphasized in the excerpt from the court's opinion above, the *Cabral* court distinguished its case from *Paul* and *Flatley* on the basis that it did not involve inherently criminal behavior.[231] However, *Paul* (which was wholly endorsed by *Flatley*) did not involve any allegation that the defendant had violated the Penal Code or committed any other criminal act. Instead, the plaintiff in *Paul* accused the defendant of violating election laws, not criminal laws.[232] Additionally, nowhere in the *Flatley* decision does the supreme court ever discuss the phrase "inherently criminal." The *Cabral* court seems to have made up the "inherently criminal" standard here.

Moreover, the *Cabral* court fails to offer any explanation as to what it means by actions that are "outside the scope of normal, routine legal services," or what "kind of illegality" is sufficient for the illegality exception.[233] Since *Paul* and *Flatley* never mention these concepts, *Paul* and *Flatley* provide us with no insight as to their meaning. In fact, as many of the anti-SLAPP cases preceding *Cabral* have illustrated, the meaning of the phrase "illegal as a matter of law" already caused a significant amount of uncertainty in this area of law.[234] With *Cabral*'s introduction of additional inquiries regarding the "inherent" criminality of an act, the breadth of scope for "normal, routine services," and the undefined "kind of illegality" deserving of separate treatment over other unspecified types of illegality, it is even less clear what is required to employ the illegality exception after *Cabral* than it was before.[235] Indeed, following *Cabral*, many would reasonably conclude that the illegality exception is simply a discretionary consideration the trial court should employ depending upon the allegations, evidence, and statutory violations in question on a case-by-case basis. The problem with such a conclusion is that, under well-established appellate authority, the standard of review regarding a trial court's anti-SLAPP ruling is *de novo*, not abuse of discretion;[236] and as such, the determination by the trial judge in the first instance simply cannot be one of discretion on a case-by-case basis. Beyond that, however, a trial court's required approach regarding the illegality exception following *Cabral* appears undefined.

231 *Id.* at 403.
232 *Id.* at 402.
233 *Id.* at 403.
234 *See supra* Part II(A)–(C).
235 *Cabral*, 99 Cal. Rptr. 3d at 403.
236 *See* Oasis W. Realty, LLC v. Goldman, 250 P.3d 1115, 1120 (Cal. 2011).

ii. *Mendoza v. ADP Screening and Selection Services, Inc.*

Once *Cabral* planted the flag for a criminality approach to the illegality exception, other cases soon began to cement its stake.[237] One notable example of such a case is found in *Mendoza v. ADP Screening and Selection Services, Inc*.[238] In *Mendoza*, the plaintiff sued an employment-screening company ("SASS"), seeking damages purportedly incurred when the screening company provided information from the "Megan's Law" website to an employer with whom plaintiff had applied for employment.[239] Plaintiff claimed SASS improperly used information from the website for purposes related to employment, which amounts to a violation of sections 290.46(1)(2)(E) and (4)(A) of the California Penal Code, and subjects the company to a civil claim for damages.[240]

SASS responded to the complaint with a special motion to strike, claiming that it had a constitutional right under the anti-SLAPP statute to republish information from the website to its clients.[241] Though SASS admitted to causing the proliferation of this information, it claimed that its actions did not violate the Penal Code section prohibiting "use" of the information for employment purposes.[242] The trial court granted the motion to strike and plaintiff appealed.[243]

On appeal, the court considered, among other issues, whether SASS' actions in using information from the Megan's Law website amounted to illegality sufficient to preclude application of the anti-SLAPP statute.[244] Plaintiff relied upon *Flatley* in arguing that SASS' violation of the applicable Penal Code sections triggered the illegality exception of the anti-SLAPP statute.[245]

The appellate court disagreed, based in large part on its conclusion that "the [California] Supreme Court's use of the phrase 'illegal' [in *Flatley*] was intended to mean criminal, and not merely violative of a statute."[246] The court supported its conclusion with two levels of reasoning. For one, it noted, the

237 *See supra* note 215.

238 Mendoza v. ADP Screening & Selection Servs., Inc., 107 Cal. Rptr. 3d 294 (Ct. App. 2010).

239 *Id.* at 298–99.

240 *Id.* at 298.

241 *Id.* at 299.

242 *Id.*

243 *Id.* at 300.

244 *See id.* at 301–03.

245 *Id.* at 302–03.

246 *Id.* at 303.

Flatley court applied the illegality exception upon a finding that Mauro had engaged in criminal extortion, punishable under the Penal Code.[247] Second, the court reasoned, *Flatley* could not have intended for just any statutory violation to trigger the illegality exception because such an approach would undermine the anti-SLAPP statute in the first place.[248] The court opined that, because a "plaintiff's complaint *always* alleges" some illegal conduct, a mere statutory violation would give the plaintiff too easy an opportunity to cancel out the speech protections intended by the anti-SLAPP statute (reasoning that seems more connected to *Flatley*'s concurrence than its majority opinion).[249]

In applying its interpretation of *Flatley* to the facts before it, the *Mendoza* court concluded that the illegality exception did not apply.[250] The court found SASS' conduct was neither illegal nor criminal, as those terms are applied in the anti-SLAPP context.[251] Notably, the court drew this conclusion despite the fact that the acts in question violated provisions of the Penal Code. To this point, the court observed that the particular Penal Code sections violated here (sections 290.46(j) and (l)) did not amount to either a misdemeanor or felony; instead, they either served as an enhancement statute (as in subdivision (j)), or they served to provide civil remedies to the acts in question (as in subdivision (l)).[252]

The plaintiff encouraged the appellate court to consider *Novartis*, which involved underlying allegations of criminal conspiracy.[253] The appellate court distinguished *Novartis*, however, from the instant case.[254] Although the court admitted that, in *Novartis*, the conduct in question amounted to criminal conspiracy sufficient to deny anti-SLAPP relief, here, the court noted, SASS' conduct was "not of the same criminal nature."[255] The court failed to expand any further on this point to describe what it meant by the phrase "same criminal nature." In the end, the court noted, the illegality exception did not apply because "SASS did not concede that its underlying conduct was criminal, nor did the evidence conclusively establish that its conduct was criminal."[256]

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247 *Id.*
248 *Id.*
249 *Id.*
250 *Id.*
251 *Id.*
252 *Id.*
253 *Id.*
254 *Id.*
255 *Id.*
256 *Id.* For similar treatment by subsequent courts, see Cross v. Cooper, 127 Cal.

Among the interesting aspects of the *Mendoza* opinion is the path it takes to arrive at and utilize criminality in the illegality exception. The *Mendoza* court relies almost entirely upon *Flatley* in its conclusion that an act must be criminal to be exempted from protection under the statute.[257] On the other hand, at no point does the court ever cite to the *Cabral* decision. Yet, a simple review of the two opinions shows that nowhere in the *Flatley* decision does the court ever indicate an act must be "criminal" to be exempted, while *Cabral* could hardly make the point less emphatically, as discussed *supra*. Perhaps the *Mendoza* court preferred to rely upon supreme court precedent over appellate court precedent, but one would think at least a passing reference to *Cabral* would have been appropriate.

Another notable characteristic in *Mendoza*'s analysis is its willingness to boldly assert principles missing from the precedent it cites. For example, the court concludes that the illegality exception requires a showing that the violation in question amounts to either a misdemeanor or felony.[258] Yet, nowhere in *Flatley*, *Paul*, or any other case on the matter, has a California court ever concluded a misdemeanor or felony penalty is required for an act to be exempted from the anti-SLAPP statute. Indeed, the *Paul* opinion never uses the words "crime" or "criminal," nor does it ever contemplate any potential criminal consequences and/or punishments of the underlying act—money laundering. Certainly, if the *Paul* court had intended for criminality and punishment to be its guide, it would surely have commented at least once as to the criminal, rather than mere illegal, nature of the conduct in question. Similarly, the *Flatley* court never discusses "substantive crimes" versus other, undefined non-substantive crimes, in considering application of the illegality exception. Yet, the *Mendoza* court used this as a point of distinction between its facts and *Flatley*'s. Indeed, with the exception of *Cabral*, every case preceding *Mendoza* emphasized "illegality" and "unlawfulness" far more than criminality in determining the application of the illegality exception.

Rptr. 3d 903, 925, 929 (Ct. App. 2011) (holding that defendant was entitled to anti-SLAPP protection since criminal conduct was not conceded and uncontroverted evidence did not establish criminal activity); and Fremont Reorganizing Corp. v. Faigin, No. B218178, 2011 WL 3806350, at *8 (Ct. App. Aug. 30, 2011) (holding that the anti-SLAPP statute could apply since the conduct in question was not illegal).

257 *Mendoza*, 107 Cal. Rptr. 3d at 303.

258 *Id.*

iii. *G.R. v. Intelligator*

Nearly a year after California's First Appellate District decided *Cabral*, the Fourth Appellate District considered (and by implication, adopted) the criminality requirement described by *Cabral* and *Mendoza*. In *G.R. v. Intelligator*[259] the court of appeal considered whether the illegality exception applied in an action for invasion of privacy by an ex-husband against his former wife's attorney.[260] The husband claimed Intelligator invaded his privacy when, during marital dissolution proceedings, Intelligator filed a copy of the husband's credit report with the court without first redacting the husband's sensitive and personal information in the report.[261]

Intelligator acknowledged her failure to redact, and further conceded that her actions amounted to a violation of Rule 1.20 of the California Rules of Court.[262] Yet, Intelligator contended she was entitled to relief under the anti-SLAPP statute because her actions were protected petitioning activity (in other words, *Flatley* did not apply here).[263] Husband, on the other hand, argued that the illegality exception precluded anti-SLAPP relief for Intelligator because her actions violated a rule of court.[264]

The court disagreed with the husband, asserting that *Cabral*, *Paul*, and *Flatley*, establish that conduct must be found criminal before it will be exempted from the protections of the anti-SLAPP statute.[265] Considering the facts before it, the court concluded (as in *Cabral*) that the redaction of personal identifiers and subsequent violation of the rules of court was "not the type of criminal activity addressed in either *Flatley* . . . or *Paul*."[266] The husband pointed to the potential sanctions an attorney faces as punishment for violating a rule of court.[267] The court of appeal found that to be unpersuasive, however, observing that "if an attorney were subject to a separate action each time he or she committed a rule violation in the representation of his or her client, the effect would be to chill the hearty pursuit of a protected activity—the right to petition."[268] In light of these

259 G.R. v. Intelligator, 110 Cal. Rptr. 3d 559 (Ct. App. 2010).

260 *Id.* at 562.

261 *Id.*

262 *Id.* at 561, 565.

263 *See id.* at 564–67 (citing cases to determine what was protected activity, supporting Intelligator's argument that the anti-SLAPP statute could apply).

264 *Id.* at 564.

265 *Id.* at 566–67.

266 *Id.* at 567.

267 *Id.*

268 *Id.*

principles, the court found the defendant had satisfied the first prong, and therefore it rested its decision on a determination regarding the husband's probability of prevailing on the merits of his claim.[269] As for the state of the illegality exception, the criminality requirement imposed by *Cabral* and *Mendoza* was strengthened by the analysis put forward by the *Intelligator* court.

iv. *Gerbosi v. Gaims, Weil, West & Epstein, LLP*

As illustrated in one of the most recently published California opinions on the illegality exception, *Gerbosi v. Gaims, Weil, West, & Epstein, LLP*,[270] the criminality requirement has not only taken a firm hold of the illegality exception doctrine, but the ambiguities in its application are beginning to create uncertainty with other, previously well-established aspects of the doctrine.

Gerbosi involved appeals from the denial of two anti-SLAPP special motions to strike from two separate, but related cases.[271] Both cases arose out of events either involving or having some direct or indirect relation to Anthony Pellicano, a private investigator who was indicted on conspiracy and wiretapping charges in 2006 by a federal grand jury.[272] In one of the cases, Erin Finn sued the Gaims law firm alleging seven different causes of action: invasion of privacy; intentional infliction of emotional distress (IIED); unlawful eavesdropping; unfair competition; negligence; malicious prosecution; and abuse of process.[273] Finn had previously dated one of Gaims' clients (Robert Pfeifer), but following their separation, she became embroiled in litigation with him (both directly and as a witness to a separate litigation matter involving Pfeifer).[274] Finn's lawsuit arose from her claim that, after she and Pfeifer separated, Pfeifer, Gaims, and Pellicano "set out to destroy" her and used illegal wiretaps and harassing lawsuits to do so.[275] Meanwhile, Michael Gerbosi, who was Finn's next-door neighbor, also filed suit against Pfeifer, Gaims, and Pellicano (among others),

269 *Id.*

270 Gerbosi v. Gaims, Weil, West & Epstein, LLP, 122 Cal. Rptr. 3d 73 (Ct. App. 2011).

271 *Id.* at 77.

272 *Id.* at 77–78.

273 *Id.* at 78.

274 *Id.* at 77.

275 *Id.* at 78.

alleging unlawful wiretapping, unlawful eavesdropping, invasion of privacy, and other similar claims.[276]

Gaims filed a special motion to strike Finn's claims first, then filed a special motion to strike Gerbosi's claims a week later.[277] Gaims' argument for anti-SLAPP relief was similar for both motions: Gaims contended that the causes of action in each of the complaints arose from Gaims' activity as counsel for Pfeifer in his litigation against Finn, and because neither Finn nor Gerbosi could show a likelihood of prevailing on their claims, the two complaints should be stricken.[278] Both Finn and Gerbosi asked the trial court for leave to conduct discovery prior to opposing the motions, which the court granted.[279] Thereafter, Finn and Gerbosi filed oppositions to the motions, and after argument the trial court denied both motions.[280] Gaims appealed on each motion.[281]

California's Second Appellate District heard Gaims' appeal. In rendering its opinion, the court first addressed, and quickly discarded, Gaims' appeal of the motion to strike in the Gerbosi action.[282] The court observed that, although Gaims held the status of a lawyer, the firm had not represented any client in connection with litigation involving Gerbosi.[283] As such, the court reasoned, the claims of wiretapping and privacy invasion did not arise out of, and were not conducted in furtherance of, "protected 'petitioning' activity."[284] With that, the court affirmed the ruling denying Gaims' motion as to Gerbosi strictly under a first prong analysis.[285]

Finn's complaint presented a more difficult analysis for the court because Finn and Gaims' client had been involved in litigation with each other.[286] In addressing Finn's complaint, the court separated Finn's claims into two groups: one for her invasion of privacy, eavesdropping, and unfair competition claims, and the second for the rest of her claims.[287] With respect to the first group, the court held that Gaims was not entitled to anti-SLAPP relief because those causes of action are each "based

276 *Id.*
277 *Id.* at 78–79.
278 *Id.*
279 *Id.* at 79.
280 *Id.*
281 *Id.*
282 *See id.* at 80–81.
283 *Id.*
284 *Id.* at 81.
285 *See id.*
286 *Id.*
287 *Id.* at 81–82.

on *alleged criminal* activity."[288] In the court's opinion, this group of claims was precluded because each of them was "predicated on violations of the Penal Code."[289]

One of the more confusing aspects of the court's criminality conclusion is the fact that, of the three causes of action in this first group, only one appears based upon the Penal Code: unlawful eavesdropping (section 632 of the California Penal Code).[290] The other two claims, invasion of privacy and unfair competition, are not claims governed by the Penal Code, but rather are claims arising from the California Constitution and the California Business and Professions Code, respectively.[291] In any event, in light of its criminality conclusion and in reliance upon *Flatley*, the court concluded there was no need for a second prong analysis on these claims.[292]

As for the second group of claims (IIED, negligence, malicious prosecution, and abuse of process), the court held them to be protected under the anti-SLAPP statute, and the court engaged in no illegality analysis as to these claims in reaching its result.[293] In other words, although every one of Finn's claims was based upon the same underlying actions by Gaims, the court held one group to be excluded due to illegality but the other to be protected under the anti-SLAPP statute.[294] The court offered no other explanation for this distinction other than the conclusive statement that it "agree[d] with Gaims that the anti-SLAPP statute applie[d]" to the latter group of claims.[295]

The court's interpretation and application of *Flatley* to the first group of claims is worth particular attention here. The court noted that it understood *Flatley* "to stand for" the proposition that "when a defendant's assertedly protected activity *may or may not be criminal* activity, the defendant may invoke the anti-SLAPP statute unless the activity is *criminal* as a matter of law."[296] The *Gerbosi* court's opinion goes on to assert that, in *Flatley*, "the [California] Supreme Court observed that an activity could be deemed *criminal* as a matter of law when a defendant concedes *criminality*, or the evidence conclusively

288 *Id.* at 81 (emphasis added).
289 *Id.*
290 *Id.* at 78.
291 *Id.*
292 *Id.* at 82.
293 *Id.* at 82–83.
294 *Id.*
295 *Id.*
296 *Id.* at 82 (emphasis added).

shows *criminality*."[297] Tellingly, the court chose not to quote, or even cite to, any portion of the *Flatley* or *Paul* opinions for this point.

The *Gerbosi* court also opined on the burden shifting process in the face of the illegality exception, again invoking a questionable interpretation of *Flatley*.[298] In a partial quote of the *Flatley* opinion, the *Gerbosi* court asserted that *Flatley* stands for the proposition that "a defendant's 'mere assertion that his or her underlying activity was constitutionally protected' *will not suffice to shift to the plaintiff the burden of showing that the defendant's underlying activity was criminal, and not constitutionally protected.*"[299] Such a rule, *Gerbosi* adds—again partially quoting *Flatley*—would "eviscerate the first step of the two-step inquiry set forth in the anti-SLAPP statute."[300] In other words, under *Gerbosi*'s view, a claim of petitioning activity by the defendant does not shift any burden of proof to plaintiff to show criminality to fend off anti-SLAPP protection; a plaintiff need only allege defendant's purported protected activities are criminal as a matter of law and the inquiry ends.[301]

However, taking a closer look back at *Flatley*, the point it was making when it contemplated an evisceration of the first step was of a more subtle, although important, difference than the one which *Gerbosi* attributes to it. *Flatley*'s entire statement, from which *Gerbosi* draws its partial quotation, provided:

> [I]t would eviscerate the first step of the two-step inquiry set forth in the statute if the defendant's mere assertion that his underlying activity was constitutionally protected sufficed to shift the burden to the plaintiff to establish a probability of prevailing *where it could be conclusively shown that the defendant's underlying activity was illegal and not constitutionally protected*.[302]

Thus, *Flatley* cautioned us that an assertion of protected conduct, by itself, should not shift the burden to plaintiff to show a likelihood of success on the merits of its claims.[303] *Gerbosi* misapplied this point, concluding that the assertion of protected conduct by a defendant should not, by itself, shift the burden to plaintiff to show illegality as a matter of law.[304]

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297 *Id.* (emphasis added).

298 *Id.*

299 *Id.* (emphasis omitted) (emphasis added) (quoting Flatley v. Mauro, 139 P.3d 2, 13 (Cal. 2006)).

300 *Id.* (quoting *Flatley*, 139 P.3d at 13).

301 *Id.*

302 *Flatley*, 139 P.3d at 13 (emphasis added).

303 *Id.*

304 *Gerbosi*, 122 Cal. Rptr. 3d at 82.

Indeed, on this point *Gerbosi* again fails to refer to the *Paul* opinion. In fact, *Gerbosi* never once cites to *Paul* throughout its entire opinion. *Gerbosi* even shies away from those portions of the *Flatley* opinion which discuss *Paul* on this point. Had *Gerbosi* focused on *Flatley*'s thorough discussion of *Paul*, its position on burden shifting might be different. *Flatley*, after all, quotes and endorses the portion of *Paul*'s opinion where it describes the burden of demonstrating illegality as falling on the plaintiff:

> [I]f the plaintiff contested the validity of the defendant's exercise of protected rights "and unlike the case here, cannot demonstrate as a matter of law that the defendant's acts do not fall under section 425.16's protection, then the claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff's burden to provide a prima facie showing of the merits of the plaintiff's case.[305]

Recall, it was *Paul*'s reasoning that the *Flatley* court found persuasive and controlling in announcing its holding. And, in the process of describing how the illegality exception should operate, it was *Paul* that described that establishing illegality was an "*additional* burden" held by plaintiff—a

> burden [that] should be met in the same manner the plaintiff meets the burden of demonstrating the merits of its causes of action: by showing the defendant's purported constitutional defenses are not applicable to the case as a matter of law *or* by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses.[306]

Gerbosi's refusal to shift this additional burden upon the plaintiff (and thus, allowing it to rest exclusively upon its allegations) marks a stark departure from the procedure envisioned by *Paul* and the other courts who subsequently adopted *Paul*'s vision. This includes the California Supreme Court's decisions in *Flatley* and *Soukup* (the latter of which noted that "a defendant who invokes the anti-SLAPP statute should not be required to bear the additional burden of demonstrating in the first instance that the filing and maintenance of the underlying action was not illegal as a matter of law," and that "as part of the plaintiff's burden of demonstrating illegality as a matter of law, the plaintiff must show the specific manner in

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305 *Flatley*, 139 P.3d at 12 (quoting Paul for Council v. Hanyecz, 102 Cal. Rptr. 2d 864, 871–72 (Ct. App. 2001)).

306 *Paul*, 102 Cal. Rptr. 2d at 872 (quoting Wilcox v. Superior Court, 33 Cal. Rptr. 2d 446, 455 (Ct. App. 1994)).

which the statute or statutes were violated with reference to their elements").[307]

III. THE PRESENT AND FUTURE OUTLOOK OF THE ANTI-SLAPP STATUTE'S ILLEGALITY EXCEPTION

What started with a limited and fact-specific carve-out of the anti-SLAPP statute—molded in its infancy by cases like *Paul*, *Kashian*, and *Flatley*—has been simultaneously retracted and expanded into an amorphous and ambiguous doctrine operating far different than these initial cases intended.[308] The discussion below considers the questions: how did the doctrine arrive at its current state and what impact will its changes have on future application of the doctrine?

A. Where Does the Illegality Exception Stand Now and How Did It Get Here?

In its early phases, *Paul* and *Kashian* set the stage for how the illegality exception would operate. *Paul* was careful to note that the exception would have only very limited application; indeed, *Paul* emphasized the exception would only be applied in the rare instances of where a party concedes illegality as to its purported protected speech and/or activity, or where such illegality could be shown as a matter of law.[309] *Kashian*, taking heart to this limited application, further noted that the requisite illegality was not something that could be established through mere allegations; illegality was an aspect of the exception that must be proven.[310] And, as *Paul* and others added, the illegality requirement was an "additional" burden of proof carried by the plaintiff, above and beyond the plaintiff's burden of proving a likelihood of success as part of the second prong analysis.[311]

Flatley, and its companion case *Soukup*, endorsed and adopted the illegality exception.[312] And, perhaps more importantly, the California Supreme Court endorsed the exception within the specific confines laid out in *Paul* (and to a lesser extent *Davis* and *Kashian*).[313]

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307 Soukup v. Law Offices of Herbert Hafif, 139 P.3d 30, 47–48 (Cal. 2006).

308 *See, e.g.*, *Gerbosi*, 122 Cal. Rptr. 3d at 82; Mendoza v. ADP Screening and Selection Servs., Inc., 107 Cal. Rptr. 3d 294, 303 (Ct. App. 2010); Cabral v. Martins, 99 Cal. Rptr. 3d 394, 403 (Ct. App. 2009).

309 *Paul*, 102 Cal. Rptr. 2d at 871–72.

310 Kashian v. Harriman, 120 Cal. Rptr. 2d 576, 590 (Ct. App. 2002).

311 *See, e.g.*, *Soukup*, 139 P.3d at 48; *Kashian*, 120 Cal. Rptr. 2d at 590; *Paul*, 102 Cal. Rptr. 2d at 871–72.

312 *Soukup*, 139 P.3d at 47; Flatley v. Mauro 139 P.3d 2, 13 (Cal. 2006).

313 *Flatley*, 139 P.3d at 13.

Moving forward to the illegality exception's present application, however, the focus of the doctrine appears to have changed. Illegality has become synonymous with criminality. Despite the fact that neither *Paul*, nor *Davis*, nor *Kashian*, nor *Flatley*, nor *Soukup* ever state that criminality is a requirement for applying the doctrine, subsequent cases such as *Cabral*, *Mendoza*, and *Gerbosi* all equate illegality with criminality.[314] In fact, by the time the Second Appellate District decided *Gerbosi*, the illegality exception not only required that the underlying actions/speech be subject to the Penal Code, but that the actions/speech be punishable by either a misdemeanor or felony charge.[315] Actions subject to other penalties under the Penal Code, such as sentence enhancements or civil penalties, no longer suffice to establish application of the illegality exception. Notably, the underlying actions in cases such as *Paul* and *Soukup*—and later *Novartis*—are not based upon and do not otherwise reference any Penal Code violations.

Expanding the meaning of "illegality" is not the only development in the doctrine, as seen above. The burden of proof has also evolved. By way of *Paul* and *Flatley*, among other decisions, California courts had initially established that the plaintiff held the burden of proving illegality, either as a matter of law or by way of a concession by the defendant.[316] Starting with *Novartis* and later *Gerbosi*, however, plaintiff's burden appears far less than it once was, and perhaps may be gone altogether. Notably, under *Gerbosi*, a plaintiff need only *allege* illegality (or, more accurately stated, criminality), to initiate the exception.[317] Indeed, so long as the plaintiff at least alleges criminality (and so long as such allegation is punishable by felony or misdemeanor), the defendant appears foreclosed from any protection in the anti-SLAPP statute.[318]

As such, under the latest California precedent applying the anti-SLAPP statute, a proactive plaintiff who anticipates an anti-SLAPP challenge would be wise to specifically tailor his or her complaint in a manner that insulates the lawsuit from anti-SLAPP challenge. Such a plaintiff should allege that the

314 *See* Gerbosi v. Gaims, Weil, West & Epstein, LLP, 122 Cal. Rptr. 3d 73, 82 (Ct. App. 2011); Mendoza v. ADP Screening and Selection Servs., Inc., 107 Cal. Rptr. 3d 294, 303 (Ct. App. 2010); Cabral v. Martins, 99 Cal. Rptr. 3d 394, 403 (Ct. App. 2009).

315 *Mendoza*, 107 Cal. Rptr. 3d at 303; *Cabral*, 99 Cal. Rptr. 3d at 403.

316 *Flatley*, 139 P.3d at 12; *Paul*, 102 Cal. Rptr. 2d at 871–72.

317 *See Gerbosi*, 122 Cal Rptr. 3d at 82 ("[A] defendant's '*mere assertion* that his [or her] underlying activity was constitutionally protected' will not suffice to shift to the plaintiff the burden of showing that the defendant's underlying activity was criminal, and not constitutionally protected." (quoting *Flatley*, 139 P.3d at 13)).

318 *Mendoza*, 107 Cal. Rptr. 3d at 303.

underlying speech and/or petitioning activities giving rise to the lawsuit are criminal. So long as these allegations are made with particularity (ideally identifying the Penal Code section that would apply if pursued as a criminal matter), the lawsuit should be able to survive a special motion to strike challenge (assuming the court follows *Gerbosi*). Ironically, in such a scenario, even if the lawsuit were a SLAPP, it would be permitted to continue as long as it meets these superficial pleading requirements.

On the other hand, a defendant faced with such a complaint would be wise to characterize the claims as primarily based upon civil remedies (to the extent possible) and otherwise based upon actions which cannot be punished by misdemeanor or felony charges. Such a defendant should also be prepared to carry the burden of proof on such characterization, but the defendant can take solace in the fact that success in characterizing the complaint in this fashion will advance the defendant to, at the very least, a second-prong determination forcing the plaintiff to show a likelihood of success on the merits. The defendant in this scenario faces a steep uphill battle since a well-pled complaint is seemingly impossible to beat. However, because so few civil claims are brought under the Penal Code, there may be room for maneuvering by defendants.

So how did we arrive at such an inconsistent application of the illegality exception? Much of the explanation for this lies in the *Cabral*, *Mendoza*, and *Gerbosi* courts' overlooking of *Paul* (or their otherwise refusal to apply *Paul*). In reaching its implied conclusion that the illegality exception required a showing that the questioned activity was inherently criminal or otherwise outside the scope of normal, routine legal services, the *Cabral* court claimed its facts were distinguishable from *Paul* (and *Flatley* for that matter).[319] *Cabral* noted that, unlike *Paul* and *Flatley*, its facts did not involve inherent criminality. *Cabral* appears to overlook the fact that *Paul* did not involve any allegations or proof that the defendant had violated any Penal Code section.[320]

Mendoza, in following *Cabral*'s lead, not only incorporates new elements into the illegality exception analysis, it also appears to ignore *Paul* altogether. *Mendoza* arrives at its conclusion (that the illegality exception did not apply in its case) because the purportedly illegal conduct was not criminal, and better yet, did not involve punishment by either misdemeanor or

319 *Cabral*, 99 Cal. Rptr. 3d at 403.
320 *Paul*, 102 Cal. Rptr. 2d at 867.

felony.[321] Strangely, however, *Mendoza* carries out this analysis without ever once citing to the *Paul* opinion.

Gerbosi continues the trend of ignoring *Paul* (and by extension *Flatley*, as it relied upon *Paul*). Like *Mendoza*, *Gerbosi* never once cites to *Paul* throughout its opinion, despite *Paul*'s undeniable influence on the development of the illegality exception.[322] Perhaps the *Gerbosi* court's disregard for *Paul* was born out of the parties' failure to rely upon or argue *Paul* during the appeal; a closer look at the briefs on appeal in *Gerbosi* reveal that neither the appellant nor the respondent ever cites to *Paul* throughout their briefing on appeal.[323] Consequently, the *Gerbosi* court devotes no attention to *Paul* in its opinion, thus never relying upon *Paul*'s guidance regarding the scope of illegality's meaning or the shifting of burdens among plaintiff and defendant throughout this process.

In any event, the bottom line for future parties and courts addressing the illegality exception is one of uncertainty. Some may follow *Paul*, *Kashian*, and *Flatley*'s reasoning in applying the early, California Supreme Court-endorsed version of the doctrine. This group will utilize the illegality exception where a plaintiff has carried its burden of proof in establishing illegality by the defendant, either as a matter of law or as conceded by the defendant. Conversely, others will follow *Cabral*, *Mendoza*, and *Gerbosi*. This group will apply the exception where the plaintiff has merely alleged criminality by the defendant, but only where such criminality is shown to be punishable by misdemeanor or felony. And, needless to say, future parties will face unpredictable (and likely contradictory) decisions as a result.

B. How Do We Resolve These Uncertainties?

i. Legislative Amendment

It is generally recognized that "[u]ncertainty undermines the rule of law."[324] As seen above, uncertainty regarding application of the illegality exception has already begun to undermine the principles which the state's anti-SLAPP laws seek to protect; and, as such, the current state of contradiction and

321 *Mendoza*, 107 Cal. Rptr. 3d at 303.

322 *See Paul*, 102 Cal. Rptr. 2d at 868, 870.

323 *See* Appellants' Opening Brief, Gerbosi v. Gaims, Weil, West & Epstein, LLP, 122 Cal. Rptr. 3d 73 (Ct. App. 2011) (No. B219587), 2010 WL 1703225; Respondents' Brief, Gerbosi v. Gaims, Weil, West & Epstein, LLP, 122 Cal. Rptr. 3d 73 (Ct. App. 2010) (No. B219587), 2010 WL 3022530; Appellants' Reply Brief, Gerbosi v. Gaims, Weil, West & Epstein, LLP, 122 Cal. Rptr. 3d 73 (Ct. App. 2010) (No. B219587), 2010 WL 4155938.

324 Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1160 (1997).

unpredictability must be addressed. The most ideal manner for this will occur in the legislative setting. Recall that the Legislature has previously addressed the illegality exception as it pertains to the SLAPPback statute. More specifically, as part of enacting section 425.18, the Legislature enacted a provision specifically incorporating elements of the illegality exception to SLAPPback suits: "A special motion to strike may not be filed against a SLAPPback by a party whose filing or maintenance of the prior cause of action from which the SLAPPback arises was illegal as a matter of law."[325] In enacting this provision, the Legislature appears to have been influenced by *Paul*, as particularly evidenced by: (1) the timing of the enactment of section 425.18 (*i.e.*, after *Paul* and before *Flatley*), and (2) the use of phrases such as "illegal" and "as a matter of law."[326]

Of course, given developments in the doctrine subsequent to *Flatley*, simply enacting legislation similar to that imposed in section 425.18(h) will be of little assistance. In other words, codifying the principle that anti-SLAPP protection is unavailable to a party whose underlying actions were "illegal as a matter of law"[327] would do nothing to cure the current inconsistencies regarding the questions of criminality and burden of proof. Future courts and litigants need guidance specifically targeted toward whether criminality is a prerequisite for the exception and who is to carry the burden of proof in determining whether the exception will be imposed. Any meaningful legislative assistance must directly address these two issues. If criminality is a requirement for illegality, the Legislature should specifically state as much as part of a modification to section 425.16. And if so, the Legislature should also indicate what criminality means. Is the underlying action required to be subject to a provision of the Penal Code? Does it mean that the underlying action must be punishable by a misdemeanor and/or felony? Whether the Legislature endorses or rejects a criminality requirement, it should spell out what is required to avoid the current uncertainty that exists.

Any legislative involvement also must address uncertainty regarding burden of proof. Early case law on the illegality exception appeared to unequivocally place this burden on the plaintiff, but recent cases have shown a hesitation to engage in such burden shifting. The Legislature should specifically set out who holds the burden in consideration of the exception, and what

325 CAL. CIV. PROC. CODE § 425.18(h) (West 2011).
326 *Id.*
327 *Id.*

level of proof needs to be meet (*i.e.*, mere allegation or proof as a matter of law).

Legislative involvement could go a long way to tighten the application of the illegality exception. But, in order to have any meaningful impact, such legislative involvement must at a minimum address the issues outlined above.

ii. Clarification from the California Supreme Court

Should the Legislature fail or otherwise choose not to enact legislation clarifying application of the illegality exception, the California Supreme Court will be the next-best source for returning consistency in this area of law. Granting review of an appeal involving these issues will not only allow the opportunity to cure inconsistencies in the law and provide courts greater guidance on application of this doctrine, it would serve as a great opportunity to return the doctrine to the roots upon which it is based.

As emphasized above, any examination by the supreme court should focus upon the reasoning employed by early cases invoking the exception, particularly *Paul* and *Flatley*. In all likelihood, such a focus would render the *Cabral* and *Gerbosi* opinions a short life-span, at least to the extent they are read as holding criminality a prerequisite for the illegality exception.

Paul and other early cases addressing the illegality exception began their analysis with focused consideration toward the underlying purpose and intent behind the anti-SLAPP statute. As *Paul* observes, though the statute encourages the "continued participation in matters of public significance," it is unlikely the Legislature intended to give defendants a means by which to protect themselves for their illegal activities.[328] Thus, *Paul* concluded, "while it is technically true that laundering campaign contributions is an act in furtherance of the giving of such contributions, that is, in furtherance of an act of free speech, we reject the notion that section 425.16 exists to protect such illegal activity."[329]

Flatley also reminds us that the underlying purpose of section 425.16 is to prevent chilling of the "valid exercise" of free speech and petitioning rights.[330] "As a necessary corollary to this statement, because not all speech or petition activity is

328 *Paul*, 102 Cal. Rptr. 2d at 869.

329 *Id.* at 871.

330 Flatley v. Mauro, 139 P.3d 2, 9 (Cal. 2006). *See also* Soukup v. Law Offices of Herbert Hafif, 139 P.3d 30, 42 (Cal. 2006).

constitutionally protected, not all speech or petition activity is protected by section 425.16."[331] Certainly, the Legislature in adopting section 425.16 and by extension carving out a litigation protection against lawsuits arising from acts in furtherance of one's "right of petition or free speech under the United States Constitution or California Constitution,"[332] never intended to protect speech otherwise unprotected by the United States and California Constitutions. This therefore begs the question: what type of speech do these constitutions refuse to protect?

In *Wilcox v. Superior Court*, the Second Appellate District deliberated this very question in considering whether to apply the anti-SLAPP statute to a dispute between a group of certified court reporters and a separate alliance of reporters.[333] The plaintiff/cross-defendants sought to strike the alliance's cross-complaint, and following the trial court's denial of their motion to strike, the plaintiff/cross-complainant sought a writ of mandate challenging the trial court's determination.[334] The appellate court ordered the mandate be issued, based on a finding that the motion to strike should have been granted.[335]

In the process of reaching its decision, the *Wilcox* court was faced with the question of what the anti-SLAPP statute "means by 'furtherance' of the defendant's 'right of petition or free speech.'"[336] The court addressed this question by analogy. If, for example, a defendant's "act" in furtherance of its speech and petitioning rights was "a lawsuit against a developer," the defendant would have a prima facie First Amendment defense (and thus the first prong of the anti-SLAPP analysis would be satisfied).[337] If, however, "the defendant's act was burning down the developer's office as a political protest the defendant's [special] motion to strike could be summarily denied without putting the developer to the burden of establishing the probability of success on the merits in a tort suit against the defendant."[338] In other words, in enacting the statute, the Legislature meant to protect acts such as the filing of lawsuits as a form of speech and petitioning activity, but did not want to protect destruction of property even though such actions are a form of speech.

331 *Flatley*, 139 P.3d at 331.
332 CAL. CIV. PROC. CODE § 425.16(a) (West 2011).
333 Wilcox v. Superior Court, 33 Cal. Rptr. 2d 446, 448 (Ct. App. 1994).
334 *Id.* at 449.
335 *Id.* at 459.
336 *Id.* at 452 (quoting CIV. PROC. § 425.16(a)).
337 *Id.*
338 *Id.* at 452–53.

As *Wilcox* illustrates, we must draw a line between speech that is protected and speech that is not protected, and apply that line in the context of the anti-SLAPP statute's illegality exception. Where do we draw that line? The most prudent source in answering this question would seem to lie in the well-established precedent addressing First Amendment rights and particularly those cases deciding protected and unprotected speech. Of course, a discussion examining the treatment of illegal speech and First Amendment protection would span volumes far beyond the confines of the instant article. However, even a brief sampling of California and federal cases addressing this issue shows that the line between protected and unprotected speech deviates from the mere consideration of whether speech is criminal or not; though, at the same time, it appears foolish to completely remove the consideration of criminality from this analysis.

Indeed, the California Supreme Court has observed, "the goal of the First Amendment is to protect expression that engages in some fashion in public dialogue, that is, 'communication in which the participants seek to persuade, or are persuaded; communication which is about changing or maintaining beliefs, or taking or refusing to take action on the basis of one's beliefs.'"[339] But, as the court adds, "[a]s speech strays further from the values of persuasion, dialogue and free exchange of ideas, and moves toward willful threats to perform illegal acts, the state has greater latitude to regulate expression."[340] And, as we have seen, threats are but one area where the First Amendment has allowed restrictions on speech; other categories of restricted speech "include defamatory speech, fighting words, incitement to riot or imminent lawless action, obscenity and child pornography."[341] California courts, such as *Larson v. City and County of San Francisco*, have also added that, "[l]ike ordinary speech, commercial speech that is *misleading, fraudulent, or concerns unlawful activity* is not protected at all by the First Amendment."[342]

As this list of restricted categories of speech reveals, mere criminality is not the test for determining protection. Indeed, the test for determining whether speech is protected is a difficult and fact-specific one, as the United States Supreme Court

339 *In re* M.S., 896 P.2d 1365, 1371 (Cal. 1995) (quoting Shackelford v. Shirley, 948 F.2d 935, 938 (5th Cir. 1991)).

340 *M.S.*, 896 P.2d at 1371.

341 Larson v. City & Cnty. of S.F., 123 Cal. Rptr. 3d 40, 57 (Ct. App. 2011).

342 *Id.* at 58 (emphasis added).

acknowledged in its recent decision, *United States v. Stevens*.[343] While the Court acknowledged that it "has often described historically unprotected categories of speech as being 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality,'" the determination is not one based on a simple cost-benefit analysis.[344] The *Stevens* decision points to the child pornography scenario as a prime example. There, the Supreme Court recognized a limitation on speech not only as a result of a cost-benefit analysis, but also in recognition that the speech in question was "'intrinsically related' to the underlying abuse, and was therefore 'an *integral part of* the production of such materials, an activity illegal throughout the Nation.'"[345] As the Supreme Court noted in *New York v. Ferber*, the child pornography case, "[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."[346]

Thus, we can conclude that speech can be restricted under the First Amendment where it is "an integral part of" a crime *(i.e.* extortion, as in *Flatley*), or where it is "misleading, fraudulent, or concerns unlawful activity" as noted in *Larson*. Though the line does not appear drawn specifically at criminality, criminality certainly plays a substantial role in this analysis. As such, to base application of the illegality exception solely upon criminality would circumscribe the exception more narrowly than the Legislature and the United States and California Constitutions appear to intend. Perhaps the California Supreme Court, to the extent it decides to take on this issue, will use criminality as a guide-post in refining the illegality exception, and implement criminality more appropriately as a starting point than an end point in the anti-SLAPP context.

343 *See* United States v. Stevens, 130 S. Ct. 1577, 1585 (2010).

344 *Id*. (emphasis omitted) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992)).

345 *Stevens*, 130 S. Ct. at 1586 (emphasis added) (quoting New York v. Ferber, 458 U.S. 747, 759, 761 (1982)).

346 *Ferber*, 458 U.S. at 761–62 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)).

California High-Speed Rail on Track? Bridging the Gap Between Competing Land Use Issues with the California High-Speed Rail Project

Kevin J. Grochow[*]

"Make no little plans; they have no magic to stir men's blood and probably themselves will not be realized. Make big plans; aim high in hope and work, remembering that a noble, logical diagram once recorded will never die, but long after we are gone will be a living thing, asserting itself with ever-growing insistency."[1]

INTRODUCTION

On August 26, 2009, a decision was rendered that paused nearly a decade of planning and development of the California High-Speed Rail project in Northern California.[2] The California Superior Court for the County of Sacramento ruled that the California High-Speed Rail Authority's[3] ("Rail Authority" or

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1 *The Late Daniel H. Burnham,* 102 AM. ARCHITECT 23, 23 (1912) (quoting American architect, Daniel Burnham).

2 *See* Town of Atherton v. Cal. High-Speed Rail Auth., No. 34-2008-80000022, slip op. at 21 (Cal. Super. Ct. Aug. 26, 2009).

3 The California High Speed Rail Authority was established in 1996 and is the state agency responsible for the planning, construction, and operation of the proposed high-speed train system. CAL. HIGH-SPEED RAIL AUTH., CAL. HIGH-SPEED RAIL PROJECT PROGRAM SUMMARY REP. 11 (July 10, 2009 ed.).

"CHSRA") May 2008 Environmental Impact Report ("EIR") for the Bay Area-to-Central Valley portion of the rail network was inadequate in that it failed to show a complete description of the project.[4] What the court found particularly insufficient were the descriptions and attempts to mitigate the various land use issues that would arise if Union Pacific Railroad continued to oppose the sharing of their track right-of-way with the proposed high-speed rail network.[5] The absence of sufficient analysis exploring these issues violated the requirements of the California Environmental Quality Act ("CEQA"), and required the Rail Authority to reevaluate these issues in revising their EIR for this section of track.[6] In response to the writ of mandate the court issued against it, the Rail Authority rescinded its certification of the May 2008 Final Program EIR and, for forty-five days, re-circulated revised portions of a prior EIR in a document called the "Bay Area to Central Valley Revised Draft Program EIR Material."[7] By the end of the forty-five day public comment period, the Rail Authority received more than 500 written letters and verbal statements at public hearings, totaling more than 3750 individual comments.[8]

On September 2, 2010, the Rail Authority certified and released its Revised Final Program Environmental Impact Report.[9] Within the first month of its release, many cities and non-profit organizations filed suit, alleging the EIR still does not address their concerns; many other cities and groups are

4 *Town of Atherton*, No. 34-2008-80000022, slip op. at 21.

5 *Id.* at 15–16.

6 *Id.* at 14–16; Final Judgment at 3–4, Town of Atherton v. Cal. High-Speed Rail Auth., No. 34-2008-80000022 (Cal. Super. Ct. Nov. 3, 2009). *See also* Robert Cruickshank, *Initial Ruling in Atherton v. CHSRA*, CAL. HIGH-SPEED RAIL BLOG (Aug. 26, 2009), http://www.cahsrblog.com/2009/08/initial-ruling-in-atherton-v-chsra (explaining that the court granted a writ of mandate, which effectively requires the issues be addressed before Rail Authority could reconsider and approve the project).

7 CAL. HIGH-SPEED RAIL AUTH., BAY AREA TO CENTRAL VALLEY HIGH-SPEED TRAIN REVISED FINAL PROGRAM ENVIRONMENTAL IMPACT REPORT, at P-1 (Aug. 16 2010 ed.) [hereinafter REVISED FINAL EIR 2010].

8 REVISED FINAL EIR 2010, *supra* note 7, at P-1.

9 Press Release, Cal. High-Speed Rail Auth., Cal. High-Speed Rail Authority Certifies Revised Final Program EIR for Bay Area to Central Valley (Sept. 2, 2010) (on file with CHSRA).

> This Revised Final Program EIR is a multi-volume document that includes the text of the Revised Draft Program EIR, with some textual modifications in response to comments; comments on the Revised Draft Program EIR; a list of persons, organizations and agencies commenting on the Revised Draft Program EIR; responses to the significant environmental points raised in the comments on the Revised Draft Program EIR; and the full text of the 2008 Final Program EIR, including volumes 1 and 2 (text and appendices) and volume 3 (responses to comments).

REVISED FINAL EIR 2010, *supra* note 7, at P-1.

considering litigation as well.[10] This Comment aims to evaluate the recently revised EIR amidst these concerns and determine, should litigation proceed, whether a California court will conclude that the revised EIR adequately addresses the concerns outlined in the prior ruling, allowing the planning of the California high-speed rail project to move forward.

In the event litigation ensues because of the EIR and results in further delay or cancellation of the project, California will miss out on the many benefits high-speed rail brings to those who build it. Part I will outline the history of high-speed rail and will focus particularly on the implementation of high-speed rail systems around the world and the benefits they have created. This part will continue with a look at the recent interest and developments in high-speed rail systems in the United States, beyond the planned route in California. Part II will analyze the specific problems with the May 2008 EIR identified by the court in *Town of Atherton v. California High Speed Rail Authority*, and the reaction of the Rail Authority in their effort to comply with this decision. Lastly, Part III will show that the Rail Authority has fully complied with the decision in *Town of Atherton* and recommend action for future courts to take in the likely event that further litigation will occur.

I. WORLD-WIDE DEVELOPMENT OF HIGH-SPEED RAIL

California's high-speed rail system, one of the most comprehensive and modern networks planned in the United States, represents a big step forward in addressing the state's problems with traffic and air pollution.[11] "The network will

10 "Palo Alto, Atherton and Menlo Park launched a fresh lawsuit September 30th against the California High-Speed Rail Authority, claiming the state agency violated state laws when it approved a comprehensive study evaluating the Bay Area-to-Central Valley segment of the 800-mile high-speed rail system." Gennady Sheyner, *Palo Alto, Menlo Park, Atherton Sue Rail Authority*, PALO ALTO ONLINE (Oct. 4, 2010, 8:30 PM), http://www.paloaltoonline.com/news/show_story.php?id=18494; "The cities are joined in their lawsuit by the nonprofit groups California Rail Foundation, the Transportation Solutions Defense and Education Fund (TRANSDEF) and the Planning and Conservation League; and two citizens' groups—Community Coalition on High-Speed Rail and the Midpeninsula Residents for Civic Sanity." Sheyner, *supra*.

11 "America's highways and airports are increasingly congested. Our nation's transportation system remains dependent on oil. And our existing transportation infrastructure is inadequate to the demands of the 21st century. Intercity passenger rail can help America address each of these challenges." TONY DUTZIK, SIENA KAPLAN & PHINEAS BAXANDALL, U.S. PIRG EDUC. FUND, THE RIGHT TRACK: BUILDING A 21ST CENTURY HIGH-SPEED RAIL SYSTEM FOR AMERICA 1 (2010), *available at* http://cdn.publicinterestnetwork.org/assets/bb6cad1a4afa0154899d1c94b48d372c/The-Right-Track-vUS.pdf. "The Center for Clean Air Policy and the Center for Neighborhood Technology estimate that a national high-speed rail network would reduce global warming pollution by 6 billion pounds, the equivalent of taking almost 500,000 cars off the road." *Id.* at 2–3.

provide the efficient travel between California's major cities that the state's large population and economy require, with multiple trains per hour stopping in all of the state's largest cities and traveling at top speeds of over 200 mph."[12] California, and the other regions in the United States currently planning high-speed rail projects, could learn from experiences abroad, including forty-five years of experience in Japan and three decades worth in Europe.[13] A review of these varied experiences can show California what to expect and how to receive the greatest possible benefit from its investment.[14]

A. Asia

The world's first true high-speed train emerged in Japan in 1964, between the cities of Tokyo and Osaka just in time for the Tokyo Olympic Games.[15] At the time, the top speed on the route was 124 mph,[16] but over time the travel speeds of Japanese bullet trains, or Shinkansen, have improved significantly, while improving energy efficiency as well.[17] Now the Shinkansen can travel at speeds of up to 185 mph over approximately 1500 miles of track across the country.[18] The development of high-speed rail in Japan has had the effect of eliminating or substantially reducing the need for air routes between certain cities,[19]

12 *Id.* at 4.

13 TONY DUTZIK & ERIN STEVA, CALPIRG EDUC. FUND, NEXT STOP: CALIFORNIA, THE BENEFITS OF HIGH SPEED RAIL AROUND THE WORLD AND WHAT'S IN STORE FOR CALIFORNIA 1 (2010), *available at* http://cdn.publicinterestnetwork.org/assets/2bfff1b51291129c3a40e9121ebc1e64/Next-Stop-California.-HSR-Report--Final.pdf.

14 "The experience of high-speed rail lines abroad suggests that California can expect great benefits from investing in a high-speed passenger rail system, particularly if it makes wise choices in designing the system." *Id.*

15 Randy James, *A Brief History of High Speed Rail*, TIME (Apr. 20, 2009), http://www.time.com/time/nation/article/0,8599,1892463,00.html.

16 "For the first time in the world, the Tokaido Shinkansen routinely topped [124 mph] and demonstrated the high safety level of railways." Yasuo Wakuda, *Railway Modernization and Shinkansen*, 11 JAPAN RAILWAY & TRANSPORT REV. 60, 62 (1997).

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> Japan's Shinkansen system is estimated to use one quarter the energy of air travel or one-sixth the energy of automobile travel per passenger. The energy efficiency of Shinkansen trains has continually improved over time, such that today's trains use nearly a third less energy, while traveling significantly faster, than the trains introduced in the mid-sixties.

DUTZIK & STEVA, *supra* note 13, at 2.

> Japan has continually improved the energy efficiency of the Shinkansen, with the latest, most energy-efficient trains consuming 32 percent less energy than the original Shinkansen trains, even though they are capable of traveling 43 miles per hour faster.

Id. at 16.

18 James, *supra* note 15.

19 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-317, HIGH SPEED PASSENGER RAIL: FUTURE DEVELOPMENT WILL DEPEND ON ADDRESSING FINANCIAL AND OTHER CHALLENGES AND ESTABLISHING A CLEAR FEDERAL ROLE 16 (2009).

magnifying the emission reductions delivered by high-speed rail.[20]

Although Japan pioneered high-speed rail, China now has the largest high-speed rail network in the world, with approximately 4300 miles of routes, nearly 1250 miles of which that can support high-speed travel of up to 220 mph.[21] China has embarked on an ambitious program of high-speed rail construction, and currently has plans to develop 9900 miles of conventional high-speed routes by 2020.[22] China is currently building rail lines at a "frenetic pace," helping to create jobs today while planning for future economic growth.[23] China has also implemented magnetic levitation (maglev) trains, with a route between Shanghai and its airport transporting passengers at 268 mph in just seven minutes.[24]

South Korea is also a recent arrival on the high-speed rail scene having opened its first line in 2004.[25] The busy Seoul-to-Busan corridor, representing the most densely populated region in Korea,[26] grew increasingly more congested during the 1980s

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> It is important to note that emissions from high-speed rail service depend critically on the mix of energy sources used to generate the electricity that powers the trains. France and Japan, for example, have electricity systems that are heavily dependent on nuclear power, which produces no direct emissions of global warming pollution or conventional air pollutants, thereby magnifying the emission reductions delivered by high-speed rail. Other nations, however, are reducing the environmental impact of high-speed rail through the use of renewable energy—a much smarter long-term energy solution than nuclear power.

DUTZIK & STEVA, *supra* note 13, at 18.

21 Elaine Kurtenbach, *Schwarzenegger Checking Out High-Speed Rail*, CHINA POST (Sept. 13, 2010), http://www.chinapost.com.tw/china/national-news/2010/09/13/272267/p1/Schwarzenegger-checking.htm.

22 Kurtenbach, *supra* note **21**; "China is currently in the midst of building a $293 billion, 10,000-mile high-speed rail system." DUTZIK, KAPLAN & BAXANDALL, *supra* note 11, at 1.

23 "Concerns over cost have slowed the addition of more maglev lines, but conventional high-speed lines are still being built in China at a frentic pace." James, *supra* note 15; "China, driven by concerns about factory unemployment during the recent global recession, has embarked on the world's most ambitious program of high-speed rail construction." DUTZIK & STEVA, *supra* note 13, at 22.

24 James, *supra* note 15; Chicago Mayor Richard Daley marveled that it only took seven minutes to get from the airport to downtown Shanghai. Hal Dardick, *Daley Hopes Asian Investors Will Bet on High-Speed Rail to Downtown*, CHI. TRIB. NEWS BLOG (Sept. 27, 2010, 12:11 PM), http://newsblogs.chicagotribune.com/clout_st/2010/09/daley-hopes-asian-investors-will-bet-on-high-speed-rail-to-downtown.html.

25 CHO NAM-GEON & CHUNG JIN-KYU, KOREA RESEARCH INST. FOR HUMAN SETTLEMENTS, HIGH SPEED RAIL CONSTRUCTION OF KOREA AND ITS IMPACT 6 (2008), *available at* http://www.gdpc.kr/data/special/sr12.pdf. "Korea Train eXpress (KTX) began service in 2004, linking the capital of Seoul with the coastal cities of Busan and Mokpo, and providing an alternative to travel on increasingly congested highways." DUTZIK & STEVA, *supra* note 13, at 27.

26 NAM-GEON & JIN-KYU, *supra* note 25, at 3.

and 1990s with traffic congestion on the highways and the existing rail line running at full capacity.[27] Construction began on this line on June 30, 1992, and once completed in 2004, the rail line began transporting passengers at speeds up to 186 mph.[28] This cut the travel time between Seoul and Busan to two hours and forty minutes, a reduction of approximately one hour and thirty minutes,[29] and effectively eliminated much of the need for air and bus routes between the two cities.[30] With the addition of the line connecting the cities of Yongsan and Mokpo, bullet trains in South Korea now stop at a total of twenty stations, with that number expected to increase with the implementation of additional phases along the network.[31] South Korea is also looking to expand their rail network with underwater tunnel links to China and Japan.[32]

Taiwan is the most recent Asian country to implement a high-speed rail line, which began service on January 5, 2007.[33] The line stretches 214 miles between Taipei in the North, and Kaohsiung in the South, Taiwan's two largest cities.[34] The main purpose of this line is "to tackle the continuing growth in traffic along the heavily travelled western corridor."[35]

Beyond these countries that have already implemented high-speed rail effectively, many other countries are in the planning

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27 *Id.* at 11–12.

> Meanwhile, railway facilities on the Gyeongbu Line also reached the limit of their capacity, making it impossible to inject additional trains. Even if the existing line could be used as an electric railway line to boost the line capacity, the Gyeongbu Line was expected to reach the limit again in 2000–2003.

Id.

28 *Id.* at 6, 15 ("On April 1, 2004, Phase One section (Seoul-Dongdaegu) of the high-speed rail opened twelve years after construction began.").

29 The Seoul-Busan section previously required travel time of four hours and ten minutes. *Id.* at 26. "Similarly, the KTX [Korea Railroad] cut down the travel time in the Seoul-Dongdaegu section by one hour and twenty four minutes, and forty two minutes in the Seoul-Daejeon section." *Id.*

30 *See id.* at 27 ("The number of passengers using express buses operating in the cities with KTX stations have diminished after the opening of the HSR. From the first quarter of 2004 through the first quarter of 2006, it declined 38.7% in the Seoul~Daegu section, 27.3% in the Seoul~Busan section, 13.3% in the Seoul~Cheonan section, and 5.0% in the Seoul~Daejeon section. Since the number of users traveling a long distance such as the Seoul~Daegu and Seoul~Busan sections more significantly decreased, the KTX has proved its competitiveness in long-distance transportation.").

31 *Id.* at 16.

32 Ju-min Park, *South Korea Mulls Undersea Tunnels to China, Japan*, REUTERS, Sept. 21, 2010, *available at* http://www.reuters.com/article/idUSTOE68K00920100921.

33 Takashi Shima, *High-Speed Railways in Asia: Taiwan High Speed Rail*, 48 JAPAN RAILWAY & TRANSP. REV. 40, 40 (2007) ("The Taiwan High Speed Rail Corporation . . . began trial revenue operation of its 700T high-speed train with half-price fares starting 5 January 2007 and then kicked off official operation with regular fares from 1 February.").

34 *Id.* at 41.

35 *Id.*

stages. India, Iran, Saudi Arabia, and Turkey are all currently planning high-speed rail routes between major cities.[36]

B. Europe

The most extensive high-speed rail network in Europe belongs to France, which has approximately 1178 miles of track.[37] The French high-speed rail network first began operation in 1981 with the inauguration of the line between Paris and Lyon.[38] Trains in the French network are capable of up to 186 mph,[39] with some newer lines capable of speeds up to 199 mph.[40] Due to the implementation of a nation-wide high-speed rail network, automobile and air traffic have experienced declines in those regions serviced by high-speed rail.[41] The network has also had the effect of turning many cities that are now an hour away from Paris into commuter bedroom communities, increasing the high-speed network's own market while restructuring land use.[42] France has been successful in expanding its high-speed rail network beyond its own borders as

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36 Union of Int'l Railways High-Speed Dep't, *High-Speed Lines in the World*, UNION OF INT'L RAILWAYS 7–9 (2011), http://www.uic.org/IMG/pdf/20110701_a1_high_speed_lines_in_the_world.pdf [hereinafter UIC].

37 *Id.* at 1.

38 Lizzy Davies, *High-Speed Rail in France: Way Out in Front—and Pushing Further Ahead*, THE GUARDIAN (Aug. 5, 2009, 5:45 PM), http://www.guardian.co.uk/world/2009/aug/05/tgv-high-speed-rail-in-france ("Ever since 1981, when the very first TGV [Train à Grande Vitesse, meaning high-speed train] departed on its journey between Paris and Lyon, France has sped ahead of the rest of Europe in the race to build a fully functioning high-speed rail network.").

39 David Levinson, *Rail Reinvented? A Brief History on High Speed Ground Transportation*, NEXUS 1 (last visited Oct. 25, 2011), http://nexus.umn.edu/Papers/RailReinvented.pdf.

40 UIC, *supra* note 36, at 1 (noting that the LGV Méditerrané and LGV Est lines are capable of speeds up to 199 mph).

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> The TGV has played a role in the reduction of automobile and air traffic along competitive routes. For example, on the main tollway in the south, which is in direct competition with the TGV-SudEst, traffic abruptly stopped growing in 1982, the first full year of operation of the SudEst. This phenomenon was not experienced on the tollways in the north and west, tollways not in direct competition with the SudEst line, during the first year of TGV service. The TGV-Atlantique has had a similar impact. Since the line came into service, traffic growth on the Paris-Bordeaux and Paris-Le Mans tollways, which are in competition with the Atlantique, started to taper off immediately. . . . Again, this trend was not mirrored by the north and east tollways where traffic volume continued to grow. . . . Air traffic along these routes has experienced similar declines. A sharp drop in Paris-Lyon air traffic has been noted. . . . Air services in competition with the TGV-Atlantique have almost without exception experienced a substantial drop in traffic.

Jeremy D. Colello, *The Development of the High-Speed Rail Network in France,* LEHIGH.EDU (last visited Oct. 25, 2011), http://www.lehigh.edu/~incntr/publications/perspectives/v15/colello.pdf.

42 Levinson, *supra* note 39, at 4.

well. French service currently stretches to Switzerland, Belgium, the Netherlands, Germany, and Luxemburg,[43] and plans are being developed for a line from Lyon to Budapest, Hungary.[44] The French government intends on doubling their existing high-speed track mileage to 2500 miles by the year 2020.[45] Its priority is to "accelerate the transfer from road to rail, and to give an alternative to short haul air travel" for those regions which, up to this point, have not been served by the country's high-speed rail network.[46]

Germany's network currently consists of approximately 798 miles of track, with much more either currently being constructed, or in the planning phase.[47] The original purpose of the high-speed rail network in Germany was to alleviate the bottleneck of the most heavily travelled route in the country, the 590-mile railway from Hamburg to Munich, via Hannover, Frankfurt and Stuttgart.[48] The network was subsequently expanded following the collapse of East Germany in 1989.[49] This resulted in several new routes from cities in former West Germany, such as Hannover and Hamburg, to Berlin in former East Germany.[50] Germany's location at the center of Europe also encouraged the development of more international services.[51]

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43 "TGV offers route to exciting cities in neighboring countries and many destinations in France. Trains operate between Paris and Luxembourg, Switzerland and Germany. Service is also offered from Brussels and Geneva to Avignon, Marseille, Lyon and Nice." VACATIONS BY PLAZA, http://www.vacationsbyplaza.com/default.asp?pid=36090&sid=2092 (last visited Oct. 25, 2011).

44 Other stops on this route would include Trieste, Koper, Divaca, Ljubljana, and the Ukrainian border. *See Project N°6,* TRANS-EUROPEAN TRANSPORT NETWORK (Sept. 3, 2005), http://ec.europa.eu/ten/transport/maps/doc/axes/pp06.pdf.

45 Davies, *supra* note 38 ("The work, which aims to connect parts of the provinces as yet untouched by the economic and environmental potential of the TGV, is expected to cost about 18bn [euro].").

46 *Id.* (quoting Jean-Marie Guillemot from the Réseau Ferré de France (RFF), which is the body in charge of France's rail infrastructure).

47 UIC, *supra* note 36, at 2. Germany currently has 235 miles of track under construction, with another 416 miles planned. *Id.*

48 TERRY GOURVISH, U.K. DEP'T. OF TRANSP., THE HIGH SPEED RAIL REVOLUTION: HISTORY AND PROSPECTS 14 (2010), *available at* http://webarchive.nationalarchives.gov.uk/+/http://www.dft.gov.uk/pgr/rail/pi/highspeedrail/hs2ltd/historyandprospects/pdf/report.pdf.

49

> More construction followed, after the east and west German railways were merged as Deutsche Bahn AG in 1994: Hannover-Berlin in 1998; Köln-Frankfurt in 2002/04, Germany's first [186 mph] line; and Hamburg-Berlin in 2004. . . . Policy was also affected by the need to embrace reconstruction and unification objectives following the collapse of the East German State in 1989, which was a critical factor in the Hannover-Berlin and Hamburg-Berlin projects.

Id.

50 *Id.*

51 *Id.*

This resulted in high-speed rail routes to destinations in Austria, Switzerland, the Netherlands, and Belgium.[52] Like in Japan, regional air service has been eliminated, or substantially reduced due to the implementation of a high-speed rail network in Germany.[53]

Italy enjoys the distinction of being the first European country to successfully deploy a high-speed rail route, by connecting Rome and Florence in 1978.[54] As in France and Germany, high-speed rail lines were originally constructed to overcome increasingly congested bottlenecks, which caused the nation's transportation networks to be increasingly more unreliable.[55] The Italian network now consists of approximately 574 miles of track, connecting large cities such as Rome, Florence, Bologna, Naples, and Milan.[56]

Spain is a relative newcomer to high-speed rail in Europe, opening up its first line in 1992.[57] This line connected the 293-mile distance between Madrid and Seville, effectively easing capacity constraints and reducing the travel time between the two cities.[58] Travel time was reduced from six and a half hours, to two hours and thirty-two minutes.[59] Encouraged by this success, additional lines were constructed, including one along the main artery between the major cities of Madrid and Barcelona, cutting the travel time there to two hours and thirty-

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52 "DB Bahn's first ICE [Intercity-Express] made its debut in 1991 and today there are 5 varieties. ICE 1,2,3,T, and Sprinter. Each operates between several major cities including international destinations in Switzerland, Austria, Belgium, and the Netherlands." *The ICE: DB Bahn's Fastest Breed of Trains*, DB BAHN (last visited Dec. 27, 2010), http://www.bahn.com/i/view/USA/en/trains/overview/ice.shtml.

53 DUTZIK & STEVA, *supra* note 13, at 1.

54 James, *supra* note 15.

55 "The original high speed lines in France, Germany and Italy were seen largely as a means of overcoming bottlenecks on the national networks. These bottlenecks limited capacity, caused conflicts between types of traffic and increased unreliability. Higher speeds were in many respects an accidental by-product of improved reliability." Andrew Nash & Ulrich Weidmann, Vienna Transport Strategies & The Institute for Transportation Planning and Systems, *Europe's High Speed Rail Network: Maturation and Opportunities* 4 (Nov. 15, 2007), http://www.andynash.com/nash-publications/Nash2008-HSRinnovation-TRB-paper.pdf.

56 UIC, *supra* note 36, at 2–3. In addition, approximately 245 miles of track are planned for future construction, connecting Genoa to Milan, and Milan to Venice. *Id.*

57

> As in Japan and France, the easing of capacity constraints was a major stimulus, but the new AVE [Alta Velocidad Española, the Spanish high-speed train] service produced a dramatic reduction in journey times and the impact in terms of traffic generation and abstraction from the airlines was large and instantaneous.

GOURVISH, *supra* note 48, at 15–16.

58 *Id.*

59 *Id.* at 16.

eight minutes.[60] Spain now has over 1277 miles of high-speed rail,[61] with ambitious plans to increase that number substantially. There are roughly 1098 miles of additional track being constructed currently, with another 1058 miles planned for the future.[62] The goal is to link all of the country's provincial capitals by 2020.[63] Construction is also taking place on a line from Barcelona that would ultimately be connected to France, and the rest of the European high-speed rail network.[64]

There are many other successful high-speed rail networks currently operating in other countries in Europe, with many more being planned or constructed. The UK currently is limited to the Channel Tunnel, linking London to the continental high-speed rail network.[65] When finally (partially) opened in 2003, the Channel Tunnel reduced the travel time from London to Paris by more than fifty percent and achieved even greater time savings on the London to Brussels route.[66] Belgium currently has several lines in operation connecting the country to the French, German, and Dutch borders at speeds of up to 186 mph.[67] In 2007, Switzerland completed a tunnel through the Alps that allows high-speed trains to travel between Germany and Italy in about a third of the time it previously took.[68] The Swiss are currently constructing another tunnel through the Alps that will become the largest tunnel in the world.[69] It is expected to revolutionize travel throughout Europe, providing a high-speed link from the north of the continent to the south.[70] The travel time between

60 *Id.* This route has also reduced the airlines' share of the traffic from eighty-eight percent to fifty-two percent. *Id.*

61 UIC, *supra* note 36, at 4.

62 *Id.* at 4–5.

63 GOURVISH, *supra* note 48, at 17.

64 "Today an international HSR network is gradually taking shape. Major network building blocks including the PBKAL (Paris-Brussels-Köln-Amsterdam-London) network and France's TGV Est have recently been completed. Additional elements including the Lyon-Turin tunnel linking Italy and the Perpignan-Barcelona line linking Spain to the network are under construction." Nash & Weidmann, *supra* note 55, at 5.

65 *Id.* at 3.

66 GOURVISH, *supra* note 48, at 19, 39.

67 UIC, *supra* note 36, at 1.

68 *Huge Swiss Tunnel Opens in Alps*, BBC NEWS (June 15, 2007, 10:05 PM), http://news.bbc.co.uk/2/hi/europe/6755953.stm [hereinafter *Swiss Tunnel*]. This tunnel through the Alps is currently the world's longest rail tunnel on land at twenty-one miles in length, and will eventually handle about forty-two passenger trains and up to eighty freight trains daily. *Swiss Tunnel*, *supra*.

69 *Swiss Create World's Longest Tunnel*, BBC NEWS (Oct. 15, 2010, 10:23 AM), http://www.bbc.co.uk/news/world-europe-11548845 [hereinafter *World's Longest Tunnel*]. The tunnel will be thirty-five miles long, becoming the largest tunnel in the world and exceeding the thirty-four mile long Seikan rail tunnel linking the Japanese islands of Honshu and Hokkaido, and the thirty-one mile long Channel Tunnel linking England and France. *World's Longest Tunnel*, *supra*.

70 *World's Longest Tunnel*, *supra* note 69.

the Swiss capital of Zurich and Milan, Italy is expected to be cut by about one hour and thirty minutes.[71] Other countries that currently do not have a high-speed rail network, but are currently planning on implementing one, include Portugal, Poland, Russia, and Sweden.[72]

C. Other Parts of the World

While Europe and Asia currently have a monopoly on high-speed rail networks, there are several others throughout the world being planned. Brazil is attempting to complete a high-speed rail line between the cities of San Paolo, Rio de Janeiro, and Campinas in time for the 2016 Olympics, with parts of the route potentially to be completed by the 2014 World Cup, both of which they are hosting.[73] As planned, the route will stretch approximately 320 miles, and cost $17.4 billion.[74] The population of the three metropolitan regions is roughly 33.5 million people, and the GDP of Rio de Janeiro and San Paolo alone represent forty-five percent of the country's total.[75] In addition to benefitting Brazil's transportation network during these international events, the project is identified as being key to sustaining the country's annual growth rate by former Brazilian President Luiz Inácio Lula da Silva, as well as relieving the congested San Paolo to Rio de Janeiro air and automobile traffic.[76]

Another project in South America currently being planned in Argentina will connect the country's three largest metropolitan areas. The route will run from Buenos Aires on the coast, to the port town of Rosario, and will terminate further inland at Córdoba, the second largest city in Argentina.[77] The 435-mile

71 *World's Longest Tunnel*, *supra* note 69. High-speed trains will be able to travel through the tunnel at speeds of up to 155 mph. *World's Longest Tunnel*, *supra*.

72 UIC, *supra* note 36, at 3–5.

73 Ana Nicolaci da Costa, *Brazil to Hold High-Speed Rail Auction on May 2*, REUTERS, Feb. 4, 2010, *available at* http://www.reuters.com/article/idUSN0419382520100204.

74 *Id.*

75 Sao Paolo has a population of 19 million people, Rio de Janeiro has a population of 12 million people, and Campinas has a population of 2.5 million people. Brazilian Embassy in Tokyo, *Brazilian High Speed Train—TAV*, BRASEMB.OR.JP 2 (Apr. 2008), http://www.brasemb.or.jp/economy/pdf/MinDilmaTAV.pdf.

76 "The train and other massive infrastructure projects being sponsored by heavy government credit are key for Brazil to sustain annual growth rates above 5% a year this decade." James Matthews, *Brazil Urges Budget Cut for Bullet Train-Report*, REUTERS, June 30, 2010, *available at* http://www.reuters.com/article/idUSN3020089620100630.

77 "The so called 'tren bala' (bullet train) will run between Buenos Aires and Córdoba, the country's two biggest urban centers. It will also pass through third-city Rosario, whose port is the departure point for most of Argentina's exports." Marc Rogers, *Biting The Bullet: High-Speed Train Sparks Controversy*, THE ARGENTINA INDEPENDENT (June 27, 2008), http://www.argentinaindependent.com/currentaffairs/

link will be designed to support speeds of up to 186 mph, and will cut the travel time from Buenos Aires to Córdoba from fourteen hours, to three hours.[78] As a result, the project is viewed as an essential one to Argentina, and one that will have a major impact on the economic development of the region.[79] Originally planned for completion by 2011, the project is currently on hold due to the financial crisis.[80]

Morocco is also currently planning a high-speed network, which would be the first in the Arab world, and the first on the African continent.[81] Construction started in 2010, and service is scheduled to begin in 2015.[82] The master plan calls for the construction of 932 miles of track by 2030,[83] linking many of the country's largest cities at speeds of up to 186 mph.[84] Two lines are planned; the first would link Tangier to Agadir via Rabat, Casablanca, Marrakech, and Essaouira in less than four hours, and the second would link Casablanca to Oujda via Meknès and Fès in under three hours.[85] This would cut the time of popular routes such as Tangier to Casablanca from five hours and forty-five minutes, to two hours and ten minutes, and Marrakech to

newsfromargentina/biting-the-bullet-high-speed-train-sparks-controversy-/.

78 *Boost for High-Speed Train Maker*, BBC NEWS (Jan. 17, 2008), http://news.bbc.co.uk/2/hi/business/7193511.stm. "Journey times from the capital are estimated at eighty five minutes to Rosario and a further ninety minutes to Córdoba, a major reduction from today's route (four and ten hours, respectively, by road)." Rogers, *supra* note 77.

79 Describing the Buenos Aires–Rosario–Córdoba line as "the largest very high speed rail project outside Europe since the KTX in Korea," Alstom Chairman & CEO Patrick Kron said it represented "an essential component in the revival of railways in Argentina, which will have a major impact on the economic development of the region." Chris Jackson, *Veloxia Signs Argentine High Speed Deal*, RAILWAY GAZETTE (Apr. 29, 2008), http://www.railwaygazette.com/nc/news/single-view/view/veloxia-signs-argentine-high-speed-deal.html.

80 Castalia Strategic Advisors, Nat'l Council for Pub.-Private P'ships, *HSR PPP's: Realism About What is Possible, Innovation in How to Structure it*, CASTALIA 1 (Nov. 19, 2009), http://www.castalia-advisors.com/files/Castalia_HSR-PPP_Presentation_for_NCPPP.pdf.

81 *Morocco Plans Arab World's First High-Speed Train*, KHALEEJ TIMES ONLINE (Sept. 15, 2006), http://www.khaleejtimes.com/DisplayArticleNew.asp?xfile=data/middleeast/2006/September/middleeast_September345.xml&section=middleeast; "Today, the Moroccan TGV line is going forward and will make the country the first on the African continent to join the High-Speed Rail club." SNCF Int'l, *In Morocco*, SNCF GROUPE (June 2008), http://www.sncf-international.net/upl/file/MarocGB.pdf.

82 "The work to build the high-speed train line between Tangier and Casablanca will be launched this year and the line service would begin in December 2015." *Morocco to Launch $2.5 Billion High Speed Train Line*, REUTERS, Feb. 2, 2010, *available at* http://af.reuters.com/article/topNews/idAFJOE61101T20100202?pageNumber=2&virtualBrandChannel=0&sp=true.

83 SNCF Int'l, *supra* note 81.

84 UIC, *supra* note 36, at 10.

85 "Two lines are planned to be opened in the first phase. The first, northerly, is to link Tangier with Casablanca in 2013. The second, southerly link will connect Marrakech to Casablanca." SNCF Int'l, *supra* note 81.

Casablanca from three hours and fifteen minutes, to one hour and twenty minutes.[86] This rail network is expected to ease congestion on Morocco's busy roads, stimulate the economy, and provide employment, all while improving the transportation links from the center of the country to long-neglected outlying regions and cities.[87]

D. United States

In addition to the California high-speed rail project discussed at length in this Comment, the U.S. currently has a successful near-high-speed rail line currently in operation.[88] Capable of speeds up to 150 mph, the line connecting Boston, New York, and Washington D.C. is the closest example of high-speed rail in the U.S., but wouldn't be classified as high-speed rail under international standards due to its slower speed.[89] However, many other corridors throughout the U.S. have been designated for future implementation of high-speed rail.[90] California's project is certainly the most developed among other potential networks in the U.S. and will likely have the best chance of reaching completion.[91]

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86 *Id.*

87 *Id.*

88 Major cities along this route include Washington D.C., Baltimore, Wilmington, Philadelphia, Trenton, New York City, New Haven, Providence, and Boston. Fed. R.R. Admin., *Northeast Corridor Main Line*, FED. RAILROAD. ADMIN., http://www.fra.dot.gov/rpd/passenger/643.shtml (last visited Oct. 26, 2011).

89 Fed. R.R. Admin., *supra* note 88; Europe's definition of a high speed rail line was set by the European Union's Trans-European High Speed Rail Network. High-speed rail lines must have one of the following characteristics:

> Specially built high-speed lines equipped for speeds generally equal to or greater than [155 mph], specially upgraded high-speed lines equipped for speeds of the order of [124 mph], or specially upgraded high-speed lines which have special features as a result of topographical, relief or town-planning constraints, on which the speed must be adapted to each case.

Council Directive 96/48, annex I, 1996 O.J. (L 235) (EC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0048:EN:HTML.

90 In addition to the California Corridor, other corridors include the Pacific Northwest Corridor, Chicago Hub Network, Northern New England Corridor, Empire Corridor, Keystone Corridor, Southeast Corridor, Florida Corridor, Gulf Coast Corridor, and the South Central Corridor. Fed. R.R. Admin., *High-Speed Rail Corridor Descriptions*, FED. RAILROAD ADMIN. (last visited Oct. 25, 2011), http://www.fra.dot.gov/Pages/203.shtml.

91 According to U.S. Secretary of Transportation Ray LaHood, Californians "are obviously way, way ahead of everyone else." Jon Gertner, *Getting up to Speed*, NYTIMES.COM (June 10, 2009), http://www.nytimes.com/2009/06/14/magazine/14Train-t.html.

II. *TOWN OF ATHERTON V. CALIFORNIA HIGH-SPEED RAIL AUTHORITY*: THE DECISION AND SUBSEQUENT ACTION TAKEN

The issue with the California high-speed network arose when the California Superior Court for the County of Sacramento found that the Environmental Impact Report completed by the Rail Authority contained an inadequate description of the high-speed rail project, and as a result, an inadequate land use analysis.[92] An EIR is an informational document written by the lead agency describing and analyzing the significant environmental effects of a proposed project, identifying alternatives, and discussing ways to reduce or avoid possible environmental damage.[93] An EIR is prepared when the lead agency finds substantial evidence that the project may have a significant effect on the environment by causing either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.[94] EIR's are required pursuant to the California Environmental Quality Act, adopted in 1970.[95] The basic purposes of CEQA are to: inform governmental decision makers and the public about the potential significant environmental effects of proposed activities, identify ways that environmental damage can be avoided or significantly

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92 Town of Atherton v. Cal. High-Speed Rail Auth., No. 34-2008-80000022, slip op. at 21 (Cal. Super. Ct. Aug. 26, 2009).

93 CAL. PUB. RES. CODE § 21061 (West 2007).

94 CAL. CODE REGS. tit. 14, § 15064(a)(1) (2011); A "project" is defined as either "[a]n activity directly undertaken by any public agency," "[a]n activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies," or "[a]n activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies" that causes either direct or reasonably foreseeable indirect physical change in the environment. CAL. PUB. RES. CODE § 21065 (West 2007); A "direct physical change" in the environment is defined as:

> a physical change in the environment which is caused by and immediately related to the project. Examples of direct physical changes in the environment are the dust, noise, and traffic of heavy equipment that would result from construction of a sewage treatment plant and possible odors from operation of the plant.

tit. 14, § 15064(d)(1);

> An indirect physical change in the environment is a physical change in the environment which is not immediately related to the project, but which is caused indirectly by the project. If a direct physical change in the environment in turn causes another change in the environment, then the other change is an indirect physical change in the environment. For example, the construction of a new sewage treatment plant may facilitate population growth in the service area due to the increase in sewage treatment capacity and may lead to an increase in air pollution.

tit. 14, § 15064(d)(2). "An indirect physical change is to be considered only if that change is a reasonably foreseeable impact which may be caused by the project. A change which is speculative or unlikely to occur is not reasonably foreseeable." tit. 14, § 15064(d)(3).

95 *California Environmental Quality Act*, 1970 Cal. Stat. 2780 (codified in CAL. PUB. RES. CODE § 21000 et seq. (West 2007)); tit. 14, § 15064(a).

reduced, require changes in projects through the use of alternatives or mitigation measures when feasible, and disclose to the public the reasons why a project was approved if significant environmental effects are involved.[96] CEQA applies to projects undertaken, funded or requiring an issuance of a permit by a public agency.[97]

The California High Speed Rail Authority was established in 1996 and is the state agency responsible for the planning, construction, and operation of the proposed high-speed train system.[98] A statewide EIR was "certified in November 2005 as the first phase of a tiered environmental review process for the proposed California high-speed train system planned to provide a safe and reliable mode of travel that links the major metropolitan areas of the state."[99] The Rail Authority, "in cooperation with the Federal Railroad Administration (FRA), prepared a Draft Program EIR/EIS [Environmental Impact Statement] for the San Francisco Bay Area-to-Central Valley region, circulated it for public and agency review in 2007, and then completed th[e] Final Program EIR/EIS that respond[ed] to comments received on the Draft Program EIR" in May 2008.[100] The Final Program EIR contained information regarding the purpose and objectives of the project, a summary of potential alternatives, environmental consequences and mitigation strategies, costs and operations, economic growth and related impacts, preferred and alternative locations for stations and track alignment, and unavoidable adverse environmental impacts.[101]

The release of the Final Program EIR in May 2008 caused great concern to many cities and towns along the Bay Area-to-Central Valley portion of the route.[102] Among those that brought suit against the Rail Authority were the Town of Atherton and the City of Menlo Park; they were joined by a number of non-profit organizations including the Planning and Conservation

96 *See* PUB. RES. §§ 21000–21002.

97 PUB. RES. § 21065.

98 PROGRAM SUMMARY REP., *supra* note 3, at 11.

99 CAL. HIGH-SPEED RAIL AUTH., FINAL BAY AREA TO CENTRAL VALLEY HIGH-SPEED TRAIN (HST) PROGRAM ENVIRONMENTAL IMPACT REPORT/ENVIRONMENTAL IMPACT STATEMENT (EIR/EIS), at P-1 (2008) [hereinafter FINAL EIR 2008].

100 *Id.*

101 *Id.* at ix–x.

102 Steve Hymon, *California High-Speed Rail Dispute*, L.A. TIMES BLOGS (Aug. 11, 2008), http://latimesblogs.latimes.com/bottleneck/2008/08/california-high.html; Menlo Park City Councilwoman Kelly Fergusson stated, "We've seen no indication of the High Speed Rail Authority even considering the concerns of communities up and down the Peninsula. . . . We've been shown no respect." Rory Brown, *MP, Atherton Join Suit Against High-Speed Rail*, THE ALMANAC (Aug. 6, 2008), http://www.almanacnews.com/news/show_story.php?id=2407.

League, the Transportation Solutions Defense and Education Fund, the California Rail Foundation, and the Bayrail Alliance as named plaintiffs.[103] Palo Alto, and other Bay Area cities, showed their support for those cities bringing suit by filing an amicus brief outlining their shared objection to the project.[104]

The California Superior Court for the County of Sacramento heard the matter on May 29, 2009.[105] Generally, the plaintiffs opposed the Rail Authority's approval of the Bay Area-to-Central Valley portion of the high-speed rail project.[106] Specifically, what concerned the plaintiffs was the "alignment . . . .running through Pacheco Pass, rather than the other major alternative alignment which ran through Altamont Pass."[107] These plaintiffs claimed that the Rail Authority did not provide a legally adequate review in the EIR under section 21000 of CEQA and contended that the Rail Authority's approval of the EIR was therefore unlawful as it violated CEQA and title 14, section 15000 of the California Code of Regulations.[108] They alleged the review was "inadequate in several respects."[109] First, the plaintiffs claimed that the EIR "failed to contain an adequate description of the project and feasible alternatives."[110] Second, they contended the EIR "failed to adequately identify and mitigate the [P]roject's significant impacts, and that its alternatives analysis was inadequate" since it was improperly predisposed towards the Pacheco Pass alignment without outlining any alternative alignments.[111] Lastly, the plaintiffs alleged that the Rail Authority, upon learning that Union Pacific Railroad was unwilling to share its right-of-way with the proposed project, did not revise and re-circulate its Draft Program EIR.[112] In alleging a legally inadequate review in a CEQA case, an EIR has a presumption of validity, and the plaintiffs have the burden of proving otherwise.[113]

103 Town of Atherton v. Cal. High-Speed Rail Auth., No. 34-2008-80000022, slip op. at 1 (Cal. Super. Ct. Aug. 26, 2009).

104 "While Menlo Park and Atherton were both plaintiffs in the initial lawsuit, Palo Alto remained largely on the sidelines. Palo Alto submitted a 'friend of the court' letter in support of the plaintiffs, but the court didn't consider the letter in issuing its judgment." Sheyner, *supra* note 10.

105 *Town of Atherton*, No. 34-2008-80000022, slip op. at 1.

106 *See id.* at 2.

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.*

113 *See* CAL. PUB. RES. CODE § 21167.3 (West 2007).

The court ultimately decided that many of the specific points the plaintiffs raised were without merit, however, the judge did find that certain points addressing land use issues met the burden of proof required by CEQA.[114] The judge determined that the EIR contained an inadequate description of the project, which resulted in an inadequate description of land use impacts.[115] The court also decided that, upon the Rail Authority receiving confirmation of Union Pacific Railroad's position against allowing the use of its right-of-way for the proposed project, the Rail Authority should have re-circulated the EIR for public commentary reflecting this updated development.[116]

This decision had the effect of forcing the Rail Authority to revisit their initial EIR, address the changes the court required, and re-circulate the revised EIR to all interested parties for public comment. Fortunately for the Rail Authority, only the portions of the EIR addressed by the court needed revision, and the court's judgment did not begin the EIR process anew.[117] On December 3, 2009, the Rail Authority began the process of revising their initial EIR by passing resolution 10-012,[118]

114 *Town of Atherton,* No. 34-2008-80000022, slip op. at 21.

115 *Id.*

116 *Id.*

117 The court order specifying what action is necessary by the public agency is limited to those portions of the EIR found to be noncompliant if the portion or specific project activity is severable, severance will not prejudice complete and full compliance with CEQA, and if the court has not found that the remainder of the EIR is noncompliant with CEQA. CAL. PUB. RES. CODE § 21168.9 (West 2007); Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova, 150 P.3d 709, 733 (Cal. 2007) (noting that recirculation of the EIR may be limited by the scope of the revisions required); Protect the Historic Amador Waterways v. Amador Water Agency, 11 Cal. Rptr. 3d 104, 113 (Cal. Ct. App. 2004) (noting that the court's conclusion that the EIR was inadequate does not mean the lead agency was required to start the EIR process anew, but rather meant it needed only correct the deficiency in the EIR that the court had identified before considering recertification of the EIR).

118 Resolution 10-012 not only rescinded the 2008 Final EIR, but outlined the next immediate steps that needed to be taken in order to comply with CEQA and the court's ruling:

> NOW, THEREFORE, BE IT RESOLVED by the California High-Speed Rail Authority that:
>
> 1. The Authority rescinds Resolution 08-01, including all certifications and approvals included therein;
>
> 2. The Authority directs staff to prepare the documentation needed to comply with the final judgment in the *Town of Atherton* litigation and to circulate such documentation for the public comment period required under the California Environmental Quality Act; and
>
> 3. The Authority directs staff to present an informational staff report to the Authority at the next regularly scheduled meeting following the close of the public comment period on the corrected material.

Cal. High-Speed Rail Auth., *Rescinding July 2008 Certification of Final Program Environmental Impact Report for the Bay Area to Central Valley High-Speed Train System*, HSRA Res. 10-012 (Dec. 3, 2009) (on file with the CHSRA).

rescinding the Rail Authority's initial certification of the 2008 EIR and approval of the Pacheco Pass network alternative, and directing staff to prepare the necessary revisions and prepare for re-circulation of the Revised Draft Program EIR.[119] The revision process took four months to complete, and re-circulation of the revised EIR began in March 2010, with the public commentary period taking place from March 11 through April 26.[120] Pursuant to CEQA, any feedback received during the commentary period was limited to those portions revised as a result of the court order.[121] "By the close of the 45-day public comment period, the [Rail] Authority received more than 500 written letters and verbal statements at public hearings, totaling more than 3,750 individual comments."[122]

The Rail Authority carefully considered this commentary in drafting the Final Program EIR, which was completed in August 2010.[123] At the Rail Authority's subsequent board meeting on September 2, 2010, the Final Program EIR for the Bay Area-to-Central Valley portion of the route was certified.[124] Within

119 CAL. HIGH-SPEED RAIL AUTH., BAY AREA TO CENTRAL VALLEY HIGH-SPEED TRAIN (HST) REVISED DRAFT PROGRAM ENVIRONMENTAL IMPACT REPORT MATERIAL 1-2, 1-4 (Mar. 2010) [hereinafter REVISED DRAFT EIR].

120 *Id.*

121 "If the revision is limited to a few chapters or portions of the EIR, the lead agency need only recirculate the chapters or portions that have been modified." CAL. CODE REGS. tit. 14, § 15088.5(c) (2011);

> When the EIR is revised only in part and the lead agency is recirculating only the revised chapters or portions of the EIR, the lead agency may request that reviewers limit their comments to the revised chapters or portions of the recirculated EIR. The lead agency need only respond to (i) comments received during the initial circulation period that relate to chapters or portions of the document that were not revised and recirculated, and (ii) comments received during the recirculation period that relate to the chapters or portions of the earlier EIR that were revised and recirculated.

tit. 14, § 15088.5(f)(2) (2011).

122 REVISED FINAL EIR 2010, *supra* note 7, at P-1.

123 The Revised Final Program EIR includes "some textual modifications in response to comments; comments on the Revised Draft Program EIR; a list of persons, organizations and agencies commenting on the Revised Draft Program EIR;" and the original responses to the comments made in the 2008 Final EIR. REVISED FINAL EIR 2010, *supra* note 7, at P-1.

124 The 2010 Final Program EIR was certified by Resolution 11-11:

> Section 1. Certification of Revised Final Program EIR. The Authority hereby certifies that:
>
> (a) the Revised Final Program EIR has been completed in compliance with CEQA and the final judgment in the *Town of Atherton* case;
>
> (b) the Revised Final Program EIR has been presented to the Authority Board and the Board has reviewed and considered the information contained in the Revised Final program EIR prior to approving the project; and
>
> (c) the Revised Final Program EIR reflects the Authority's independent judgment and analysis.

Cal. High-Speed Rail Auth., *Certification of the Bay Area to Central Valley High-Speed*

weeks, the cities of Atherton, Palo Alto, and Menlo Park decided to file suit, alleging again that the EIR did not address their concerns regarding the land use impacts associated with the route selection.[125] The city councils of Burlingame, Redwood City, San Mateo, and Belmont all considered joining the litigation as well, but all ultimately adopted a "wait and see" approach.[126] The suit was officially filed on October 4, 2010 in the Superior Court of California for the County of Sacramento.[127]

III. THE REVISED EIR: SUFFICIENT UNDER CEQA, ALLOWING THE PROJECT TO MOVE FORWARD

CEQA's requirement of an environmental impact report, while noble in its attempt to reveal all significant environmental impacts of projects and stimulate vigorous public debate before officials give approval, often has the unintended consequence of allowing opponents of a project to be able to delay or halt even the most well-planned project on procedural flaws in the EIR.[128] Since the passage of CEQA in 1970, California courts have interpreted the EIR to be, in many respects, "[t]he heart of CEQA."[129] However, CEQA also expressly provides that an EIR

Train Revised Final Program Environmental Impact Report for Compliance with the California Environmental Quality Act (CEQA), at 3–4, HSRA Res. 11-11 (Sept. 2, 2010).

125 Renee Batti, *Atherton Continues High-Speed Rail Litigation*, THE ALMANAC, Sept. 22, 2010, at 12; "Palo Alto officials are claiming that the new document violates the California Environmental Quality Act because it fails to address many of the city's comments on the voluminous document. These include concerns about the project's ridership and revenue projections and its route selections." Gennady Sheyner, *Palo Alto to Sue High-Speed Rail Authority*, PALO ALTO ONLINE (Sept. 21, 2010, 12:39 AM), http://www.paloaltoonline.com/news/show_story.php?id=18317; The Palo Alto and Atherton city councils voted to challenge the project's environmental studies, saying they do not meet requirements of the California Environmental Quality Act. Sandy Brundage, *Menlo Park Joins High-Speed Rail Lawsuit*, THE ALMANAC, Sept. 29, 2010, at 9.

126 Irvin Dawid, *Three Peninsula Cities File Another Lawsuit Against Ca HSR Authority*, PLANETIZEN BLOG (Oct. 6, 2010, 10:00 AM), http://www.planetizen.com/node/46291; Belmont Mayor Christine Wozniak cited cost and relations with neighboring cities as reasons for not joining the litigation at this time, stating, "'[a] lawsuit is expensive, and it might not go over well with our neighbors' who haven't joined the lawsuit." Anthony Myers, *Belmont Will Not Join Suit Against High-Speed Authority*, SAN MATEO COUNTY TIMES, Sept. 29, 2010, *available at* http://www.thetransitcoalition.us/newspdf/sjmn20100929a.pdf.

127 Brief for Petitioner at 1, Town of Atherton v. Cal. High Speed Rail Auth., No. 34-2010-80000679 (Cal. Super. Ct. Oct. 4, 2010).

128 William Fulton, an urban planner and author of "Guide to California Planning," stated, "The law developed such complicated procedures, it is too easy to challenge in court. . . . So when some people don't like a project in their back yard, they can try to stop it by attacking the procedure rather than the project." Kenneth R. Weiss, *Reports Have an Impact on Environment*, L.A. TIMES, Sept. 15, 1991, at B1, *available at* http://articles.latimes.com/1991-09-15/local/me-3409_1_environmental-study.

129 CAL. CODE REGS. tit. 14, § 15003(a) (2011); "The EIR has been aptly described as the 'heart of CEQA.' Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made. Thus, the EIR 'protects not only the environment but also informed self-government.'" Citizens of Goleta

is merely an "informational document" which is to be considered by public agencies before approving or disapproving a project.[130] It also emphasizes that the courts should balance environmental concerns against economic considerations.[131]

As discussed earlier, the court in *Town of Atherton* found that the EIR contained an inadequate project description regarding the Bay Area-to-Central Valley portion of the high-speed rail project, and as a result, it contained an inadequate land use analysis.[132] An EIR must contain a general description of the project's technical, economic, and engineering characteristics, and a statement of the objectives sought by the proposed project.[133] "An accurate, stable and finite project

Valley v. Bd. of Supervisors, 801 P.2d 1161, 1167 (Cal. 1990) (internal citations omitted); "The EIR is the primary means of achieving the Legislature's considered declaration that it is the policy of this state to take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state." Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 764 P.2d 278, 282 (Cal. 1988); "The report referred to in the sections may be viewed as an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." Cnty. of Inyo v. Yorty, 108 Cal. Rptr. 377, 388 (Cal. Ct. App. 1973).

130 CEQA also states:

> The purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.

CAL. PUB. RES. CODE § 21061 (West 2007).

131 It is the policy of the state that:

> All persons and public agencies involved in the environmental review process be responsible for carrying out the process in the most efficient, expeditious manner in order to conserve the available financial, governmental, physical, and social resources with the objective that those resources may be better applied toward the mitigation of actual significant effects on the environment.

PUB. RES. § 21003(f).

132 Town of Atherton v. Cal. High-Speed Rail Auth., No. 34-2008-80000022, slip op. at 21 (Cal. Super. Ct. Aug. 26, 2009).

133 CAL. CODE REGS. tit. 14, § 15124(b), (c) (2011). There is a significant amount of case law holding that a *general* description of a project's technical, economic, and engineering characteristics is all that is necessary unless the characteristic is an integral part of the project and a more complete description is necessary in the decision making process. *See, e.g.*, Dry Creek Citizens Coal. v. Cnty. of Tulare, 82 Cal. Rptr. 2d 398, 403 (Cal. Ct. App. 1999) (holding that a general description of water diversion structures provided sufficient information to allow adequate impact analysis, and that it must be proved that more detailed engineering drawings are necessary to better allow the public and decision makers to fully understand the environmental consequences of the entire project); San Joaquin Raptor/Wildlife Rescue Ctr. v. Cnty. of Stanislaus, 32 Cal. Rptr. 2d 704, 709 (Cal. Ct. App. 1994) (holding that a project description for a housing development that did not include the expansion of a public wastewater treatment plant was legally inadequate because the housing development could not proceed without the plant expansion, making the expansion an integral component of the project); Santiago Cnty. Water Dist. v. Cnty. of Orange, 173 Cal. Rptr. 602, 607 (Cal. Ct. App. 1981) (holding that an EIR for a sand and gravel mining operation was inadequate because the project description omitted mention of the construction of water delivery facilities that were an integral part of the project, resulting in some important ramifications of the proposed

description is the *sine qua non*[134] of an informative and legally sufficient EIR."[135] However, a project description need not contain every detail about the project.[136] In determining whether the project description in an EIR is accurate, stable and finite enough to meet the demands of CEQA, the court shall focus only on whether there was "a prejudicial abuse of discretion."[137] "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence."[138] In addition, "[i]n any such action, the court shall not exercise its independent judgment on the evidence but shall only determine whether the act or decision is supported by substantial evidence in the light of the whole record."[139]

Although the EIR has achieved this designation as "[t]he heart of CEQA," CEQA itself seems to place a premium on the EIR being accurate, but finite, and only challengeable if the agency has abused its discretion. After all, "the purpose of CEQA is to inform government decision makers and their constituency of the consequences of a given project, not to derail it in a sea of administrative hearings and paperwork."[140]

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project remaining hidden from view when the project was being analyzed and approved); Whitman v. Bd. of Supervisors, 151 Cal. Rtpr. 866, 876 (Cal. Ct. App. 1979) (holding that an EIR prepared for a test oil well project failed to consider the environmental impacts associated with an oil pipeline to service the facility if the well proved successful, and that although admittedly contingent on certain occurrences, the pipeline was part of the overall plan for the project and "could have been discussed in the EIR in at least general terms").

134 "An indispensable condition or thing; something on which something else necessarily depends." BLACK'S LAW DICTIONARY 712 (9th ed. 2009).

135 San Joaquin Raptor Rescue Ctr. v. Cnty. of Merced, 57 Cal. Rptr. 3d 663, 672 (Cal. Ct. App. 2007); "An accurate project description is necessary for an intelligent evaluation of the potential environmental effects of a proposed activity. A narrow view of a project could result in the fallacy of division, that is, overlooking its cumulative impact by separately focusing on isolated parts of the whole." Burbank-Glendale-Pasadena Airport Auth. v. Hensler, 284 Cal. Rptr. 498, 506 (Cal. Ct. App. 1991) (internal citations omitted);

> A curtailed or distorted project description may stultify the objectives of the reporting process. Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal (i.e., the 'no project' alternative) and weigh other alternatives in the balance.

Cnty. of Inyo v. City of L.A., 139 Cal. Rptr. 396, 401 (Cal. Ct. App. 1977).

136 CEQA does not require an analysis in the EIR of each and every activity carried out in conjunction with a project. Native Sun/Lyon Cmtys. v. City of Escondido, 19 Cal. Rptr. 2d 344, 354 (1993) (holding that in the case of a land development project subject to a development agreement, the EIR need only include a reference to the agreement and its relevance to the decision making process. The EIR need not include a detailed description of the terms of the development agreement).

137 CAL. PUB. RES. CODE § 21168.5 (West 2007).

138 PUB. RES. § 21168.5.

139 PUB. RES. § 21168.

140 Long Beach Sav. & Loan Ass'n v. Long Beach Redev. Agency, 232 Cal. Rptr. 772,

The revised project description in the 2010 Final EIR should be sufficient to meet the demands of CEQA, as well as the court's instructions in *Town of Atherton* if further litigation ensues. The 2008 EIR indicated that most, if not all, of the proposed high-speed rail line in the area between San Jose and Gilroy would be built within the existing right-of-way used by Union Pacific Railroad.[141] However, shortly after the release of the May 2008 EIR, Union Pacific indicated it would not be willing to share the use of its right-of-way with the Rail Authority.[142] As a result, the court decided that the project description was inadequate since it did not account for the Rail Authority's inability to use the Union Pacific right-of-way, and therefore lacked specificity as to the route the line would take.[143] The revised project description in the 2010 EIR is much more comprehensive in that it does not rely solely on the Union Pacific right-of-way, but instead specifies much more clearly where the line will run in relation to the Union Pacific right-of-way, and the cities the route will run between before changing directions.[144] On its face, the revised project description does a far superior job showing the land use impacts that would occur, and along with the accompanying maps, is much more precise as to the project's location and boundaries, which CEQA requires.[145] The court in *Town of Atherton* was mostly concerned with the specificity of the project description, because lack of specificity here resulted in an inadequate discussion of other land use impacts of the high-speed rail line, such as impacts on surrounding businesses and residences which may be displaced, requiring the taking of property.[146] Any future court examining the revised project description in the 2010 EIR should find that it is more accurate

780 (Cal. Ct. App. 1986). "The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind." *Native Sun/Lyon Cmtys.*, 19 Cal. Rptr. 2d at 351 (citing Citizens of Goleta Valley v. Bd. of Supervisors, 801 P. 2d 1161, 1167 (Cal. 1990)).

141 Town of Atherton v. Cal. High-Speed Rail Auth., No. 34-2008-80000022, slip op. at 4 (Cal. Super. Ct. Aug. 26, 2009). *See also* FINAL EIR 2008, *supra* note 99, at 2-40.

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> [U]nion Pacific Railroad had informed the Authority just prior to the publication of the [EIR] that it would not allow the Authority to use any of its right-of-way for the project. And after the [EIR] was released, but before the Authority certified the EIR and made the related findings and decisions, Union Pacific submitted a longer letter reiterating its unwillingness to share its tracks with High-Speed Rail vehicles.

Town of Atherton, No. 34-2008-80000022, slip op. at 4–5 (internal citations omitted).

143 *Id.* at 6.

144 REVISED FINAL EIR 2010, *supra* note 7, at 2-1.

145 *Id.*; "The precise location and boundaries of the proposed project shall be shown on a detailed map, preferably topographic. The location of the project shall also appear on a regional map." CAL. CODE REGS. tit. 14, § 15124(a) (2011).

146 *Town of Atherton*, No. 34-2008-80000022, slip op. at 6.

and precise than the preceding project description, allowing for a much more detailed analysis of the various land use impacts that could arise. The Rail Authority has complied with CEQA and the previous ruling in *Town of Atherton* in revising the project description, and as such, a future court should not find there was any prejudicial abuse of discretion on the part of the Rail Authority.

The land use impacts of the project, which were deficiently analyzed in the 2008 EIR,[147] will also likely be found to be sufficient in the 2010 EIR should further litigation occur. The 2008 EIR lacked any description of the methodology for the analysis of such land use issues as compatibility, communities and neighborhoods, property, and environmental justice.[148] However, in the revised 2010 EIR, the land use analysis section begins with an in depth overview of how the Rail Authority obtained and analyzed information regarding these issues, which aids the reader in understanding the Rail Authority's findings.[149] If the reader is a reviewing court in future litigation, these descriptions will assist the court in justifying a ruling that there was no abuse of discretion, which is necessary in order to find a violation of CEQA.[150] Including the methodology for the project

147 *Id.* at 16.

148 FINAL EIR 2008, *supra* note 99, at 3.7-33–3.7-34.

149 *Id. at* 2-2. Future land use compatibility and consistency is based on information from regional and local planning documents such as general plans. An alignment alternative is considered highly compatible if it is located in an area planned for transportation or corridor development, redevelopment, economic revitalization, transit-oriented development, or high intensity employment. Compatibility would be considered low if an alignment alternative would be potentially inconsistent with local or regional planning documents. Homes and schools are typically more sensitive to change, while industrial uses tend to be less sensitive to change, and therefore more compatible. REVISED FINAL EIR 2010, *supra* note 7, at 2-2. "A potential impact on a community or neighborhood was identified if an alignment alternative would create a new physical barrier, isolating one part of an established community from another and potentially resulting in a physical disruption to community cohesion." *Id.* at 2-3.

> Assessment of potential property impacts is based on the types of land uses adjacent to the particular proposed alignment alternative, and the land use sensitivity to potential impacts. Impacts include potential acquisition, displacement and relocation of existing uses, or demolition of properties. . . . To determine potential property impacts, the land uses within 50 ft of either side of the existing corridor or within 50 ft of both sides of the centerline for new high-speed train alignments were characterized by type and density of development.

Id. at 2-3–3-4. The environmental justice analysis is based on identifying the presence of minority populations and low-income populations within 0.25 mile from a potential alignment, and "was done using U.S. Census 2000 information and alignment information to determine if minority or low-income populations exist within the study areas, and if they do, whether the alignments would be within or adjacent to an existing transportation right-of-way (lower potential for impacts) or a new alignments [sic] (higher potential for impacts)." *Id.* at 2-5.

150 CAL. PUB. RES. CODE § 21168.5 (West 2007).

description also lends credibility to the sufficiency of the EIR as an informative document, upon which the court will place a premium.[151]

Because of the court's express concern over the increased risk of requiring the taking of additional land due to Union Pacific's unwillingness to share their track right-of-way with the Rail Authority,[152] the 2010 EIR goes into a more detailed analysis of potential impacts to property.[153] Like the project description in the 2008 EIR, the description of impacts to property was short and less detailed because of the Rail Authority's incorrect assumption that they would not be impacting much property due to their use of the Union Pacific right-of-way.[154] With it now clear that it is not an option to use Union Pacific's right-of-way, the 2010 EIR focuses more intently on the route, assessing potential property impacts and rating them no higher than medium, meaning that in some places the taking of property may be necessary.[155] It also identifies potential areas where there would be little to no impact to property,[156] and in many places where potential property impact is medium, the Revised Final EIR highlights that the property is mainly agricultural land, resulting in less of an impact.[157] If in

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151 "The reviewing court does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document." Native Sun/Lyon Cmtys. v. City of Escondido, 19 Cal. Rptr. 2d 344, 351 (Cal. Ct. App. 1993).

152 "If Union Pacific will not allow the Authority to use its right-of-way, it appears it will be necessary for the Authority to obtain additional right-of-way outside of this area, requiring the taking of property and displacement of residents and businesses. However, none of this was addressed in the [EIR]." Town of Atherton v. Cal. High-Speed Rail Auth., No. 34-2008-80000022, slip op. at 5 (Cal. Super. Ct. Aug. 26, 2009).

153 REVISED FINAL EIR 2010, *supra* note 7, at 2-6–2-7.

154 FINAL EIR 2008, *supra* note 99, at 3.7-34.

155 REVISED FINAL EIR 2010, *supra* note 7, at 2-6.

156

> Between the proposed Diridon station and Lick, the right-of-way is owned by the Peninsula Corridor Joint Powers Board (PCJPB or Caltrain). The HST would be built largely within the existing rail right-of-way. The potential for property impacts is between low and medium. From Lick to Morgan Hill (where Monterey Highway is immediately adjacent to the mainline UPRR right-of-way), the HST would be built within the right-of-way of the existing Monterey Highway. Generally, north of Bernal Road, in the City of San Jose, the existing highway right-of-way is sufficient to accommodate both a reconfigured roadway and the HST facilities.

Id.

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> South of Bernal Road, Monterey Highway would be shifted to the east of the existing roadway in places to accommodate the HST facilities. This shift would vary from 0 to approximately 60 feet, depending on location. As the existing land use in this area is largely agricultural, the potential property impacts would be low.

Id. at 2-6–2-7.

future litigation, those challenging the EIR allege that there was not sufficient information to allow the Rail Authority to approve this section of the EIR, the Rail Authority must simply show that there was substantial evidence to support their decision, which the more thorough analysis here accomplishes.[158]

The Rail Authority also expanded upon the environmental justice section in the revised land use analysis, a section that is often overlooked by project planners.[159] Like the analysis of potential property impacts, the environmental justice analysis was sparse in the 2008 EIR because of the assumption that all of the tracks would be part of existing right-of-way, thereby reducing any risk of creating further division of communities or disproportionally affecting minority or low income populations.[160] Once it was apparent that the entire route would not likely fit within already established rights-of-way, a more detailed analysis of the effects of the project on environmental justice concerns was necessary. The 2010 EIR emphasizes that a large portion of the route will still be within already existing rights-of way, reducing the possibility of disproportionate impacts on environmental justice communities.[161] On the sections of the route not within an existing right-of-way, the Rail Authority goes step by step through those sections, and comes to the conclusion that the route would not be expected to result in disproportionate impacts on environmental justice communities,[162] even in communities where minority or low income populations exceed

158 CAL. CODE REGS. tit. 14, § 15091(b) (2011); Under CEQA, substantial evidence is defined as having "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." § 15384(a); In applying the substantial evidence standard, "the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision." Topanga Ass'n for a Scenic Cmty. v. Cnty. of Los Angeles, 522 P.2d 12, 16 (Cal. 1974).

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> [S]ocial and environmental justice have been largely overlooked by the urban transportation planning process. . . . Because many existing urban transportation problems were created by the urban planning and transportation planning processes themselves, those involved in these processes should consider the long-term consequences of a plan in terms of both efficiency and justice, keeping in mind that the United States is a pluralistic society where different groups have differing needs and interests.

Devajyoti Deka, *Social and Environmental Justice Issues in Urban Transportation*, *in* THE GEOGRAPHY OF URBAN TRANSPORTATION 332, 332 (Susan Hanson & Genevieve Guiliano eds., 2004).

160 FINAL EIR 2008, *supra* note 99, at 3.7-34.

161 "Where the alignment alternatives use existing rail rights-of-way (i.e., along the Caltrain Corridor from San Jose to Lick), they would not be expected to result in disproportionate impacts on environmental justice communities." REVISED FINAL EIR 2010, *supra* note 7, at 2-7.

162 *Id.*

the threshold set by the Rail Authority.[163] Although the court in *Town of Atherton* did not specifically mention a deficient analysis of possible adverse effects to environmental justice like it did with the possibility of requiring the taking of property,[164] including the revised section on environmental justice should help the future reviewing court determine that the land use section contributes to the sufficiency of the EIR as an informative document, which the court is required to consider.[165]

The result of all of the revisions in the project description and land use analysis in the August 2010 EIR is a more comprehensive and complete analysis, which was required by the court in *Town of Atherton* in order for the EIR to be in compliance with CEQA. Those who ultimately bring suit against the approval of the EIR and the continuation of the project will probably feel compelled to argue that the conclusions reached in the EIR are incorrect, or that alternative conclusions could have been made. However, a court may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable.[166] The Supreme Court of California said it best:

> A court's task is not to weigh conflicting evidence and determine who has the better argument when the dispute is whether adverse effects have been mitigated or could be better mitigated. . . . [Courts] have neither the resources nor scientific expertise to engage in such analysis, even if the statutorily prescribed standard of review permitted [it] to do so. [The court's] limited function is consistent with the principle that [t]he purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind.[167]

CEQA does not, indeed cannot, guarantee that the decision made will always favor environmental considerations.[168]

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163 The analysis was used to determine "whether at least 50% of the population in the study area may be minority or low income," or "the percentage of minority or low-income population in the study area is at least 10% greater than the average generally in the county or community." *Id.* at 2-5.

164 Town of Atherton v. Cal. High-Speed Rail Auth., No. 34-2008-80000022, slip op. at 5 (Cal. Super. Ct. Aug. 26, 2009).

165 *See supra* text accompanying note 151.

166 When applying the substantial evidence test, "[c]ourts may reverse the agency's decision only if, *based on the evidence before the agency*, a reasonable person could not reach the conclusion reached by the agency." Greenebaum v. City of L.A., 200 Cal. Rptr. 237, 241 (Ct. App. 1984) (citing McMillan v. Am. Gen. Fin. Corp., 131 Cal. Rptr. 462, 469–70 (Ct. App. 1976)).

167 Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 764 P.2d 278, 283 (Cal. 1988).

168 Bozung v. Local Agency Formation Comm'n of Ventura City, 529 P.2d 1017, 1030 (Cal. 1975).

CONCLUSION

The United States is in a position to establish a high-speed rail network like those found in Europe and Asia, with the project in California taking the lead. However, one attempt to halt or slow down the project was successful with the challenge to the sufficiency of the EIR in the *Town of Atherton* case. Even after this initial litigation, which found the majority of the EIR sufficient under CEQA, and resulted in the Rail Authority revising those sections that were not, further litigation is certainly a possibility, with many of the same cities filing suit again on October 4, 2010. Unless allegations are brought that were not alleged in the *Town of Atherton* litigation, should this issue go to trial the reviewing court will likely look to the project description and land use analysis to ensure that they are now in compliance with CEQA, and will likely conclude that they are. Upon reaching this conclusion, the court should find the EIR for the entire Bay Area-to-Central Valley portion of the high-speed rail route sufficient and in compliance with CEQA.

However, there is still much work for the Rail Authority to accomplish on this project, much of which may be susceptible to further litigation. While the EIR examined here likely meets the standards set forth by CEQA, the Rail Authority still must complete EIRs for the other sections of the track, such as the Southern California-to-Central Valley portion. The completion of these EIRs will carry the same risk of inciting other municipalities and parties opposed to the project to challenge the EIRs on their procedural sufficiency under CEQA. While the environmental concerns expressed in these EIRs will likely be different between Southern and Northern California, using the August 2010 Final Program EIR for the Bay Area-to-Central Valley as a template or as a basis for the other sections of the route should dramatically reduce the risk of successful litigation against a future EIR. The Rail Authority has also learned a valuable lesson regarding the possible use of rights-of-way, and should prepare from the outset contingencies not reliant on existing rights-of-way and reflect that preparation in its future EIRs. The lack of such preparation was one of the largest contentions in *Town of Atherton*, and it ultimately proved costly for the Rail Authority.

Even if this EIR, and all others subsequently completed for other portions of the route, are found sufficient under CEQA, parties opposed to the project may find other ways to slow down its progress, with the intention of ultimately stopping it. For example, air carriers whose business is reliant on short-to-medium length distance flights in regions that would be served

by a high-speed rail service may bring suit to prevent high-speed rail from encroaching on their market share,[169] albeit by making unrelated allegations.[170] However, making sure this, and all subsequent EIRs are sufficiently completed under CEQA is the first step to completing the planning process, and ultimately reaching the implementation of the California high-speed rail system.

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> The airlines threatened most severely, therefore, are those that serve this short-to-medium distance market, such as Southwest Airlines. Southwest is uniquely situated in this conflict; most other airlines competing for short-to-medium distance passengers prefer the more lucrative longer trips, and some airlines view the development as potential relief from airport congestion. Furthermore, the TGV-proposed routes were the same cities served by Southwest—the Texas Triangle: Dallas-Fort Worth, Houston, Austin, and San Antonio. Predictions made during Southwest's battle against high-speed rail claimed the proposed Texas TGV [named after the French high-speed TGV trains] rail system would redirect sixty percent of local air passengers to the rail system.

Kathy Fox Powell, *Southwest Airlines v. High-Speed Rail: More Powerful than a Locomotive?*, 60 J. AIR L. & COM. 1091, 1094 (1995). "[S]outhwest is credited with causing delays which contributed to Texas TGV's failure to meet its deadlines under the franchise agreement. In fact, most commentators give Southwest the lion's share of the credit for 'killing' this opportunity for high-speed rail in Texas." *Id.* at 1094–95.

170 Southwest had sued for judicial review of an order of the Texas High-Speed Rail Authority. Southwest Airlines Co. v. Tex. High-Speed Rail Auth., 867 S.W.2d 154, 156 (Tex. App. 1993).

Just a Matter of Fairness: What the Federal Recognition of California Registered Domestic Partners Means in the Fight for Tax Equity

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"Never doubt that a small group of thoughtful, committed citizens can change the world; indeed, it's the only thing that ever does."—Margaret Mead

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INTRODUCTION

For Mr. Eric Rey, it was just a matter of fairness. "For the first time ever, I'm able to file federal taxes that, in a small way, acknowledges what's going on in my relationship,"[1] he exclaimed after a historic Internal Revenue Service (IRS) Chief Counsel Advisory Memorandum (2010 CCA) was handed down on May 28, 2010.[2] It had been a long journey for Mr. Rey as he and his domestic partner fought for the right to split their income and won. In 2005, when California amended its domestic partnership laws to extend full community property rights to registered domestic partners (RDPs),[3] he asked the IRS for guidance on how those changes affected the overall tax treatment of RDPs.[4] The

1 Laura Meckler, *Gay Couples Get Equal Tax Treatment*, WALL ST. J., June 5, 2010, at A3.

2 I.R.S. Gen. Couns. Mem. 201021050 (May 28, 2010), at 2; *see infra* note 11 (discussing the precedential value of the 2010 CCA for the purposes of this Comment). The IRS issues many types of rulings and other advice in order to "answer inquiries of individuals . . . whenever appropriate in the interest of sound tax administration." Treas. Reg. § 601.201(a) (2011). Revenue rulings are the most binding of these and are issued "for the guidance of taxpayers, Internal Revenue Service officials, and others concerned." *Id.* Although they do not have "the force and effect of Treasury Department regulations," revenue rulings "are published to provide precedents . . . and may be cited and relied upon for that purpose." Rev. Proc. 89-14, 1989-1 C.B. 815. A private letter ruling (PLR), on the other hand, is a "written statement issued to a taxpayer . . . which interprets and applies the tax laws to a specific set of facts." Treas. Reg. § 601.201(a) (2011). Unlike revenue rulings, PLRs cannot be cited as precedent. I.R.C. § 6110(k)(3) (West 2011). Revenue rulings usually originate from PLRs, the main difference being that revenue rulings are published officially. *See* MARTIN J. MCMAHON, JR. & LAWRENCE A. ZELENAK, FEDERAL INCOME TAXATION OF INDIVIDUALS ¶ 46.5[3] (2d ed. 2010) (explaining the difference between revenue rulings and "taxpayer letter rulings"). The IRS also issues Chief Counsel Advice (CCA) which is "written advice or instruction . . . prepared by . . . the Office of Chief Counsel which is issued to field . . . employees . . . and conveys any legal interpretation of a revenue position." I.R.C. § 6110(i)(1) (West 2011). Like PLRs, CCAs cannot be used or cited as precedent. I.R.C. § 6110(k)(3) (West 2011).

3 See *infra* Part I(B) for a thorough explanation of California's domestic partnership legislation. Throughout this Comment, I will be discussing different types of couples and how they are treated under state and federal tax laws. To refer to heterosexual, married couples, I will use the phrase "opposite-sex married couples." In some states, such as California and Massachusetts, homosexual couples are, or were, allowed to be officially married, and I will refer to these couples as "same-sex married couples." *See generally* Marc R. Poirier, *Name Calling: Identifying Stigma in the "Civil Union"/"Marriage" Distinction*, 41 CONN. L. REV. 1425, 1431–33, 1441 (2009). In many states, even if homosexual couples are not allowed to marry, they are allowed to enter into a state-recognized partnership. *Id.* at 1440. The names of these partnerships vary by state, but in California, the term used is "registered domestic partner," or RDP. Patricia A. Cain, *Relitigating* Seaborn*: Taxing the Community Income of California Registered Domestic Partners*, TAX NOTES, May 1, 2006, at 561, 566 [hereinafter Cain, *Relitigating* Seaborn]. For an enlightening discussion of the naming of different families and the inevitable stigma that attaches when gay men and lesbians are forced to use names for their unions other than the term "marriage," see generally Poirier, *supra*, at 1425.

4 Meckler*, supra* note 1, at A3. In California, all property received or earned while a couple is married, or in a registered domestic partnership, is considered part of the community which means that each spouse, or partner, owns an undivided half interest in it. For income tax purposes, the Supreme Court has held that in community property states, opposite-sex married couples can each claim one-half of community income when

IRS responded in 2006 with a highly criticized[5] Chief Counsel Advisory Memorandum (2006 CCA) which effectively refused to recognize California's community property treatment of RDPs.[6] Since the 2006 CCA left more questions than answers for Mr. Rey and his partner, as well as other RDPs in California,[7] he tried again to get some assistance, and in 2007, he asked the IRS for a private letter ruling.[8] The IRS refused to offer him any guidance.[9] Still not willing to give up, Mr. Rey saw a glimmer of hope when President Obama was elected, so he asked the IRS once more for a ruling.[10] This time, the IRS reversed its previous position and ruled that, "[a]pplying the principle that federal law respects state law property characterizations, the federal tax treatment of community property should apply to California registered domestic partners."[11]

The ruling significantly lowered Mr. Rey's tax burden, as well as the tax burden of other similarly situated RDPs in California, and it sent ripples throughout the gay and lesbian community and the tax community at large.[12] However, the ruling ultimately has led to confusion and exposed inequities. For example, in light of the Defense of Marriage Act (DOMA),[13] it

filing their federal income taxes. *Id.* Mr. Rey, who earned much more than his partner, could benefit by being allowed to do this "income splitting" since it would put him in a lower tax bracket if he could assign some of his income to his partner. *See infra* notes 18–31 and accompanying text.

5 *See, e.g.*, Dennis J. Ventry, Jr., *No Income Splitting for Domestic Partners: How the IRS Erred*, TAX NOTES, Mar. 13, 2006, at 1221–25 (explaining "that the IRS got it wrong" because the federal government's treatment of community property has nothing to do with marriage and everything to do with ownership of the property); Cain, *Relitigating* Seaborn, *supra* note 3, at 567 (critiquing that the IRS's position and refusal to give cogent guidance as contrary to its stated mission of helping all taxpayers understand and apply federal tax laws); *see also infra* notes 139–54.

6 I.R.S. Gen. Couns. Mem. 200608038 (Feb. 24, 2006), at 4.

7 Cain, *Relitigating* Seaborn, *supra* note 3, at 567 ("The advisory's lack of reasoning gives no guidance about how to answer the multitude of additional questions raised by the existence of community property for registered domestic partners.").

8 Meckler, *supra* note 1, at A3.

9 *Id.*

10 *Id.*

11 I.R.S. Gen. Couns. Mem. 201021050 (May 28, 2010), at 2. Although, as discussed *supra* note 2, the 2010 CCA has no precedential value, it was accompanied by a private letter ruling which also held, in part, that the "[t]axpayer must report on his individual federal income tax return one-half of the combined income that Taxpayer and Domestic Partner earn . . . ." I.R.S. Priv. Ltr. Rul. 201021048 (May 28, 2010), at 4. Technically, this ruling applies only to the taxpayer requesting it, which in this case is Mr. Rey, but the IRS has applied its provisions to all same-sex partners in community property states, so I will refer to the 2010 CCA as if it does have precedential value and can be relied upon by all California RDPs. *See infra* notes 230–55. See *infra* Part III for a discussion of whether the ruling applies to other same-sex couples in California or throughout America.

12 *See infra* Part II.

13 Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended at 1 U.S.C.A. § 7 (West 2010)). This Comment will not discuss DOMA in depth, but a cursory understanding of the law will help in appreciating the magnitude of the IRS's new

is not clear if the new rules apply only to RDPs or also to same-sex married couples.[14] In addition, it is unclear whether they apply to domestic partners in other community property states.[15]

This Comment will show that, as a direct result of the strength of California's domestic partnership laws, the IRS, for the first time, is willing to recognize California RDPs and tax them in a manner similar to opposite-sex married couples. As a result, RDPs in California are more equal to opposite-sex married couples for tax purposes than same-sex couples in many other states. Although a common solution to the problem of tax inequity in the gay community is to call for a repeal of DOMA, this Comment will take a different approach. It will argue that the IRS's change of position regarding the community income taxation of California RDPs should be viewed as a roadmap in the struggle for tax equality because it marks the first time that the federal government is willing to recognize same-sex relationships for tax purposes. By crafting stronger domestic partnership laws, while simultaneously calling attention to the geographic disparity the new rules reintroduce into the tax system, advocates can use the 2010 CCA to achieve more tax equity for all families.

Part I will provide a history of the IRS advisories in the context of community property and domestic partnership law while illustrating how the evolution of the tax treatment of families in the United States is a direct result of judicial and legislative reactions to outcries over perceived discriminatory, geographic disparities. Part II will discuss the practical implications of the IRS advisory for California RDPs and any other taxpayers to whom it applies. Part III will examine the geographic disparity that the advisory reintroduces into the tax system. Finally, Part IV will conclude that even though the IRS's

position on the taxation of RDPs. DOMA was passed by Congress in 1996 and essentially bans the federal government from recognizing same-sex marriages for any reason. *See* Patricia A. Cain, *DOMA and The Internal Revenue Code* 102 (Santa Clara U. Sch. of Law, Legal Stud. Research Paper No. 09-09, Mar. 2009), *available at* http://ssrn.com/abstract=1354564. The statute reads, in part:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one women as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

Defense of Marriage Act § 7. DOMA has been roundly criticized by many in the tax community for the arbitrary and chaotic effect that is has on the national tax policy. *See, e.g.*, William P. Kratzke, *The Defense of Marriage Act (DOMA) is Bad Income Tax Policy*, 35 U. MEM. L. REV. 399, 401–02, 404 (2005) (asserting that "[i]nserting DOMA into the [Tax] Code" actually "thwarts" the tax policies that Congress pursues).

14 *See infra* Postscript.

15 *Id.*

new position results in marked geographic disparity and confusion, the advisory should be viewed as an extremely important step towards achieving tax equity because it marks the first time that the federal government has been willing to recognize same-sex couples for federal tax purposes. In addition, when viewed in light of the history of the federal income taxation of families and the fight for domestic partnerships in California, the advisory is a road-map for making even greater strides toward tax equity.

I. BACKGROUND

In order to appreciate the significance of the 2010 CCA, it is necessary to first understand the history surrounding the issues of community property, federal taxation, and domestic partnerships. Section A illustrates how geographic disparities in federal taxation can lead to state and federal changes in tax law by describing the early history of the federal taxation of married couples in the United States. Section B examines California's storied history of providing statewide recognition to same-sex couples. Finally, Section C examines how these concepts interact by exploring the IRS's (changing) positions regarding the federal recognition and taxation of California RDPs.

A. History of Outrage: The Tax Treatment of Families in the United States

Ever since the income tax system was developed, Americans have been trying to figure out ways to pay fewer taxes. And, as a corollary, when taxes are lowered for some Americans but not for all, outrage usually follows. From 1921, when the Treasury Department ratified the use of income-splitting for married taxpayers in most community property states, until 1948, when Congress "finally conceded victory to the states by nationalizing income-splitting,"[16] the tax policies regarding the taxation of married taxpayers were confusing, inequitable, and "a fertile breeding ground of costly, difficult and wasteful litigation."[17] The story of income-splitting is the story of a fight for government recognition of marital relationships in order to achieve tax equity for all married couples throughout the United States.

16 Stephanie Hunter McMahon, *To Save State Residents: States' Use of Community Property for Federal Tax Reduction, 1939–1947*, 27 LAW & HIST. REV. 585, 590 (2009).

17 Stanley S. Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 HARV. L. REV. 1097, 1104 (1948) (quoting Stanley S. Surrey, *Family Income and Federal Taxation*, 24 TAXES 980, 987 (1946)).

i. Tax Rates Go up and Taxpayers in Community Property States Find a Way to Pay Less

California is one of nine community property states in the United States.[18] In a community property state, all property acquired during the marriage is considered to be the property of the community, thus each spouse is entitled to an undivided half interest in the property.[19] In all other states, known as common-law property states, property is owned only by the spouse who acquires it.[20] The national implications of this distinction did not become evident until a federal income tax was instituted in the United States.[21] After the Sixteenth Amendment was adopted in 1913[22] and Congress passed a statute taxing income,[23] the Treasury Department ruled that husbands and wives were to report separate income on separate returns.[24] This decision was not controversial under the very low tax rates of the first revenue act.[25] However, starting in 1916,[26] Congress began raising income tax rates annually in order to fund World War I,[27] and by

18 CAL. FAM. CODE § 751 (West 2009) ("The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing, and equal interests."). The nine community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Cain, *Relitigating* Seaborn, *supra* note 3, at 567.

19 *See* 15A AM. JUR. 2D *Community Property* § 2 (2000); FAM. § 760 ("Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property.").

20 *See* BLACK'S LAW DICTIONARY 294 (8th ed. 2004) ("The chief difference today between a community-property state and a common-law state is that in a common-law state, a spouse's interest in property held by the other spouse does not vest until (1) a divorce action has been filed, or (2) the other spouse has died.").

21 Until a federal income tax was instituted, the federal government had absolutely no interest in state defined property rights. Cain, *Relitigating* Seaborn, *supra* note 3, at 565. In this respect, differences among the states were completely irrelevant. Similarly, same-sex couples are treated vastly differently from state-to-state with respect to state created rights and interests, but none of that mattered until the IRS issued the 2010 CCA and finally recognized a state-created right granted to domestic partners. See *infra* Part IV for a further discussion of the significance of federal recognition for same-sex couples.

22 U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.").

23 Revenue Act of 1913, ch. 16, § 2, 38 Stat. 114, 166 (1913).

24 George Donworth, *Federal Taxation of Community Incomes—The Recent History of Pending Questions*, 4 WASH. L. REV. 145, 147 (1929) (noting that in 1914, two separate Treasury Decisions held that income should be determined individually and specifically that husband and wife should not combine their income); *see also* Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1400 (1975) (describing the early Revenue Acts as being focused on taxation of individuals rather than on married couples).

25 Incomes up to $20,000 were taxed at the rate of one percent, and then the tax rate increased in one percent increments, up to a top marginal rate of seven percent on incomes over $500,000. Revenue Act of 1913 § 2. There was a $4000 deduction for couples and a $3000 deduction for single taxpayers. *Id.*

26 Revenue Act of 1916, ch. 463, § 1, 39 Stat. 756, 756–57 (1916).

27 War Revenue Act of 1917, ch. 63, § 1, 40 Stat. 300, 300–01 (1917) ("An Act to

1918, incomes over $4000 were taxed at a six percent rate with rate increases that topped out at sixty-five percent for incomes over $1 million.[28] These sudden increases in marginal tax rates gave many taxpayers "significant economic incentives to seek tax avoidance."[29] Income shifting within families became a significant method of tax avoidance.[30] Married taxpayers in community property states, relying on the fact that even if the husband earned all of the income it was equally owned by both spouses, began to split their income so that they could escape the higher progressive tax rates.[31] In 1921, the Attorney General issued an official opinion holding that spouses in every community property state but California could split their income for federal income tax purposes because under state law, wives had a vested ownership interest in one-half of all community property.[32] In California, on the other hand, the wife had a mere expectancy of ownership in community property, and so spouses in that state could not split their income.[33] Suddenly, and for the

provide revenue to defray war expenses, and for other purposes.").

28 Revenue Act of 1918, ch. 18, § 210, 40 Stat. 1057, 1062–64 (1918).

29 Dennis J. Ventry, Jr., *Saving* Seaborn*: Ownership as the Basis of Family Taxation* 14 (U.C. Davis Legal Stud. Research Paper Series, Research Paper No. 166, Apr. 2009) [hereinafter *Saving* Seaborn], *available at* http://ssrn.com/abstract=1374493.

30 *Id.* at 14 ("Some of the early techniques [for tax avoidance] included gifts of income and property[,] . . . a multiplying array of trusts, joint ownership of property, assignments of income and property, and family partnerships."). In 1921, economist Thomas Adams, chair of the Treasury Department's Tax Advisory Board, castigated "rich men [who] have recently divided their property by gift, conveying it usually to members of the family and so dividing the former income into several parts." *Id.* at 15.

31 For example, under the 1918 tax rates, if a husband earned $20,000, his tax rate was twenty-one percent which resulted in a tax of $4200. However, if each spouse reported an income of $10,000, the tax rate on each return would be sixteen percent, or $1600 each. By income splitting, the couple is able to save $1000. This practice was also roundly criticized by the federal government. Thomas Adams called the practice the "community property problem" and a "major evil" which the government should take steps to eliminate. *Id.* at 5, 15–17.

32 Community Property—Income and Estate Taxes, 32 Op. Att'y Gen. 435, 463 (1921). In this opinion, the Attorney General cited *Warburton v. White*, 176 U.S. 484 (1900), for the proposition that in discharging its duties, the federal government should adopt the property rules as codified and interpreted by the respective States. The opinion also included an exhaustive review of each community property state's relevant property law. Community Property—Income and Estate Taxes, 32 Op. Att'y Gen. at 461. The Attorney General ultimately concluded that income splitting was available to spouses in Arizona, Idaho, Louisiana, New Mexico, Nevada, and Washington. *Id.* at 435. The Attorney General had ruled in an earlier opinion that Texas spouses could split their income. Income Tax—Community Property, 32 Op. Att'y Gen. 298, 298 (1920).

33 Community Property—Income and Estate Taxes, 32 Op. Att'y. Gen. at 456. California suddenly found itself (but not for the first time) at the center of a national debate over how federal tax law and state property law interact. *See Saving* Seaborn, *supra* note 29, at 26 (arguing that understanding California's role in the early history of the taxation of families, especially the interplay between federal tax law and state property law, "can help us understand the current debate over the legal recognition of different family forms"). California quickly amended its laws to give wives a vested interest and asked the Attorney General for a second opinion in 1923. *Id.* at 42–43.

first time, geographic disparity existed in federal income taxation of married couples because of differences in state laws.

ii. Disparate Tax Treatment of Similarly Situated Taxpayers Raises Ire

The ruling sent shockwaves through the country as taxpayers in non-community property states demanded an immediate legislative response to "restore uniformity of treatment."[34] In addition, "[c]ommunity tax payers in California were much dissatisfied with the ruling."[35] Finally in 1926, a test case from California made its way to the Supreme Court. In *United States v. Robbins*,[36] Justice Holmes reaffirmed that income splitting was prohibited for California spouses.[37] However, after this ruling on the merits, Justice Holmes stated that *even if* California wives had a vested interest in the community property, spouses in that state could not split their income because Congress should be taxing income based on who has control of it.[38] Although his statements were arguably "dictum for all practical purposes of the case,"[39] the holding "was a bombshell for married taxpayers . . . ."[40] The Attorney General announced that he was "considering whether the dictum . . . of Justice Holmes applied to states other than California" and invited representatives of the community property states to file briefs.[41] Hearings were held as the nation waited with bated breath as "[f]or more than a year the matter was held under advisement by the Attorney General and Solicitor General."[42]

Although initially the Attorney General overturned his previous position, that opinion was withdrawn two months later at the insistence of the Treasury Department, which issued a statement casting doubt on the legality of income-splitting in general and promising to bring a test case to the Supreme Court in order to get final resolution of whether California spouses could split their income. *Id.* at 41–46.

34 Donworth, *supra* note 24, at 152 (internal formatting omitted). Starting in 1921 and continuing in 1924, 1934, and 1941, amendments to every Revenue Act were introduced in Congress proposing to include community property in the gross income of the spouse having management and control of it. *See* George E. Ray, *Proposed Changes in Federal Taxation of Community Property: Income Tax*, 30 CAL. L. REV. 397, 397–98 n.4 (1942); *see also Saving* Seaborn, *supra* note 29, at 48–52 (documenting the debate between legislators from community property and non-community property states regarding whether to tax the owner of property or the spouse having management and control of the property).

35 Donworth, *supra* note 24, at 156.

36 United States v. Robbins, 269 U.S. 315 (1926).

37 *Id.* at 326–27. Essentially, the Court agreed with the earlier Attorney General opinion as to whether wives in California had a vested ownership interest in community property, concluding that they had a mere expectancy. *See supra* note 33.

38 *Robbins*, 269 U.S. at 327–28.

39 Donworth, *supra* note 24, at 158.

40 *Saving* Seaborn, *supra* note 29, at 56.

41 Donworth, *supra* note 24, at 164.

42 *Id.*

Finally, on July 16, 1927, Attorney General Mitchell issued his opinion.[43] Acknowledging the utter chaos of the taxation system brought about by the decision in *Robbins*, but concluding that the absence of a judicial determination specific to each state would "produce the utmost confusion and create an intolerable situation,"[44] the Attorney General withdrew the previous opinions which held that spouses in community property states could split their income.[45] Notably, the opinion stated that the questions at issue were not appropriate for congressional action because "the nature and extent of a wife's interest in community income are matters determined by the laws of the States . . . ."[46] The opinion concluded that test cases should be initiated in each community property state in order to resolve the issue.[47]

iii. The Supreme Court Weighs in

In 1930, the Supreme Court finally had its chance to decide the matter in *Poe v. Seaborn*.[48] In the landmark case, the Court held that married couples in the State of Washington could split their income for federal income tax purposes because "under the law of Washington the entire property and income of the community can no more be said to be that of the husband, than it could rightly be termed that of the wife."[49] The *Seaborn* decision did not extend to California. In response to this, California amended its community property statute to give both spouses an equally vested right in all community property,[50] and four years later the Court extended the *Seaborn* rule to California spouses.[51] Once again, spouses in community property states enjoyed an advantage over spouses in other states.

In response to *Seaborn*, non-community property states began to search for methods of lowering their residents' tax burdens.[52] Oklahoma was the first state to attempt to change its

43 Withdrawal of Opinions Relating to the Wife's Interest in the Community Income, 35 Op. Att'y. Gen. 265 (1927).

44 *Id.* at 268.

45 *Id.* at 268–69.

46 *Id.* at 268.

47 *Id.* at 269 ("For these reasons I feel constrained to, and do now, withdraw the two opinions referred to in order to leave you free, as has been done in similar situations, to arrange for test cases in the courts.").

48 Poe v. Seaborn, 282 U.S. 101 (1930). In companion cases decided the same day, the Court held similarly for spouses in three other community property states. Goodell v. Koch, 282 U.S. 118, 121 (1930) (Arizona); Hopkins v. Bacon, 282 U.S. 122, 125–27 (1930) (Texas); Bender v. Pfaff, 282 U.S. 127, 132 (1930) (Louisiana).

49 *Seaborn*, 282 U.S. at 113.

50 CAL. CIV. CODE § 161(a) (West 1954).

51 United States v. Malcolm, 282 U.S. 792, 794 (1931).

52 *See* McMahon, *supra* note 16, at 592–95 (discussing the push by non-community property states to keep their residents from leaving for community property states).

common law property regime into a community property system by allowing people to opt-in or opt-out of the community property scheme.[53] This solution was short-lived, however, because in 1944, in *Commissioner v. Harmon*,[54] the Court held that because of its voluntary nature, Oklahoma's regime was not enough to vest spouses with the ownership rights needed to split their income under *Seaborn*.[55] Years of judicial and legislative wrangling followed and by 1948, the issue had developed into a crisis and Congress had no choice but to respond.[56]

iv. Congress Saves the Day: Married Filing Jointly

There were essentially three options for Congress to consider: it could legislatively overturn *Poe v. Seaborn* by taxing only the earner of all property regardless of how the state classified it, it could mandate joint returns for all spouses, or it could take the middle ground and create a new filing status.[57] Congress settled on the last choice, but not because of any concerns that it was the right thing to do or that it would most benefit the family unit, but because it was the only viable solution.[58] Congress enacted the Revenue Act of 1948, which established a joint return, allowing all married couples to split their income for federal income tax purposes regardless of who earned it and who owned it under state law.[59] For the first time, all married couples in the United States were treated the same for the purposes of federal income taxation.

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53 *Id.* at 592, 595.

54 Comm'r v. Harmon, 323 U.S. 44 (1944).

55 *Id.* at 46, 48 ("In *Poe v. Seaborn* . . . the court was not dealing with a consensual community but one made an incident of marriage by the inveterate policy of the State. . . . The important fact is that the community system of Oklahoma is not a system, dictated by State policy, as an incident of matrimony.").

56 *See Saving* Seaborn, *supra* note 29, at 91–92 (discussing the factors that moved the "idea of income splitting to the top of the policy agenda" by the 1946 congressional elections); Surrey, *supra* note 17, at 1104 (urging Congress to enact a nationwide income splitting plan because of the geographical discrimination between families in community property states and those in non-community property states).

57 Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 816–17 (2008) [hereinafter Cain, *Taxing Families Fairly*].

58 *See Saving* Seaborn, *supra* note 29, at 91 ("Income splitting accomplished the desired tax reduction without protracted and acrimonious debate over adjustments to tax rates and brackets."). To those who urged a mandatory joint return, Chairman Millikin replied, "I may refresh your memory; we tried it several times. The only difference []with it is that you can not get the votes to make a law out of it." Surrey, *supra* note 17, at 1105. And to those who were advocating for a reversal of *Poe v. Seaborn*, he replied, "The difficulty is that it is not a novel thought. It has been tossed in the hopper around here a number of times. But legislatively it has not been possible to do it." *Id.*; *see also* Cain, *Taxing Families Fairly*, *supra* note 57, at 817 ("The point here is that the joint return . . . was adopted solely in response to the political outburst by taxpayers in non-community property states and because no other solution was thought viable.").

59 Revenue Act of 1948, Pub. L. No. 471, § 303, 62 Stat. 110, 111–14 (1948).

B. New Kind of Family: California Domestic Partnership Legislation

Just as in 1948, when Congress enacted a federal solution to address tax inequities among opposite-sex married couples, same-sex couples facing similar inequities today have called for a national solution.[60] The 2010 CCA, granting California RDPs federal recognition, is a step in that direction and would not have happened were it not for the strength of California's domestic partnership laws, which grant RDPs statewide recognition and all of the same rights and responsibilities granted to married couples.[61]

i. Early Efforts at Recognition (1979–1994): City-wide Ordinances

In 1979, Tom Brougham went to work for the City of Berkeley.[62] As a founding member of the first gay rights group in Northern California, The Gay Liberation Front,[63] Brougham had been on the forefront of the fight for Berkeley to pass a historic[64] gay rights ordinance in 1978. So, he was surprised when he found out that his life partner, Barry Warren, could not receive the health and dental benefits given to married spouses of city employees.[65] He set about to craft a unique solution to this

60 Cain, *Taxing Families Fairly*, *supra* note 57, at 817, 848–49 (asserting that "the only satisfactory solution" to the inequities that arise as a result of the current tax law is a federal legislative response such as applying "one uniform set of rules . . . to all financially interdependent couples, whether married or not, and whether recognized as couples by state law or not"); Keeva Terry, *Separate and Still Unequal? Taxing California Registered Domestic Partners*, 39 U. TOL. L. REV. 633, 652 (2008) (calling on the federal government to "create a new designation for federal income tax purposes recognizing domestic partners as a new filing category . . . ."); *see, e.g.*, *id.* at 848–49 (asserting that "the only satisfactory solution" to the inequities that arise as a result of the current tax law is a federal legislative response such as applying "one uniform set of rules . . . to all financially interdependent couples, whether married or not, and whether recognized as couples by state law or not"); Keeva Terry, *Separate and Still Unequal? Taxing California Registered Domestic Partners*, 39 U. TOL. L. REV. 633, 652 (2008) (calling on the federal government to "create a new designation for federal income tax purposes recognizing domestic partners as a new filing category . . .").

61 *See* CAL. FAM. CODE § 297.5 (West 2010).

62 Leland Traiman, *A Brief History of Domestic Partnerships*, GAY AND LESBIAN REV. WORLDWIDE, Jul.–Aug. 2008, at 23.

63 Will Evans, *Organization Honors Trailblazer*, DAILY CALIFORNIAN, Sept. 1, 2000, at 5, *available at* http://archive.dailycal.org/article/3049/organization_honors_trailblazer_.

64 *Berkeley Council Approves Strong Gay Rights Law*, L.A. TIMES, Oct. 12, 1978, at B28 ("The Berkeley City Council has given final approval to what is believed to be the strongest homosexual rights ordinance in the nation.").

65 Traiman, *supra* note 62, at 23; *see also Interview with Tom Brougham for Out and Elected in the USA*, OUTHISTORY.ORG, http://www.outhistory.org/wiki/Tom_Brougham (last modified Apr. 12, 2009, 5:39 AM) [hereinafter *Interview*] ("Basically when I went to

problem and a year later, he introduced the concept of the domestic partnership to local gay rights groups.[66]

For the next three years, Brougham refined his idea and made formal proposals to the City of Berkeley and the University of California, but "there wasn't very much in the way of serious consideration."[67] Then in 1982, San Francisco Supervisor Harry Britt[68] heard one of Brougham's proposals and was inspired to take the idea back to the San Francisco Board of Supervisors.[69] On November 22, 1982, the San Francisco Board of Supervisors approved an ordinance that would create "a new class"[70] of domestic partners and require that the term be used interchangeably with the term marriage when determining eligibility for city benefits.[71] Britt, who authored the measure, described it as "a significant redefinition of the law" that would provide "legal recognition to the relationships between lesbians and between gay men."[72] However, the celebration was short lived because Britt underestimated the public backlash.[73] The religious community was outraged over the proposal, and that

work for the City of Berkeley in early 1979 we noticed that everybody signs up for benefits, and I realized than [sic] my partner could not be a beneficiary. It got me thinking along the lines of what it really meant to have equal opportunity and equal benefits.").

66 Traiman, *supra* note 62, at 23. His idea was met with skepticism, even from within the gay community. *Interview*, *supra* note 65. As he said years later, "There wasn't much discussion about relationships or family matters. There was definitely no public policy and there was no terminology . . . . It was very interesting in the early days when we tried to talk about this with people within the gay movement, there was very little interest, very little expectation that anybody could do anything about it. People would just kind of shrug and say, 'Well, they're married and we're not.' And that was pretty much the end of it." *Id.*

67 *Interview*, *supra* note 65.

68 Harry Britt was appointed to the San Francisco Board of Supervisors on January 8, 1979 to replace Supervisor Harvey Milk who was assassinated. William Endicott, *S.F. Homosexual Named to Succeed Supervisor Milk*, L.A. TIMES, Jan. 9, 1979, at A18. His appointment was seen as an acknowledgement and a solidification of "the substantial power of homosexuals in San Francisco politics." *Id.*

69 *Interview*, *supra* note 65.

70 Wallace Turner, *Couple Law Asked for San Francisco: Unmarried Domestic Partners to Get Insurance Coverage if Measure is Approved*, N.Y. TIMES, Nov. 28, 1982, at 31.

71 *Id.*

72 *Id.*

73 *See* Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation, and Collective Bargaining*, 15 WIS. WOMEN'S L.J. 93, 130 n.163 (2000) (noting that the outcry from entities opposing the ordinance was "swift and vehement"). As Brougham explains in his interview, Britt proposed the ordinance "very, very fast, and I think was under prepared for all the controversy and upset that it would cause, but he got a lot of exposure—and he fell flat on his face . . . . [I]t was considered to be the kookiest possible idea that had ever come out of San Francisco." *Interview*, *supra* note 65; *see also* Traiman, *supra* note 62, at 23 (explaining that Britt was unprepared for the "vicious" press coverage, the fact that the religious community would become "riled up," and the fact that the gay community would be "confused" over the measure).

outrage culminated with Roman Catholic Archbishop John Quinn personally pleading with Mayor Dianne Feinstein to veto the measure.[74] In the end, Mayor Feinstein would not sign the bill calling it ambiguous, vague, and unclear.[75] The first attempt at official recognition of same-sex relationships failed miserably.

The disaster in San Francisco would serve as a model to the gay community for how *not* to get domestic partnership legislation passed. A group was formed in Berkeley called the East Bay Lesbian/Gay Democrat Club, which quickly made getting a domestic partnership law passed its main priority.[76] In 1983, the City of Berkeley developed the Domestic Partner Task Force to be headed by Leland Traiman.[77] Also working with the task force was Brougham. In 1984, after a year of careful study, the task force wrote, and the City of Berkeley adopted, the first domestic partnership legislation that was ever enacted by a government entity.[78] Eventually, other cities throughout California began passing their own domestic partnership laws, including San Francisco[79] and Santa Cruz.[80]

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74 RANDY SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC 204 (20th Anniversary ed. 2007). Almost every religious leader in the city came out against the measure. *Id.* The Episcopal bishop declared that marriage was under attack while the president of the Board of Rabbis of Northern California said he must "look askance upon any legislation that would attempt to equate nonmarried adults, heterosexual or gay, to what our society deems as a marriage between a man and a woman." *Id.* at 205.

75 Wallace Turner, *Partnership Law Vetoed on Coast: Bill Proposed by Homosexual Would Have Given Benefits to Unmarried Couples*, N.Y. TIMES, Dec. 10, 1982, at A17; *see also* SHILTS, *supra* note 74, at 204–05 (opining that Feinstein's real reason for vetoing the measure was in reaction to the religious outrage throughout the city). Feinstein, in a letter to Britt explaining her veto, wrote, "I see no reason why San Francisco should undertake what you concede the State of California would not consider." Cynthia Gorney, *Making It Official: The Law and Live-Ins*, WASH. POST, July 5, 1989, at C8.

76 *Interview*, *supra* note 65 ("[T]he East Bay Lesbian & Gay Democratic Club was formed about then and they picked it up as a main issue. We worked as an organization. I became political action chair. We really, really worked hard on politics—did a lot of precinct walking, we did endorsement cards, we organized, we got a big mailing list, etcetera.").

77 Application for Leave to File Amicus Curiae Brief; Amicus Curiae Brief in Support of State of California and the Attorney General at 1–2, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008); Traiman, *supra* note 62, at 23.

78 Application for Leave to File Amicus Curiae Brief; Amicus Curiae Brief in Support of State of California and the Attorney General at 1–2, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S147999), 2007 WL 4632424 (stating that the 1984 policy became the template for all other domestic partnership policies throughout the United States).

79 S.F., CAL., ORDINANCE § 4001 (1989) (repealed Nov. 7, 1989). In 1989, Harry Britt, now the president of the Board of Supervisors, sponsored another domestic partnership ordinance that was signed into law, which made San Francisco the first major U.S. city to allow public registration of domestic partnerships. Katherine Bishop, *San Francisco Grants Recognition to Couples Who Aren't Married*, N.Y. TIMES, May 31, 1989, at A17. In a sign that times were changing, this time, Mayor Art Agnos had a small signing ceremony where he called the measure, "a landmark ordinance granting official recognition to gay [and] lesbian . . . couples." Gorney, *supra* note 75, at C8.

80 Gorney, *supra* note 75, at C8.

However, there were limitations to the types of protections that mere city-wide ordinances could provide. For one thing, as seen in San Francisco, city-wide domestic partnership ordinances were susceptible to repeal by ballot initiatives.[81] In addition, smaller cities were facing problems getting insurance companies to actually cover domestic partners once they were registered.[82] Moreover, most family statuses and corresponding tax law treatment are conferred strictly by state law.[83] Because of these "inherent limitations" of local ordinances, gay rights supporters began to call for the passage of statewide domestic partnership legislation.[84] In other words, although achieving some measure of official acknowledgment of their relationships was exciting and important, without official *state* recognition, no real equality could ever be granted.

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81 On the day that San Francisco's domestic partnership law was to become effective, July 6, 1989, a minister and a rabbi walked into the office of the city registrar with a box of petitions asking that the law be put to a vote which blocked it from taking effect. Cynthia Gorney, *Protest Impedes 'Partners' Law: Petitioners Call for Vote on San Francisco Ordinance*, WASH. POST, July 7, 1989, at D3. On Election Day that November, voters narrowly struck down the measure. Maralee Schwartz, *Pocketbook Big Factor with Voters: Initiatives to Raise Taxes Fare Poorly*, WASH. POST, Nov. 9, 1989, at A44. The organizing efforts of conservative clergy were credited with the defeat. *Id.* After the defeat, Harry Britt went back to the drawing board, and in 1990, he wrote and introduced Proposition K, which would simply allow unmarried persons who share a home to register as domestic partners but would not grant any financial benefits. Robert Reinhold, *2 Candidates Who Beat Death Itself*, N.Y. TIMES, Oct. 30, 1990, at A20. The measure was passed into law in November 1990 after more than eight years of effort on the part of Britt and others and was timed to become effective on February 14, 1991. Michael Ybarra, *A City's Gay Valentine: San Francisco Recognizes "Domestic Partners,"* WASH. POST, Feb. 15, 1991, at D2.

82 *See* Stephen Braun, *Law Lists Rights, Lacks Teeth: Intent of W. Hollywood Domestic Partnership Ordinance Clear but Impact Isn't*, L.A. TIMES, Feb. 28, 1985, at WS1 (discussing the uncertainties surrounding West Hollywood's domestic partnership law). The City of West Hollywood spent two months unsuccessfully searching for an insurance company willing to cover domestic partners. *Id.* Peter McAlear, the accountant heading the search, said that the city had "talked to six insurance brokers so far and they've all told us there's no precedent they can look at to base their premiums on." *Id.*

83 *See, e.g.*, Sosna v. Iowa, 419 U.S. 393, 404 (1975) ("[D]omestic relations . . . has long been regarded as a virtually exclusive province of the States."); Rev. Rul. 58-66, 1958-1 C.B. 60 (recognizing common-law marriages for federal tax purposes if recognized under state law).

84 Heidi Gewertz, *Domestic Partnerships: Rights, Responsibilities and Limitations*, PUB. LAW RESEARCH INST. (Fall 1994), http://www.uchastings.edu/public-law/plri/fall94/gewertz.html ("In an analysis of domestic partnership law, it is critical to recognize the inherent limitations on any ordinance passed by a local rather than a state government . . . . Under this analysis, the passage of state domestic partnership legislation is critical to elevating such partnerships to a greater parity with the institution of marriage."); Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1203 (1992) (discussing that some benefits, such as the ability to file joint state tax returns, would be preempted by state statute and thus, could not be granted by a local ordinance to domestic partners).

ii. We're Going to State (1994–1999): Early Efforts at Statewide Recognition

The first attempt at California statewide recognition for domestic partnership was made in February 1994 by Assemblyman Richard Katz when he introduced a bill, AB 2810, on the floor of the State Assembly that set up the state's first domestic partnership registry.[85] The proposed registry would be open to all unmarried couples, gay and straight.[86] The bill was very modest, providing only that domestic partners who register with the Secretary of State would be afforded hospital visitation and conservatorship rights identical to those given to married couples.[87] It defined the term domestic partner to be "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring."[88] The legislation passed the Legislature on August 25, 1994 and was sent to Governor Peter Wilson.[89] However, Wilson, bowing to pressure from conservative religious groups[90] vetoed the measure on September 11, 1994.[91] Wilson seemed to take issue with the fact that unmarried, opposite sex couples could take advantage of "substitute relationship[s]"[92] and did not even mention the recognition and rights that domestic partnerships would provide to same-sex couples in the state.[93]

85 Assemb. B. 2810, 1993–1994 Assemb., Reg. Sess. (Cal. 1994).

86 *Id.*

87 *Id.*

88 *Id.* Notably, this is the exact same definition used in San Francisco's domestic partnership ordinance. S.F., CAL., ADMIN. CODE § 62.2(a) (2004); *see also supra* note 79.

89 Assemb. B. 2810.

90 *See, e.g.*, Lou Sheldon, Op-Ed., *An Assault on the Family and Taxpayers*, ORANGE COUNTY REG., Sept. 8, 1994, at B10 (calling on state residents to contact Governor Peter Wilson to urge him to veto AB 2810 because "[m]arriage and family relations are . . . disintegrated through Assembly Bill 2810" and because eventually the state would have to provide benefits to domestic partners which the state cannot afford). Reverend Louis P. Sheldon, an Anaheim, California preacher, formed the conservative Traditional Values Coalition (TVC) in 1980, which describes itself as "America's largest . . . grassroots church lobby." *About TVC*, TRADITIONAL VALUES COALITION, http://www.traditionalvalues.org/content/about (last visited Oct. 7, 2011). The Southern Poverty Law Center lists TVC as a hate group. Evelyn Schlatter, *The Hard-Liners*, INTELLIGENCE REP., Winter 2010, at 35, 43, *available at* http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2010/winter/the-hard-liners.

91 Veto Message from Governor Peter Wilson to the Members of the California Assembly on AB 2810 (Sept. 11, 1994) [hereinafter AB 2810 Veto Message] (explaining that AB 2810 is "unnecessary to achieve its specific aims" and expressing his belief that the law would weaken the institution of marriage). Katz later accused Wilson of "caving in to election-year pressure exerted by members of the religious right." Jerry Gillam, *Bill Granting Some Benefits to Unwed Couples Reintroduced*, L.A. TIMES, Feb. 25, 1995, at A22.

92 AB 2810 Veto Message, *supra* note 91, at 9392.

93 *Id.*

Not defeated, Katz tried again during the next legislative session when he introduced AB 627 in February 1995.[94] This bill was an exact replica of AB 2810.[95] It passed the state assembly easily the year before, but in the five months between Wilson's veto and the introduction of AB 627, Republicans had captured a majority in the assembly[96] and, as a result, the bill died in committee.[97] The next year, Katz termed out of the California assembly[98] and Democrats took back the majority,[99] so another bill was introduced. A freshman assemblyman, Kevin Murray, introduced the Murray-Katz Domestic Partnership Act.[100] It was "nearly identical" to the previous domestic partnership legislation.[101] The bill passed both the judiciary and the appropriations committees, but Murray decided not to bring it to a vote and it died.[102]

The same year that the Murray-Katz Act died, Assemblywoman Carole Migden also introduced domestic partnership legislation. Migden, who previously served on the San Francisco Board of Supervisors with Harry Britt when San Francisco passed its domestic partnership ordinance,[103]

94 Assemb. B. 627, 1995–1996 Assemb., Reg. Sess. (Cal. 1995).

95 ASSEMB. COMM. ON JUDICIARY, REPORT ON A.B. 627, Assemb. 1995–1996, Assemb., Reg. Sess. (Cal. 1995), at 5, http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_0601-0650/ab_627_cfa_950328_154417_asm_comm.html ("Last session, the author introduced AB 2810 to do exactly what this bill proposes.").

96 CAL. SEC'Y OF STATE, STATEMENT OF VOTE NOVEMBER 8, 1994 GENERAL ELECTION 55–65 (1994).

97 CAL. ASSEMB., COMPLETE BILL HISTORY, A.B. 627, Assemb. 1995–1996, Assemb., Reg. Sess. (Cal. 1996), *available at* http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_0601-0650/ab_627_bill_history.html.

98 CAL. SEC'Y OF STATE, STATEMENT OF VOTE NOVEMBER 5, 1996 GENERAL ELECTION 17–29 (1996).

99 *Id.*

100 Assemb. B. 54, 1997–1998 Assemb., Reg. Sess. (Cal. 1997).

101 ASSEMB. COMM. ON APPROPRIATIONS, REPORT ON A.B. 54, 1997–1998 Assemb., Reg. Sess. (Cal. 1997), at 2 ("This bill is nearly identical to AB 2810 (Katz), 1984, which passed both houses but was vetoed by the governor; and to AB 627 (Katz), 1995, which was held in Assembly policy committee.").

102 CAL. ASSEMB., COMPLETE BILL HISTORY, A.B. 54, 1997–1998 Assemb., Reg. Sess. (Cal. 1997), *available at* http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_0051-0100/ab_54_bill_19980202_history.html. The 1996 election saw Democrats taking back control of the State Assembly, the Assembly's first openly lesbian member becoming the speaker pro tem, and Carole Migden, another openly gay assemblywoman, chairing the Assembly Appropriations Committee. Dan Walters, *New Faceoff on Gay Rights*, SACRAMENTO BEE, Aug. 11, 1997, at A3, *available at* 1997 WLNR 6253173 [hereinafter *Faceoff*]. Although supporters of domestic partnership legislation thought that the political climate was perfect in 1997 for introducing gay-rights bills, by the end of the summer, all but three of the ten gay rights bills that had been proposed had been stalled. *Faceoff*, *supra.*

103 Wyatt Buchanan, *For Departing Sen. Migden, "A Bittersweet Time,"* S.F. GATE, Dec. 1, 2008, http://articles.sfgate.com/2008-12-01/bay-area/17130877_1_carole-migden-domestic-partners-san-francisco-democrat ("In 1991, she was elected to the Board of Supervisors, the same year that city voters approved domestic partners rights.").

introduced AB 1059 in 1997.[104] The bill, which would require health insurance companies to give employers an option of covering their employees' domestic partners,[105] originally contained a provision to create a statewide domestic partnership registry.[106] But, in the face of conservative opposition, "Midgen agreed to strip out provisions calling for state recognition of domestic partnerships"[107] and the final bill passed the state legislature with no mention of a state domestic partnership registry.[108] Once again, Governor Wilson vetoed the legislation, this time blaming the lack of definition for the term "domestic partner."[109]

Migden returned to the drawing board. Learning from prior mistakes, she reintroduced a domestic partnership bill, AB 26, in the California Legislature on December 7, 1998.[110] The bill, which was described as being "substantially similar" to Migden's prior bill, AB 1059, was changed and amended to provide a very specific definition of the term domestic partner.[111] In addition, bowing to pressure from Governor Davis, Migden amended the bill to apply only to same-sex couples.[112] The bill also specified that the filing of a declaration of domestic partnership would not

104 Assemb. B. 1059, 1997–1998 Assemb., Reg. Sess. (Cal. 1997).

105 *Id.* The proposal would allow private employees to offer insurance to those who had registered as domestic partners under city-wide ordinances.

106 ASSEMB. COMM. ON INSURANCE, REPORT ON A.B. 1059, 1997–1998 Assemb., Reg. Sess. (Cal. 1997), at 1 ("Specifically, this bill . . . [e]stablishes a domestic partnership registry operated by the Secretary of State . . . in conformity with AB 54 (Murray) which passed out of the Assembly Judiciary Committee on April 2.").

107 Max Vanzi, *Assembly Approves Domestic Partner Insurance Measure*, L.A. TIMES, June 3, 1997, at A3, *available at* 1997 WLNR 5705297.

108 *Id.* Although statewide recognition had failed again, the legislation did solve the problem that employers and municipalities who offered domestic partnership benefits were having with finding insurance companies who would insure them. *See supra* text accompanying note 82.

109 Veto Letter from Governor Pete Wilson to Cal. Assem. on AB 1059 (Sept. 29, 1998) [hereinafter AB 1059 Veto] ("The lack of definition for 'domestic partner' lends itself to instability, fraud and adverse selection."). Wilson seemed to be addressing the fear of opponents of the measure that "roommates might sign up for these benefits, and the constitutional right to privacy would prevent government from determining whether their relationship was more than just casual." ASSEMB. COMM. ON INSURANCE, REPORT ON A.B. 1059, 1997–1998 Assemb., Reg. Sess. (Cal. 1997), at 4.

110 Assemb. B. 26, 1999–2000 Assemb., Reg. Sess. (Cal. 1999).

111 S. JUDICIARY COMM., REPORT ON A.B. 26, S. 1999–2000, Reg. Sess. (Cal. 1999), at 1–2. According to the Judiciary Report, AB 26 "would define the legal effect of creating a domestic partnership." *Id.* at 3. This was in response to Governor Wilson's veto message of AB 1059 regarding the lack of definition for the term 'domestic partner.' *See* AB 1059 Veto*, supra* note 109. Section 9 of the Judiciary Report is entitled "AB 1059: Governor's veto message," and states, "[t]he problem of defining 'domestic partner' has been taken care of by AB 26." S. JUDICIARY COMM., REPORT ON A.B. 26*, supra*, at 14.

112 Martin Wisckol, *Partner Benefit Limited to Gays,* ORANGE COUNTY REG., Sept. 7, 1999, at B1 ("The numerous modifications—including the elimination of provisions for most opposite-sex couples—came at the request of Gov. Gray Davis, who said he would otherwise not sign the bill into law.").

change or create any property interest, or change the income or estate tax liability of the partners.[113] On October 2, 1999, Gray Davis signed AB 26 into law.[114]

Although same-sex partners in California had finally achieved statewide recognition, the new law was very narrow and basically afforded no benefits to domestic partners.[115] Once advocates finally figured out how to frame the debate about rights for domestic partners in a way that worked, the Legislature began to expand those rights in a piecemeal manner. Migden, determined to secure for domestic partners the "substantive legal and economic benefits that married spouses enjoy,"[116] introduced AB 25 in 2001, which would "confer a number of new legal rights on, domestic partners, to the same extent such rights are guaranteed to married couples."[117] The bill was signed into law on October 22, 2001 and was the first successful expansion of rights to California RDPs since state recognition was granted.[118] Over the next year, five more amendments expanding benefits to California's domestic partners were proposed and passed in the Legislature.[119]

iii. The March Towards Parity[120]: The California Domestic Partner Rights and Responsibilities Act of 2003

Finally, in 2003, AB 205[121] was proposed to "provide more equity to domestic partners."[122] Even though great strides had

113 S. JUDICIARY COMM., REPORT ON A.B. 26, *supra* note 111, at 8–9. In a section entitled "comparison to SB 75 (Murray); remaining issues to reconcile," the report states that the author of AB 26 has agreed to amend into the bill the same amendments that had already been amended into SB 75, specifically the income tax and community property treatment of domestic partners. *Id.* at 6–7.

114 Assemb. B. 26, 1999–2000 Assemb., Reg. Sess. (Cal. 1999).

115 S. JUDICIARY COMM., REPORT ON A.B. 26, *supra* note 111, at 8–9 (excluding rights to Domestic Partners by indicating the Bill would not change or create interests in property).

116 ASSEMB. COMM. ON JUDICIARY, REPORT ON A.B. 25, 2001–2002 Assemb., Reg. Sess. (Cal. 2001), at 3.

117 *Id.*

118 Assemb. B. 25, 2001–2002 Assemb., Reg. Sess. (Cal. 2001).

119 S. B. 1049, 2001–2002 S., Reg. Sess. (Cal. 2001) (authorized San Mateo County to provide survivor benefits to domestic partners); Assemb. B. 2216, 2001–2002 Assemb., Reg. Sess. (Cal. 2002) (provided domestic partners with intestate succession); Assemb. B. 2777, 2001–2002 Assemb., Reg. Sess. (Cal. 2002) (permitted the counties of Los Angeles, Santa Barbara, and Marin to offer survivor benefits to domestic partners); S. B. 1575, 2001–2002 S., Reg. Sess. (Cal. 2002) (excludes domestic partners from provisions that void wills if they help draft); S. B. 1661, 2001–2002 S., Reg. Sess. (Cal. 2002) (grants temporary disability benefits to employees to take time off to care for domestic partners).

120 S. JUDICIARY COMM., REPORT ON A.B. 205, 2003-2004 S., Reg. Sess. (Cal. 2003), at 2 ("This bill continues the march towards parity in rights and benefits between domestic partners, as currently defined, and married couples, under state law.").

121 Assemb. B. 205, 2003–2004 Assemb., Reg. Sess. (Cal. 2003). In a committee, this bill was described as "recast[ing] the amendments to the Domestic Partnership Act by

been made in conferring rights to domestic partners, supporters of the new measure "point[ed] out that domestic partners are currently afforded fifteen rights under law, while married couples are provided hundreds of rights and responsibilities."[123] As introduced, the bill would have allowed domestic partners to file their state income taxes as married filing jointly or married filing separate, which means that they could use a different filing status for their state and their federal returns, and it would have granted domestic partners the same community property privileges as married couples under California law.[124] However, after the Franchise Tax Board (FTB) suggested that the measure be amended to delete these provisions,[125] the bill was changed to require domestic partners to use the same filing status on their state returns as they use on their federal return, and to provide that "*earned income* may not be treated as community property for state income tax purposes."[126] Anticipating the confusion that

various bills enacted over the last four years." S. JUDICIARY COMM., REPORT ON A.B. 205, *supra* note 120, at 1.

122 ASSEMB. COMM. ON JUDICIARY, REPORT ON A.B. 205, 2003–2004 Assemb., Reg. Sess. (Cal. 2003), at 1.

123 *Id.* In the summary of the bill, the author is quick to point out that the measure would still not make domestic partners and married couples equal because of federal and state laws prohibiting gay marriage. But, by extending to domestic partners most of the rights and responsibilities extended to married couples under state law, the bill "would provide a critical, urgently needed measure of equity to registered domestic partners." In addition, the summary points out the many rights and obligations that cannot be conferred to domestic partners such as equal tax and community property treatment. *Id.*

124 Assemb. B. 205, 2003–2004 Assemb., Reg. Sess. § 4(g) (Cal. 2003).

125 LUANNA HASS, CAL. FRANCHISE TAX BOARD, SUMMARY ANALYSIS OF AMENDED BILL 2–3 (Aug. 18, 2003), *available at* http://ftb.ca.gov/law/legis/03_04bills/AB205_081803.pdf (arguing that as the bill was introduced, the tax liability changes for domestic partners would result in revenue losses of $4.3 million by the 2005/2006 fiscal year and suggesting the bill be stripped of its equal taxation provisions); *see also* S. REV. AND TAX'N COMM., REPORT ON A.B. 205, 2003–2004 S., Reg. Sess. (Cal. 2003) (noting that according to the FTB the fiscal effect on California would be $1 million in 2004, $5 million in 2005, and $7.5 million in 2006); *but see* Appropriations Committee Testimony on AB 205, 2003–2004 Assemb., Reg. Sess. (Cal. 2003) (statement of R. Bradley Sears, Williams Project Director), *available at* http://wiwp.ucla.law.edu/wp-content/upload/Sears-Testimony/AB205-Apr-2003.pdf (presenting estimates that AB 205 would actually increase state tax revenue by almost $700,000 per year). Sears acknowledges in his testimony that his conclusions are different from the FTB's findings of AB 205's impact on state tax revenues. *Id.* He argues that the FTB made faulty assumptions about same-sex couples when crafting the hypotheticals that it used to compute projected income changes; specifically that same-sex couples earn much more than opposite-sex couples and that they have greater income disparity. *Id.* Second, Sears points out that the FTB's model discards any data showing that tax liability would increase for some couples under AB 205, because it assumes that domestic partners whose tax liability goes up will dissolve their partnership and that no couples will register as domestic partners in the first place if it increases their tax liability. *Id.* This faulty analysis by the FTB is a clear example of the state recognizing same-sex couples' relationships, but treating those relationships vastly differently when making assumptions. *Id.* It is highly unlikely that the state would ever assume that opposite-sex married couples would get divorced if being single would result in lower taxes. *Id.*

126 Cal. Assemb. B. 205 § 4(g) (emphasis added). This provision, added only to quell

the amendments would cause, the FTB further recommended that the bill be amended to exclude all community property (and not just earned income) from community property status.[127] No further amendments were made to the bill, however, and it passed both houses of the state Legislature on September 3, 2003.[128] On September 19, 2003, Governor Gray Davis made history by signing the California Domestic Partner Rights and Responsibilities Act of 2003[129] into law saying, "[a] family is a family not because of gender but because of values, like commitment, trust and love."[130] The law provided that "[r]egistered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law . . . as are granted to and imposed upon spouses."[131]

C. Past and Present Collide: Domestic Partners Fight to Split Income

Just like the married taxpayers of the 1920s who saw income splitting as a way to save money on their tax bill,[132] California RDPs (including Mr. Rey and his partner) began to wonder if the new law could help them lower their taxable income. In 2006, the IRS issued the 2006 CCA denying California RDPs the right to split their income, and, in response, California amended its domestic partnership laws in 2007.[133] In 2010, the IRS finally

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fears of massive *state* revenue losses, was later used as justification for prohibiting California RDPs from splitting their community income for *federal* tax purposes. *See infra* notes 147, 152 and accompanying text.

127 LUANNA HASS, CAL. FRANCHISE TAX BOARD, SUMMARY ANALYSIS OF AMENDED BILL 2–3 (Aug. 21, 2003), *available at* http://ftb.ca.gov/law/legis/03_04bills/AB205_082103.pdf. The Franchise Tax Board acknowledged that adding the provision excluding all *earned income* from community property for state tax purposes alleviated its previous concerns about the loss of state tax revenue, but it also expressed marked concern that the provision, as written, would cause confusion because not all income is earned income and some income, such as pension income, could still be treated as community property for state tax purposes. *Id.* at 1–2. The FTB suggested replacing the term "earned income" with the phrase "property or income of a domestic partner", in order to accomplish the intent of bill's supporters of "allow[ing] domestic partners to have the same community property privileges and burdens as those given to civil marriage partners" while eliminating any impact to the state's income tax revenue. *Id.* at 2. The FTB's concerns proved prophetic. *See* discussion *infra* note 152 and accompanying text.

128 Cal. Assemb. B. 205.

129 The California Domestic Partner Rights and Responsibilities Act, ch. 421, 2003 Cal. Legis. Serv. 2586 (West) (codified at CAL. FAM. CODE §§ 297–299.3 (West 2004)).

130 *Law to Give Gay Partners Spousal Rights*, CHI. TRIB., Sept. 21, 2003, http://articles.chicagotribune.com/2003-09-21/news/0309210453_1_domestic-partner-domestic-partners-same-sex-couples.

131 FAM. § 297.5.

132 *See supra* notes 29–32 and accompanying text.

133 *See* I.R.S. Gen. Couns. Mem. 201021050 (May 28, 2010), at 1–2 (explaining amendments to California's domestic partnership laws).

recognized RDPs and applied the rule of *Poe v. Seaborn* to their relationships.[134]

i. "Outside the Context of Husband and Wife": The 2006 IRS Advisory and Reactions

After the passage of California Domestic Partner Rights and Responsibilities Act of 2003,[135] which extended full community property rights to RDPs,[136] some observers believed that income splitting should be a viable solution for gay couples.[137] Throughout 2004 and 2005, Don Read, Mr. Rey's tax attorney, and Pat Cain, a noted tax scholar, as well as other tax professionals, began to ask the IRS to issue a ruling concerning whether California RDPs could split their income when reporting their federal taxable income.[138] Finally, almost three years after the new law was passed, and one year after it became effective, the IRS issued some guidance.

134 *Id.* at 2.

135 The California Domestic Partner Rights and Responsibilities Act, ch. 421 (codified at FAM. §§ 297–299.3). *See supra* Part I(B)(3) for a discussion of the enactment of this law.

136 *See* Ventry, *supra* note 5, at 1221 (arguing that California RDPs are subject to the same responsibilities, obligations, and duties under the law as spouses and therefore, all income and property received during the partnership is community property and each partner had equal ownership interests).

137 *See* Cain, *Relitigating* Seaborn, *supra* note 3, at 562 ("In need of guidance[,] . . . registered domestic partners began to consider submitting private letter ruling requests to the IRS."); Meckler, *supra* note 1, at A3 (discussing that after the law changed in California to give RDPs full community property rights, Mr. Rey realized that splitting his income with his partner would give him a "clear tax benefit" because it would put him in the lower tax bracket and saved him $7000).

138 *See* Cain, *Relitigating* Seaborn, *supra* note 3, at 562. Cain discussed how she and Read asked the IRS to issue a public revenue ruling in 2004 regarding the soon to be effective law. Specifically, Cain argued that since RDPs had the same community property rights as spouses under the new law, the IRS should extend the income-splitting rule of *Poe v. Seaborn* to California RDPs. *Id.* In addition, Read stated on the TaxProf Blog that he and Cain "contacted the Office of Tax Legislative Counsel to request that the Tax Policy office urge the IRS to issue a public revenue ruling . . . so that registered domestic partners could plan their tax affairs and tax preparers could know how to prepare their returns." Paul L. Caron, *Pat Cain's Role in the IRS Ruling on California Gay/Lesbian Couples*, TAXPROF BLOG (June 7, 2010), http://taxprof.typepad.com/taxprof_blog/2010/06/pat-cains-role-.html [hereinafter Don Read Interview]. When the IRS refused to respond to this request, they worked on a private letter request, filed in April 2005, which the IRS declined to issue "in the interest of general tax administration." *Id.* In December 2005, the California Society of Certified Public Accountants also pleaded with the IRS to issue some guidance to domestic partners since filing season was a month away. Letter to Hon. Eric Solomon from California Society of CPAs (Dec. 14, 2005), *available at* http://www.calcpa.org/Content/Files/Litigation%20Sections/LIT_comment121405.pdf ("As 2005 comes to a close, one issue for registered domestic partners and their CPAs is determining how to report the earned income of domestic partners on each partner's federal tax return . . . . [W]e urge you to issue public guidance as to how to address these issues as early as possible.").

On February 24, 2006, the IRS issued an internal advisory memorandum addressing the extent to which California's new domestic partnership law was to be taken into account for federal income tax purposes.[139] The advisory, relying heavily on *Poe v. Seaborn*[140] and *Commissioner v. Harmon*,[141] concluded that California RDPs could not split their income for federal income tax purposes.[142] The IRS read *Commissioner v. Harmon* as standing for the proposition that *Poe v. Seaborn* only applies when the community property system at issue is "made an incident of marriage by the inveterate policy of the state."[143] Because RDPs are not married under California law, the IRS concluded that the community property rights granted to California RDPs were not an "incident of marriage" as required by *Harmon*,[144] so *Poe v. Seaborn* could not apply to California RDPs.[145] Thus, "an individual who is a registered domestic partner in California must report all of his or her income earned from the performance of his or her personal services . . . ."[146] The IRS also seemed to place some weight on the fact that the final domestic partnership law treated the community property of RDPs differently for *state income tax* purposes than the community property of opposite-sex married couples in California.[147]

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139 I.R.S. Gen. Couns. Mem. 200608038 (Feb. 24, 2006).

140 Poe v. Seaborn, 282 U.S. 101, 110 (1930) (accepting that the state definition as to the ownership of community property and income is paramount in deciding the federal tax treatment of such property). Essentially, *Poe v. Seaborn* came to stand for the doctrine that the because the federal government, when taxing income, would only tax the owner of the income, in community property states, where each spouse had a completely vested ownership interest in all community property no matter who earned it, the IRS would tax both spouses separately on half of all community property. *See supra* notes 49–51 and accompanying text.

141 Comm'r v. Harmon, 323 U.S. 44, 46 (1944) (holding that Oklahoma's recently enacted community property statute that allowed spouses to elect whether or not to include their property in the community was a "consensual community" and thus, unlike the community regime present in *Poe v. Seaborn*, did not entitle spouses to split their income). *See also supra* text accompanying notes 54–55.

142 I.R.S. Gen. Couns. Mem. 200608038 (Feb. 24, 2006), at 1, 4.

143 *Id.* at 4 (quoting *Harmon,* 323 U.S. at 46–47).

144 *Id.*

145 *Id.* ("We do not believe that the *Poe v. Seaborn* decision applies to the application of a state's community property law outside of the context of husband and wife."). This particular reasoning is hard to follow since California's new RDP law marked the first time that full community property rights had been extended to anyone "outside the context of husband and wife." *Id.* The IRS was essentially arguing that since *Seaborn* has never applied outside the context of husband and wife, it should not here, even though it could never have been applied in the past. *Id.* For a thorough discussion of criticisms of the 2006 CCA see *infra* notes 148–54 and accompanying text.

146 I.R.S. Gen. Couns. Mem. 200608038 (Feb. 24, 2006), at 4.

147 *Id.* at 2 (describing the state income tax provision as "pertinent" with "significant state tax implications").

The advisory was not well received. It was widely criticized as being "wrong-headed,"[148] "not well-reasoned,"[149] and "unpersuasive, historically inaccurate, and ultimately indefensible."[150] In an editorial in a San Francisco newspaper, Don Read went so far as to call the IRS bigoted because of its reasoning.[151] Commentators also took issue with the IRS's reliance on the fact that California's domestic partnership laws prohibited earned income from being treated as community property for state income tax purposes.[152] The ruling was extremely disappointing to those in California who thought that the 2005 law had finally made RDPs and spouses equal.[153] Don Read and Pat Cain began discussing privately how they could challenge the ruling in court.[154] However, two separate developments gave everyone renewed hope: first, an amendment

148 Cain, *Taxing Families Fairly*, *supra* note 57, at 846. Cain argues that the IRS was wrong in relying on the holding of *Harmon* for the proposition that only property systems which arise because of marriage qualify for income splitting because the case actually stands for the rule that property systems must be dictated by state policy (as opposed to being capable of being opted into) in order to be recognized under *Poe v. Seaborn*. *Id.* at 847. Since California RDPs are subject to the community property regime of the state automatically as an incident of registering, they fall under the rule of *Poe v. Seaborn*, and not the rule of *Harmon*. *Id.*

149 Cain, *Relitigating* Seaborn, *supra* note 3, at 567. Cain explains that as soon as Oklahoma made its community property system mandatory, the IRS extended the *Seaborn* rule to the state proving that "it is the mandatory nature of the system, not its history within the state, that is crucial to the determination of whether spouses can split income." *Id.* In addition, she points out that the IRS also misinterprets *Seaborn* in its ruling because the marital status of the couples in *Seaborn* is irrelevant to the Court. *Id.* Rather, "[i]t is the vested nature of the right that is given to the spouses by the state law that is the *ratio decidendi* of the case." *Id.*

150 Ventry, *supra* note 5, at 1221. Ventry further argues that "[i]f the legal analysis in *Seaborn* had anything to do with marriage, the IRS's reasoning could conceivably be appropriate. But it didn't. *Poe v. Seaborn* was about *ownership* of the community's income from property and services, *not* about marriage." *Id.* at 1222.

151 Donald H. Read, *IRS Plays Politics with the Tax Code,* S.F. GATE, Apr. 16, 2006, http://articles.sfgate.com/2006-04-16/opinion/17289714_1_domestic-partners-property-rights-community-property ("When measured against the clear legal rules governing income splitting . . . the reasoning of the IRS chief counsel's office is so tortured and weak, one must suspect that bigotry, rather than logic, was the impetus.").

152 *See* Ventry, *supra* note 5, at 1224 (calling the provision a "red herring" because the statute "does not change in any meaningful way the application of California's community property law to ownership of income from property and services for domestic partners" and thus, for the purposes of taxing *federal* income tax, the prohibition is irrelevant).

153 *See* Mark Schwanhausser, *IRS Guidance Differs from '05 State Law,* SAN JOSE MERCURY NEWS, Feb. 28, 2006, at 1 ("But critics said the IRS is ignoring the community property rights extended to registered partners under the new state law.") [hereinafter *IRS Guidance*]. Don Read was quoted as saying, "If there's no difference between the legal rights that spouses have in their community property and the legal rights that domestic partners have in their community property, then how can they be taxed differently?" *IRS Guidance*, *supra*.

154 Don Read Interview, *supra* note 138 ("Pat and I began thinking of how the client would file his return consistently with the 2006 CCA and then file a claim for refund and, if unsuccessful, file suit for refund in [federal district court].").

to the 2005 law was proposed in the California Senate; and second, Barack Obama was elected as President.

ii. California Amends Its Laws to Seek Favorable Tax Treatment for Its Taxpayers

On the same day that the IRS declined to grant RDPs full community property tax treatment, Carole Migden, now a State Senator, introduced what she called "the final piece"[155] of legislation to make RDPs fully equal to spouses in California. On February 24, 2006, Migden introduced SB 1827, the State Income Tax Equity Act.[156] The bill proposed to require RDPs to file their state income taxes as married couples and to apply California community property rules to RDPs exactly like the rules apply to married couples.[157] Migden stated that the bill was necessary because "[u]nder current law, married couples have more favorable tax treatment than domestic partners. Domestic partners share the same expenses as married couples and deserve the same tax treatment."[158] On August 29, 2006, the bill passed the Legislature[159] and on September 29, Governor Arnold Schwarzenegger signed it into law.[160]

The amendment was seen by some as putting the onus back on the IRS to treat RDPs like spouses for income tax purposes.[161] But, the new rules were not without criticism, even from those who support equal rights for gay couples. Commentators called the new law a "symbolic victory," but also predicted that it would "add to the confusion that gays and lesbians face because there are numerous differences in state and federal tax laws."[162]

155 Mark Schwanhausser, *Gay Tax Bill Awaits Decision: Letting Couples File as Married Could Set Up a Showdown with Federal Law*, SAN JOSE MERCURY NEWS, Sept. 28, 2006, at 1, *available at* 2006 WLNR 16802877 [hereinafter Schwanhausser, *Gay Tax Bill*].

156 S. B. 1827, 2005–2006 S., Reg. Sess. (Cal. 2006).

157 ASSEMB. COMM. ON REVENUE AND TAXATION, REPORT ON S.B. 1827, 2005–2006 S., Reg. Sess. (Cal. 2006), at 2.

158 *Id.* at 4.

159 Cal. S. B. 1827. This was one of the most contentious fights to expand rights for same-sex couples as opponents of the bill recognized that the benefits conferred by this bill were "the last marital benefit still reserved for married couples." ASSEMB. COMM. ON REVENUE AND TAXATION, REPORT ON S.B. 1827, 2005–2006 S., Reg. Sess. (Cal. 2006), at 6. The fighting over this bill became so severe on the floor of the Assembly that debate had to be paused to allow tempers to cool. Greg Lucas, *Assembly Rancor Over Domestic Partners Measure*, S.F. CHRON., Aug. 24, 2006, at B2, *available at* 2006 WLNR 14645786.

160 Cal. S. B. 1827.

161 *See* Schwanhausser, *Gay Tax Bill*, *supra* note 155, at 1 (quoting Jean Johnston, a California tax attorney, as saying, "[t]his has taken away the ambiguities about how California is treating [community property] . . . . It is saying, 'It's community property, we're taxing it like community property, and we're throwing it over to the feds saying, so should you'").

162 Mark Schwanhausser, *Bill Would Give Gay Couples Right to File Taxes as*

Against this backdrop, Barack Obama was elected President, which gave those fighting for tax equality hope that a new administration would have a different point of view. So, in 2009, Mr. Rey decided to ask the IRS one more time to allow him to split his income with his domestic partner.[163]

iii. The Squeaky Wheel Gets the Grease: The IRS Recognizes California RDPs

On May 28, 2010, the IRS issued a Chief Counsel Advisory Memorandum which essentially reversed its previous position and extended the income splitting rule of *Poe v. Seaborn* to California RDPs.[164] The advisory explained that the 2006 CCA refused to allow income splitting for California RDPs because, even though the 2003 Domestic Partnership Law treated earned income (and other property) of RDPs as community property for property law purposes, it did not treat earned income as community property for state income tax purposes.[165] Once California passed Senate Bill 1827, however, which treats earned income as community property for state income tax purposes as well, the IRS considered California to have "extended *full community property treatment* to registered domestic partners."[166] Since federal tax law relies on state property law characterizations, the advisory concluded that "the federal tax treatment of community property should apply to California

Married Couples But Landmark Victory Would Come With Tax Headaches, SAN JOSE MERCURY NEWS, Sept. 28, 2006, *available at* 2006 WLNR 16802046.

163 Don Read Interview, *supra* note 138 ("[A]fter the 2008 election of President Obama and the 2009 White House website declaration of controlled support for the GLBT community, it seemed propitious to try the private ruling approach again."); *see also* Meckler, *supra* note 1, at A3 ("When President Barack Obama was elected, Mr. Rey's tax attorney, Donald Read, thought they should try again, citing the White House Web site's professed commitment to 'equal federal rights' for gay and lesbian couples.").

164 I.R.S. Gen. Couns. Mem. 201021050 (May 28, 2010), at 2, *available at* 2010 WL. 2137821.

165 *Id.* at 1; *see also* I.R.S. Gen. Couns. Mem. 200608038 (Feb. 24, 2006), at 4 (prohibiting California RDPs from splitting their community income because the principles of *Poe v. Seaborn* do not apply "outside the context of a husband and wife" and the rights granted to RDPs are not granted to them by the state as a result of marriage). Although the 2006 CCA mentions the fact that under the 2003 law earned income is not considered community property for state tax purposes, it does not base its reasoning on that fact. *Id.* at 2. The IRS seems to be proving the commentators right who argued, after the 2006 CCA, that *Poe v. Seaborn* had nothing to do with marriage and everything to do with state property law. *See supra* notes 147–153 and accompanying text.

166 I.R.S. Gen. Couns. Mem. 201021050 (May 28, 2010), at 2; *but see supra* notes 148–153 and accompanying text (arguing that the 2005 law already granted RDPs full community property treatment irrespective of the prohibition on taxing community property at the state level because federal tax law follows state property law, not state tax law).

registered domestic partners."[167] For the first time ever, the federal government recognized California RDPs.[168]

II. PRACTICAL IMPLICATIONS OF THE 2010 CCA

The change in the IRS's official position regarding California RDPs has been greeted with joy, anger, hopefulness, and cynicism, but for average taxpayers, the new rules bring with them many questions about how the advisory affects them personally. Although it is not clear if the advisory extends to taxpayers other than California RDPs,[169] it is certain that the new rules will have a substantial impact on those to whom they do apply. Some of the effects of the advisory can be explained easily, but other possible impacts are still unclear, and further guidance from the IRS will probably be necessary.[170]

A. The Tax Man Cometh: How RDPs Should File Under the New Rules

In general, the new rules mean that in calculating income for federal income tax purposes, every couple to whom the rules apply must add together all of the community income earned by both members of the couple during the filing period and then each report half of that income on his or her separate federal income tax return.[171] Each RDP must report the entire amount

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167 I.R.S. Gen. Couns. Mem. 201021050 (May 28, 2010), at 2. Although the 2010 CCA can be viewed as applying new law (the 2007 amendments) to reach a new result (income-splitting for RDPs), it could also be argued that the IRS was finally ruling as it should have ruled in 2006 when it should have recognized California's property laws regardless of the state tax treatment of community property. Arguably, the tax laws of the state were as irrelevant then as they are now. Under this analysis, the 2010 CCA, although positive from an equality standpoint, still gets the law wrong. In addition, it only adds to the confusion surrounding this issue since it is unclear upon what rules or principles the IRS is basing its reasoning in allowing RDPs to split their income.

168 *See* Nicole C. Brambila, *Tax Break for Same-Sex Couples*, THE DESERT SUN, June 13, 2010, at B1, *available at* 2010 WLNR 12229527.

169 This Part examines the practical implications of the new rules without regard to whether or not they apply to a specific type of taxpayer. Part III of this Comment will analyze whether or not the rulings might extend to same-sex couples other than California RDPs.

170 In fact, there are so many unanswered questions that the ABA has formed a panel to study the rulings and submit comments to the IRS. Nicole Duarte, *ABA Forms Group to Examine Domestic Partner Community Property Questions*, TAX NOTES, June 21, 2010, at 118, *available at* http://taxprof.typepad.com/files/tax-notes-today_-2010-tnt-1..-3.pdf. Patricia Cain will be leading the group, tentatively called the Community Property Comment Project. *Id.* See *infra* notes 231–256, for a discussion of subsequent developments including guidance from the IRS regarding the new rules.

171 *See generally* LAMBDA LEGAL, THE IRS APPLIES "INCOME-SPLITTING" COMMUNITY PROPERTY TREATMENT TO CALIFORNIA'S REGISTERED DOMESTIC PARTNERS: PRELIMINARY ANSWERS TO SOME FREQUENTLY ASKED QUESTIONS (FAQS) 1–9 (2010) [hereinafter 2010 LAMBDA LEGAL FAQS] (on file with author). This publication was updated in 2011 in response to new guidance from the IRS. *See infra* note 243.

of his or her separate income.[172] Under California law, community income is income that couples in a community earned while living in California or another state in which community property rights apply to them, or income from property acquired using community money while living in California, even if the property is in another state.[173] Separate income, on the other hand, is income from separate property, such as property that was owned before the domestic partnership, property earned while living in a state in which community property laws do not apply to the property, and property acquired using other separate property.[174]

B. You Can't Please All of the People: Negative Impacts of the New Rule

For some taxpayers, such as Mr. Rey, the new rules are beneficial and will lower overall tax liability.[175] This is especially true if the incomes of the partners are very disparate.[176] For some taxpayers however, the new rules may have devastating effects. For example, some RDPs have been able to use the head of household filing status in the past if one of the partners had little to no income and could therefore qualify as a dependent.[177]

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172 Unlike married couples who can file jointly, thus also combining their separate income, domestic partners cannot use the "married filing jointly" filing status. *See* Merrill v. Comm'r, 98 T.C.M. (CCH) 25, 26–27 (2009) (holding that a taxpayer in a long-term, same-sex relationship cannot file as married filing jointly with his partner unless the taxpayer is married under the laws of the taxpayer's state even though the taxpayer's state does not recognize same-sex marriage).

173 2010 LAMBDA LEGAL FAQS, *supra* note 171, at 2.

174 *Id.*

175 Meckler, *supra* note 1, A3 (noting that Mr. Rey and his partner would have saved about $7000 on their tax bill if the new rules had been in effect in 2007).

176 For example, imagine a couple who earn $300,000 together, but Partner A has taxable community income of $250,000 and Partner B has taxable community income of $50,000. If each partner has to file federal taxes separately, which was the case prior to the 2010 CCA, then, using 2010 tax rates, Partner A's tax liability is $67,617 and Partner B's tax liability is $8681. Since the hypothetical taxpayers are really a couple despite the erroneous "single" classification that they must adhere to, they will combine their tax liability for a total tax bill of $76,298. However, if the taxpayers in this example can "split" their community income, as the 2010 CCA allows some taxpayers to do; each taxpayer will report half of the total taxable income, or $150,000. Then, each taxpayer will have a tax liability of $35,709, for a total of $71,418. This is a total savings of almost $5000, but, more than that, allowing same-sex partners to split their income, and hence split their tax bill, is a true reflection of the way in which same-sex couples live and conduct their affairs.

177 According to current tax law, an individual can file taxes as single, married filing jointly, or head of household. I.R.C. § 1 (West 2011). For RDPs who cannot file as married, the head of household filing status has been used as a way to take advantage of a larger standard deduction and lower tax rates. 2010 LAMBDA LEGAL FAQ'S, *supra* note 171, at 2. The requirements to use the filing status are that the taxpayer be unmarried, have paid more than half the cost of maintaining a home, and have provided support for at least one qualifying person. I.R.C. § 2 (b) (West 2011). Since an RDP is considered a qualifying person (but a spouse does not), domestic partners could use the filing status as

Under the new rules, however, since each partner must report half of all community income, a primary wage earner cannot claim his partner as a dependent, and thus may not be able to use the more beneficial head of household filing status.[178] There is no comparable disadvantage for opposite-sex married couples because they can automatically file jointly using the married filing jointly status. Similarly, if one partner previously qualified for tax credits or educational financial aid, or any other low income program, he could lose these benefits because he now must report half of his partner's income.[179]

C. Unanswered Questions

There are many issues that the 2010 CCA does not address and this has led to confusion for RDPs as they prepare to file their 2010 taxes. For example, it is not clear exactly when the new rules will take effect. In addition, the IRS's new position raises many questions about how RDPs are to apply the new rules to their separate tax returns.[180]

i. Timing Issues

The 2010 CCA appears to state that the new rules are optional for calendar year 2010.[181] However, according to the Lambda Legal guide, "some IRS representatives have informally communicated that community property treatment will be *mandatory* for calendar year 2010 taxpayers."[182] RDPs may amend their prior returns from 2007, 2008, and 2009 to report community income under the 2010 CCA.[183] Because of the uncertainty surrounding this issue, Lambda Legal recommends that "RDPs should consult with their tax advisors about the risks when deciding whether to follow the new IRS position or the old IRS position for their calendar year 2010 taxes."[184]

ii. Community Property/Separate Filing

Even though the 2010 CCA purports that its revised position on the federal tax treatment of community property of RDPs is

long as one partner had little to no taxable income.

178 2010 LAMBDA LEGAL FAQS, *supra* note 171, at 2.

179 I.R.S. Gen. Couns. Mem. 201021050 (May 28, 2010), at 3, *available at* 2010 WL 2147821.

180 After this article was written, the IRS offered more concrete guidance which answered some of these questions. *See infra* Postscript notes 231–56.

181 *Id.* at 3.

182 2010 LAMBDA LEGAL FAQS, *supra* note 171, at 5.

183 *Id.* "To apply the new IRS position to a prior tax period, a same-sex couple must have been RDPs when the income, gain or loss occurred." *Id.*

184 *Id.* at 6.

consistent with its treatment of opposite-sex married couples,[185] RDPs may not file their federal taxes jointly because of DOMA, so the treatment is really not similar at all. These disparities raise many unanswered questions for RDPs about how to actually file their taxes. For example, when California RDPs incur expenses in earning community income, each RDP may deduct half of these expenses on their separate federal income tax return, but expenses incurred earning separate income are deductible only by the RDP who earns that income.[186] Separating an expense into these categories will be difficult, if not impossible, in some circumstances. The IRS has suggested that California RDPs should consult IRS Publication 555 for guidance on how to apply the new rules to their separate income tax returns.[187] But, as Lambda Legal points out, Publication 555 "is based on the federal filing status of 'married filing separately,' not community property law" and, thus, does not really apply to California RDPs at all.[188] Until the IRS provides further guidance, RDPs will be forced to consult costly tax professionals in order to make simple tax filings.

III. GEOGRAPHIC DISPARITY

Prior to the 2010 CCA, all same-sex couples were treated the same for purposes of federal taxation; they were only recognized as individual taxpayers.[189] Differences in state laws resulted in different state tax treatment, but there was no geographic disparity in the federal tax treatment of same-sex couples. Now, however, although there is some argument about which same-sex couples fall under the advisory, it is clear that only some same-sex couples do.[190] As a result, similarly situated same-sex couples are being treated in a disparate manner because of the IRS's position with respect to California RDPs.

A. Within California

In California, in addition to RDPs, there are many same-sex married couples who were married during the brief period that such marriages were legal.[191] Although the 2010 CCA expressly

185 I.R.S. Gen. Couns. Mem. 201021050 (May 28, 2010), at 1; 2010 LAMDA LEGAL FAQS, *supra* note 171, at 1.

186 2010 LAMDA LEGAL FAQS, *supra* note 171, at 4.

187 *Id.* at 3.

188 *Id.* at 5.

189 *Id.* at 1.

190 *Id.* at 6–7 (explaining that the new IRS position only affects a few community property states).

191 In May 2008, the California Supreme Court held that existing statutes that prohibit same-sex marriage in California were unconstitutional. *In re* Marriage Cases,

applies to California RDPs, the advisory is silent as to the tax treatment of same-sex married couples.[192] This has led to some confusion as to whom the new rules apply within California.[193] In fact, in August 2010, the California State Assembly went so far as to pass a joint resolution calling on the IRS to issue a revenue ruling "with respect to the federal income tax treatment of registered domestic partners and same-sex married couples."[194]

On one hand, same-sex married couples in California enjoy the same rights and responsibilities as RDPs and opposite-sex married couples.[195] Thus, based on the well settled principle that "[f]ederal tax law generally respects state property law characterizations and definitions,"[196] the 2010 CCA should also apply to same-sex married couples in California.[197] However, this analysis is complicated because of DOMA, which prohibits federal recognition of same-sex marriage.[198] As stated above, the IRS generally defers to state property law to determine property ownership for federal tax purposes.[199] Arguably, however, DOMA may create an exception to this long-standing rule

183 P.3d 384, 453 (Cal. 2008). As a result, same-sex marriage was legal in California until November 5, 2008 when California voters approved a constitutional amendment banning same-sex marriage. In those six months, approximately 18,000 same-sex couples got married. *See* ASSEMB. COMM. ON JUDICIARY, REPORT ON. S.B. 54, 2009–2010 Assemb., Reg. Sess. (Cal. 2010), http;//www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0051-0100/sb_54_cfa_20090708_172053_asm_comm.html.

192 I.R.S. Gen. Couns. Mem. 201021050 (May 28, 2010).

193 *See* 2010 LAMBDA LEGAL FAQS, *supra* note 171, at 1 (calling the effect of the IRS's new position on same-sex married couples in California who are not California RDPs "unclear"); Ian Lovett, *Tax Law Confusing to Same-Sex Couples*, PARK LA BREA NEWS BEVERLY PRESS, Nov. 18, 2010, at 1, *available at* http://parklabreanewsbeverlypress.com/news/2010/11/tax-law-confusing-to-same-sex-couples ("While taxes are complicated for just about everyone, same-sex couples in California must tackle something of a moving target, as both the state and federal governments continue to adjust if and how their relationships are recognized.").

194 Assemb. J. Res. 29, 2009–2010 Assemb., Reg. Sess. (Cal. 2010). In committee, the bill was described as an effort to force the IRS to "solidify their position" and "provide clarity and give all taxpayers a documented decision on which to rely." S. COMM. ON REVENUE & TAXATION, BILL ANALYSIS ON ASSEMB. J. RES. 29, 2009–2010 Assemb., Reg. Sess. (Cal. 2010), at 4.

195 *See* S. B. 54, 2009–2010 S., Reg. Sess. (Cal. 2010) (clarifying that all same-sex couples validly married before November 5, 2008 are entitled to recognition as spouses, and that all same-sex couples who marry outside of California after November 5 are entitled to all of the rights, benefits, and responsibilities of marriage in California with the exception of the name marriage).

196 I.R.S. Gen. Couns. Mem. 201021050 (May 28, 2010), at 2 (citing United States v. Mitchell, 403 U.S. 101 (1930)).

197 *See* 2010 LAMBDA LEGAL FAQS, *supra* note 171, at 6 ("Despite the uncertainty that will remain until the IRS confirms in writing the duties of California's married same-sex taxpayers, it appears the better grounded answer is that the IRS should and will defer to California's community property laws when they apply to same-sex married couples.").

198 Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended at 1 U.S.C.A § 7 (West 2010)).

199 I.R.S. Gen. Couns. Mem. 201021050 (May 28, 2010), at 2.

resulting in the federal government being unable to recognize these state property law classifications when they arise as a result of same-sex marriage.[200] It does not seem far-fetched that DOMA would create such an exception since DOMA itself is such a departure from long-standing doctrine that state law controls in the area of marriage. In addition, the fact that the IRS is willing to defer to state law property determinations with respect to *domestic partners* does not seem to have much bearing on whether it would extend the same treatment to *same-sex married couples*. Moreover, the 2010 CCA's glaring omission of any mention of same-sex married couples is telling. An argument can be made that if the IRS had wanted to extend the rule of *Poe v. Seaborn* to same-sex married couples, it would have done so when it issued the CCA. Finally, although the IRS seems to want to gloss over its reasoning in the 2006 CCA, the fact remains that it was unwilling to grant recognition to the state-defined property interests of RDPs, in spite of the long standing practice of deferring to state law, simply because RDPs were not married.

Adding to the confusion, and illustrating the utter absurdity of the application of tax laws to same-sex couples in the face of DOMA, *if* the IRS will not allow same-sex married couples to split their income, then same-sex married couples who are also RDPs (or who later register as RDPs) will be allowed to split their income but same-sex married couples who are not also RDPs will not be able to split their income. This will essentially create three different classes of same-sex couples in California for federal tax purposes. Unfortunately, until the IRS clarifies its position, it is unknown whether RDPs and same-sex married couples face equal community property tax treatment under the 2010 CCA, but this uncertainty alone should be almost as unsatisfactory as an outright denial of equal treatment by the IRS.

B. Other Community Property States

California is only one of nine community property states, and there is a possibility that, based on the IRS's reasoning in the 2010 CCA, domestic partners in other states may be able to split

200 *See* Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 190 (1998) ("Numerous members of Congress returned again and again to the cost of providing federal benefits to same-sex partners. The effect of DOMA on the marital provisions of the tax code was not an unintended consequence."); *but see* 2010 LAMBDA LEGAL FAQS, *supra* note 171, at 6 (dismissing the possibility that DOMA creates such an exception because the 2010 CCA demonstrates that the IRS intends to follow the rule that state law determines property ownership).

their income.[201] It was determinative to the IRS's change of position from 2006 to 2010 that California repealed its laws that treated the community property of RDPs differently than the community property of opposite-sex married couples for state income tax purposes.[202] This seems to suggest that if there is any difference in the way that domestic partners and opposite-sex married couples are treated by the state with respect to community property, regardless of whether that difference really affects the *ownership* of the property, the IRS will not extend equal treatment to domestic partners. Out of the other eight community property states, only two, Washington[203] and Nevada,[204] have similar domestic partnership laws to California. In both states, domestic partners are granted the same community property rights under state law as opposite-sex married couples, and it appears that the 2010 CCA will apply to domestic partners in those states.

Two other community property states, Alaska and Wisconsin, have much weaker domestic partnership laws. Wisconsin has enacted a limited domestic partnership law,[205] but it specifically states that "the legal status of domestic partnership . . . is not substantially similar to that of marriage."[206] Moreover, the Wisconsin Department of Revenue has put a statement on its website stating that "[d]ue to a difference between California and Wisconsin law related to domestic partners . . . [Wisconsin] domestic partners do not report one-half of marital income for . . . federal income tax purposes."[207] Alaska offers very limited domestic partnership

201 *See* 2010 LAMBDA LEGAL FAQS, *supra* note 171, at 6–7 (concluding that the IRS should treat RDPs in states other than California the same as California RDPs if the state formally recognizes same-sex domestic partners in some form *and* the state extends the *exact* same community property rights to same-sex domestic partners in the same manner that they extend to opposite-sex married couples under state law).

202 *See supra* notes 165–67 and accompanying text. Even though neither Nevada nor Washington imposes a state income tax, *see* 2010 LAMBDA LEGAL FAQS, *supra* note 171, at 7 n.15, this should not affect the analysis. The IRS allows spouses in these states to split their income even in the absence of a state income tax. *Id.* at 7. In addition, a key factor seems to be whether the state treats domestic partners differently than opposite-sex married couples for state income tax purposes. *Id.* If there is no state income tax, then there is no difference in treatment. *Id.*

203 WASH. REV. CODE ANN. § 26.16.030 (West 2011) ("Property . . . acquired after marriage or after registration of a state registered domestic partnership by either domestic partner or either husband or wife or both, is community property.").

204 NEV. REV. STAT. ANN. § 122A.200 (LexisNexis 2010) ("Domestic partners have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and duties under law, whether derived from statutes, administrative regulations, court rules, government policies, common law or any other provisions or sources of law, as are granted to and imposed upon spouses.").

205 WIS. STAT. ANN. § 770.001 (West 2010).

206 *Id.*

207 *Effect of Recent IRS Ruling on Wisconsin Domestic Partnerships*, WIS. DEP'T OF

benefits to state employees, but not to same-sex couples as a whole.[208] It is therefore unlikely that the 2010 CCA would apply to Alaska or Wisconsin domestic partners.[209]

Finally, four community property states, Arizona, Idaho, Louisiana, and New Mexico, do not have any formal system of recognition for same-sex couples.[210]

C. Non-Community Property States

Although the 2010 CCA has no extrinsic application to same-sex couples in non-community property states, the underlying implications of the rulings to all same-sex couples should not be overlooked. The interplay between same-sex couples in states where income splitting is now permissible and states in which it is not, can serve to highlight irrational disparities that arise as a result of our current tax system. This geographic disparity could be the catalyst needed to achieve nationwide tax equality for same-sex couples much as similar disparity spurred the eventual creation of the "married filing jointly" filing status in 1948.[211]

IV. VALUE OF THE ADVISORY

The 2010 CCA is the first time that the IRS has been willing to recognize same-sex couples for federal income tax purposes. This is especially significant in light of the federal government's official position regarding the acknowledgement of same-sex couples (or lack thereof) as stated in DOMA. In fact, by viewing the 2010 CCA as an instrument for achieving federal recognition *in spite* of DOMA, equality advocates can use the advisory, and the reactions that it creates, to craft state and federal legislation that puts same-sex relationships on equal tax footing with opposite-sex married couples for federal income tax purposes.

A. Significance of Federal Recognition of Same-Sex Relationships

The IRS's unwillingness to formally recognize same-sex relationships has long been a source of frustration among tax

REVENUE (last updated June 9, 2010), http://www.revenue.wi.gov/taxpro/news/100609.html.

208 Alaska Civil Liberties Union v. State, 122 P.3d 781, 794 (Alaska 2005) (concluding, under a minimum scrutiny analysis, that programs which offered valuable benefits to public employees' spouses but not to domestic partners violated the Alaska state constitution).

209 *See* 2010 LAMBDA LEGAL FAQS, *supra* note 171, at 7 ("[S]ame-sex couples in states other than California, Nevada, or Washington appear to be unaffected by the new IRS position . . . .").

210 *Id.* at 6 n.13.

211 *See supra* notes 57–59 and accompanying text.

scholars.[212] The passage of DOMA, prohibiting same-sex couples from ever being able to file taxes jointly, was a sharp blow, but most of the ire from the gay community comes from the fact that gay couples are forced to file their federal taxes in a way that does not recognize the realities of their relationships.[213] In fact, much of the scholarship regarding tax equality for same-sex couples focuses not on the unconstitutionality of DOMA, but on methods of getting the IRS to federally recognize same-sex couples *in spite* of DOMA.[214] The willingness of the IRS to recognize *some* same-sex couples is a critical element to achieving tax equality for *all* same-sex couples, just as federal recognition for *some* married couples[215] was the impetus that eventually led to nationwide joint filing (and thus, federal recognition) for *all* married couples.[216] This is the true value of the IRS's new position. It is the first foot in the federal door without which all of the domestic partnership laws or same-sex marriage bills are completely useless except in the definition of state-created rights. Until the federal government officially recognizes those state-created rights, federal equality is not possible. Now that the IRS

212 *See* Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763, 781 (2004) ("The federal government . . . had thus quietly banished gay and lesbian couples to the closet by failing to acknowledge the existence of their relationships."); Cain, *Taxing Families Fairly*, *supra* note 57, at 848 ("The current administration appears committed to remaining silent about the tax treatment of same-sex couples, perhaps out of fear that any pronouncement might seem to support such relationships.").

213 *See, e.g.*, Knauer, *supra* note 200, at 134 ("[S]ame-sex partners always act as strangers under the tax code regardless of the economic or contractual realities of their relationship."); Patricia A. Cain, *Taxing Lesbians*, 6 S. CAL. REV. L. & WOMEN'S STUD. 471, 472 (1997) [hereinafter Cain, *Taxing Lesbians*] ("[W]hen [lesbian couples] file income tax returns, they are required to fill out forms that force them into separate spheres from each other as though their lives were lived separately."); Infanti, *supra* note 212, at 789 ("Although Congress took the time to debate and decide that gay and lesbian couples should never be treated as married for federal tax purposes, it did not spend any time spelling out how to treat couples who do not qualify for the marital provisions in the Code.").

214 *See, e.g.*, Anthony Rickey, *Loving Couples, Split Interests: Tax Planning in the Fight to Recognize Same-Sex Marriage*, 23 BERKELEY J. GENDER L. & JUST. 145, 150, 170 (2008) (advocating for the use of obsolete split-interest tax shelters as a means of achieving federal recognition of same-sex marriages by "challeng[ing] the federal government and the public at large to accept the costs inherent in a policy of ignoring committed relationships between same-sex couples"); Matthew Fry, Comment, *One Small Step for Federal Taxation, One Giant Leap for Same-Sex Equality: Revising § 2702 of the Internal Revenue Code to Apply Equally to All Marriages*, 81 TEMP. L. REV. 545, 569–70 (2008) (concluding that even when some same-sex couples would be disadvantaged by a revision to the tax code that gave them a "hint of federal recognition," the benefits outweigh the burdens because it is "one small step in the direction of equality").

215 In 1921 when the federal government began allowing some spouses to combine and split their income for federal income tax purposes, it was essentially recognizing some spouses for federal income tax purposes, but refusing to recognize others, all because of how state law classified their relationships. *See* discussion *supra* Parts I(A)(1), I(A)(2).

216 *See supra* Part I(A)(4).

has recognized California RDPs, the fight for federal tax equality can begin.

B. A Way Forward to Greater Federal Acknowledgment

The 2010 CCA is a guidebook that lays out explicitly what it will take for the IRS to formally recognize domestic partners in community property states in order to apply the rule of *Poe v. Seaborn*. In community property states where the ruling is likely to apply, specifically California, Nevada, and Washington, the emphasis should be on forcing the IRS to clarify and codify its position.[217] The IRS must be made to unequivocally announce to whom the new rules apply. In community property states where there are weak domestic partnership laws, such as Alaska and Wisconsin, the focus should be on strengthening the current domestic partner laws to mirror those of California.[218] Finally, in those community property states with no domestic partnership laws, equality advocates must push for the creation of domestic partnership registries.[219]

As the efforts of taxpayers in community property states begin to pay off and the IRS allows income splitting in more community property states, this will lead to arbitrary and irrational geographic disparity among same-sex couples throughout the country. For example, same-sex domestic partners in community property states could actually be more equal for federal income tax purposes to opposite-sex married couples in Massachusetts, where gay marriage is legal, than same-sex married couples in Massachusetts. To put that a different way, in Massachusetts, two different couples, similarly situated except one couple is heterosexual and one couple is homosexual, can go to City Hall and get married, on the same day, even at the same time, but still be treated so differently for federal tax purposes that a non-married, California RDP is

217 This movement is already underway in California. *See* Assemb. J. Res. 29, 2009–2010 Assemb., Reg. Sess. (Cal. 2010). Although the advisory memorandum applies specifically to California RDPs, the IRS is being called upon to issue a more binding revenue ruling. *See supra* note 2 (explaining why an IRS revenue ruling is preferable to an internal advisory memorandum).

218 *See* 2010 LAMBDA LEGAL FAQS, *supra* note 171, at 6–7 ("When a state applies its community property laws to same-sex couples in a manner similar to California's treatment of RDPs, it is reasonable to anticipate that the IRS will, or at least should, treat these taxpayers as it now will treat California RDPs."); *see also supra* notes 155–63 and accompanying text (discussing the final domestic partnership amendment); *see also supra* notes 201–02 and accompanying text.

219 This is, of course, easier said than done, since such efforts are usually met with substantial resistance from certain special interest groups. However, unlike the trial-and-error approach that California, as a pioneer in domestic partnership law, had to take, current equality advocates in other states can take a short-cut by studying what worked and what did not in California. *See supra* Part I(B).

actually more equal to the heterosexual married couple than to the homosexual married couple.

There is a valid argument to be made that it is really DOMA that causes these irrational results, and that is certainly true. However, there are three good reasons why a solution to the problems of tax inequity should not focus on DOMA. First, and most obviously, DOMA is the law,[220] and so pragmatically, a solution to any problem that presupposes a world without DOMA is merely wishful thinking. Second, over forty states have passed so-called "mini-DOMAs" which ban same-sex marriage on a statewide basis,[221] so even in a DOMA-free world, most same-sex couples would still be restricted by any policies that discriminate against same-sex married couples, as opposed to domestic partners. Finally, unlike the irrationality that results from DOMA, the disparate tax effects that will arise as the federal government allows some, but not all, same-sex couples to split their income, will not be felt uniformly by all gay couples. This is the key to using the ruling as a tool to highlight the incredible inequities that exist in the current tax system. Although a taxpayer in California and a taxpayer in New York can complain about the irrational effects of DOMA, the fact remains that they are both being treated the same under DOMA (albeit poorly). However, when a taxpayer in New York can complain that a similarly situated taxpayer in California is being given special treatment, more Americans will be willing to take heed. Just as in the 1920s and 1930s when the entire discussion was framed around the inequity and inherent unfairness resulting from the federal taxation scheme,[222] by turning the discussion into one about states' rights and fundamental fairness, equality advocates today can elicit bipartisan support for a nationwide solution.[223]

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220 There have been recent developments in several federal cases challenging the constitutionality of DOMA. *See, e.g.*, Gill v. Office Pers. Mgmt., 699 F. Supp. 2d 374, 376 (D. Mass. 2010). On July 8, 2010, a federal district court in Massachusetts ruled that section three of DOMA violated the Constitution. *Id.* at 397 ("As irrational prejudice plainly *never* constitutes a legitimate government interest, this court must hold that Section 3 of DOMA . . . violates the equal protection principles embodied in the Fifth Amendment to the United States Constitution."). The Justice Department has appealed this decision to the United States Court of Appeals for the First Circuit. Gill v. Office Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010), *appeal docketed*, No. 10-2204 (1st Cir. Sept. 22, 2011).

221 *See* Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2165 (2005) (compiling a detailed listing of all of the state laws that ban same-sex marriage).

222 *See* McMahon, *supra* note 16, at 590 (showing that in response to perceived tax inequities after the *Poe v. Seaborn* decision a "relatively small interest group captured [national tax] policy formation by casting the issue as tax discrimination against residents of common law states").

223 In California, for example, the joint resolution passed by the State Assembly requesting that the IRS issue further guidance on whether the 2010 CCA applied to same-

CONCLUSION

In 1927, Mr. and Mrs. Seaborn made history when they attempted to split their income so they could save money on their tax bill, even though such tax filing had been specifically prohibited by the Treasury Department.[224] Their persistence eventually led to the enactment of the "married filing jointly" filing status in 1948.[225] In 1979, Tom Brougham and his partner refused to take "no" for an answer when they were denied health care benefits because they were not married.[226] Their tenacity eventually resulted in California enacting the most thorough domestic partnership legislation in the country.[227] And, in 2006, Mr. Eric Rey and his RDP would not back down when the federal government denied them the ability to split their income.[228] Their doggedness has already led to the federal recognition of California RDPs and may be the impetus for a nationwide solution to the problems of tax inequities for same-sex couples.[229] In all of these instances, American taxpayers recognized an inherent unfairness in the tax system and set about to change it. However, for same-sex couples, the fight is far from over because there is still much inequity left in the tax system. By learning from the fighters of the past, the fighters of today, and of the future, we can make the American tax system fair for all taxpayers, regardless of their sexual orientation. It is just a matter of fairness.

POSTSCRIPT

As the 2010 tax filing deadline approached, the call for guidance from the IRS on how to implement the new rules became even more pronounced.[230] But, as the IRS started

sex married couples was passed unanimously with wide bipartisan support. Karen Ocamb, *California Legislature Passes Resolution Calling on the IRS to Implement Tax Equality*, LGBT POV (Aug. 9, 2010, 4:32 PM), http://lgbtpov.com/2010/08/california-legislature-passes-resolution-calling-on-the-irs-to-implement-tax-equality. In fact, the resolution was co-authored by Assemblyman Charles DeVore, the Tea Party candidate in the GOP Senate primary, who is normally opposed to gay marriage. *Id.* He supported the tax equity measure because it concerned the rights of the states to define their own tax policies. *Id.* Similarly, in the aftermath of *Poe v. Seaborn*, "federal tax law drove states to consider, and a number to adopt, a marital property regime that would otherwise have held little interest for them." McMahon, *supra* note 16, at 589.

224 *See supra* notes 48–49 and accompanying text.

225 *See supra* notes 58–59 and accompanying text.

226 *See supra* notes 61–66 and accompanying text.

227 *See supra* notes 129–31 and accompanying text.

228 *See supra* notes 1–8 and accompanying text.

229 *See supra* notes 60–61 and accompanying text.

230 *See, e.g.*, Scott James, *For Same-Sex Couples, A Tax Victory That Doesn't Feel Like One*, N.Y. TIMES, Jan. 14, 2011, at 21A [hereinafter James, *Same-Sex Couples*] (calling the confusion surrounding the 2010 CCA "a headache for tens of thousands of gay and lesbian families in California"); Francine J. Lipman & Rebecca J. Kipper, *Just a Matter of*

publishing the 2010 taxpayer guides and forms, the guidance to same-sex couples was "inconsistent and incomplete."[231] Many tax professionals had assumed that the new rules would be optional for 2010 and were "stunned" when the online version of the 2010 1040 tax form stated that income-splitting for domestic partners would be mandatory.[232] In December 2010, the IRS stated in its annual tax guide, Publication 17, that RDPs in Nevada and Washington, as well as same-sex married couples in California, were definitely covered by the new rules,[233] but this only added to the confusion because the language implied that these taxpayers could *choose* whether to report their community income.[234] The tax guide also directed RDPs to seek further guidance in IRS Publication 555, Community Property; however, the publicly available version of that publication had not yet been revised to reflect the new rules for same-sex couples.[235]

Fairness: Tax Consequences of the Revised Community Property Treatment of California Registered Domestic Partners, A.B.A SEC. TAX'N NEWS Q., Winter 2011, at 16, 18 ("Until the Service issues guidance on the community property income of California same-sex married couples as well as Washington and Nevada RDPs, it is unclear whether, when and to what extent community property income splitting applies to them."). On December 31, 2010, the National Taxpayer Advocate released the 2010 Annual Report to Congress outlining areas where tax reform and IRS guidance are needed. NINA E. OLSON, TAXPAYER ADVOCATE SERV., NATIONAL TAXPAYER ADVOCATE 2010 ANNUAL REPORT TO CONGRESS 1 (2010), *available at* http://www.irs.gov/pub/irs-pdf/p2104.pdf. Identifying unanswered questions and uncertainty regarding the federal taxation of same-sex couples in America as one of the most serious problems faced by taxpayers, *id.* at 211–18, the report noted that "[t]he IRS has not provided answers to these questions, requiring many taxpayers to file returns without knowing which rules apply and potentially subjecting them to audits and penalties, as well as costs for tax advice." *Id.* at 211.

231 *See* Kathleen Pender, *Same-Sex Couples Facing Tax Woes*, S.F. CHRON., Feb. 13, 2011, at D1 [hereinafter Pender, *Tax Woes*].

232 Pender, *Tax Woes*, *supra* note 231.

233 INTERNAL REVENUE SERV., U.S. DEP'T OF TREAS., PUB. NO. 17, YOUR FEDERAL INCOME TAX 5 (2010), *available at* 2010 WL 5017303 [hereinafter YOUR FEDERAL INCOME TAX].

234 *Id.* at 5 ("A registered domestic partner in California, Nevada, or Washington generally *can choose* to report half the combined community income earned by the individual and his or her domestic partner.") (emphasis added); *see also* Patricia Cain, *RDPs and Community Income—Not Really a Choice*, SAME SEX TAX L. BLOG (Dec. 20, 2010, 2:51 PM), http://law.scu.edu/blog/samesextax/rdps-and-community-income-not-really-a-choice.cfm (discussing the confusion caused by the language of Publication 17). The guide has since been updated and now reads that "[a]registered domestic partner in California, Nevada, or Washington must report half the combined community income earned by the individual and his or her domestic partner." INTERNAL REVENUE SERV., U.S. DEP'T OF TREAS., PUB. NO. 17, YOUR FEDERAL INCOME TAX FOR INDIVIDUALS 5 (2010), *available at* http://www.irs.gov/pub/irs-pdf/p17.pdf.

235 *See* Patricia Cain, *Splitting Community Income—Yes You Can!*, SAME SEX TAX L. BLOG (Dec. 12, 2010, 1:58 PM), http://law.scu.edu/blog/samesextax/splitting-community-income-yes-you-can.cfm ("Publication 555 . . . still includes a paragraph that was added in 2007 after the 2006 CCA was issued and it says, in direct conflict with Publication 17, that California RDPs cannot split community earned income."); Pender, *Tax Woes*, *supra* note 231, at D1 ("The IRS says it is updating Publication 555 and will post it to www.irs.gov when complete.").

Faced with a looming filing deadline and continued uncertainty, tax professionals in community property states decided to take matters into their own hands.[236] In January 2011, a group of tax practitioners from California, including Patricia Cain, organized an informal meeting with the IRS regarding problems they were facing in implementing the new rules.[237] The practitioners were able to find out exactly what the IRS wanted mailed in with each return,[238] how long the IRS expected it would take to update computer systems to allow same-sex couples to e-file,[239] and whether there would be any special rules for assessing penalties and interest for late or amended returns.[240] After the meeting, while still acknowledging that "[t]here are substantive and procedural questions that have yet to be clearly answered on how exactly to file these returns,"

236 Patricia Cain, along with concerned tax professionals, were instrumental in calling attention to the problems faced by gay taxpayers attempting to file their 2010 taxes. *See* Scott James, *Should Gays Be Taxed the Same as Straights?*, BAY CITIZEN (June 11, 2011, 1:20 PM), http://www.baycitizen.org/blogs/newsroom/should-gays-be-taxed-same-straights/ [hereinafter James, *Should Gays Be Taxed*] ("If Dr. Cain is the general in this fight, she has a battalion of accountants, lawyers and tax experts joining her in battle.").

237 *See generally Discussion on 2010 Filing of RDP Community Property Returns*, SAME SEX TAX L. BLOG (Jan. 18, 2011), http://law.scu.edu/blog/samesextax/file/Notes%20on%20IRS%20&%20Practitioner%20Discussion%20about%20processing%20community%20RDP%20returns.pdf [hereinafter *Discussion*].

238 *Id.* An IRS representative from the paper processing department explained that same-sex couples should: (1) include both partner's W2s on each 1040, (2) not include a copy of the CCA with the return, (3) complete the worksheet from Publication 555 and staple it to both 1040s, (4) write on the top of each 1040 that the return was prepared in accordance with CCA 201021050, and (5) only include one return per envelope. *Id.*

239 *Id.*; Patricia Cain, *IRS National Office Personnel Provide Critical Advice for Community Property Same-Sex Couple Returns*, SAME SEX TAX L. BLOG (Jan. 21, 2011, 5:47 PM), http://law.scu.edu/blog/samesextax/irs-national-office-personnel-provide-critical-advice-for-community-property-same-sex-couple-returns.cfm ("[T]he important news is that you can e-file. Not quite yet, though. But maybe by mid-February, once IRS Release #4 has been absorbed by the tax software folks."). In March, just one month before the tax-filing deadline, Turbo Tax announced that it would not be able to fully support same-sex couples who were required to split their income under the new rules. *See* Patricia Cain, *Announcement From Turbo Tax For Community Income Couples*, SAME SEX TAX L. BLOG (Mar. 12, 2011, 11:19 AM), http://law.scu.edu/blog/samesextax/announcement-from-turbo-tax-for-community-income-couples.cfm; Kathleen Pender, *TurboTax Delays New Software For Same-Sex Couples*, S.F. CHRON., Mar. 15, 2011, at D1 [hereinafter Pender, *TurboTax*].

240 *Discussion*, *supra* note 237, at 3. The IRS stated that they were developing procedures for restricting penalties in some cases, however interest is statutory and cannot be alleviated. *Id.* This issue mainly affects California couples because they are allowed to file amended returns for 2007, 2008, and 2009. However, if one partner previously reported little or no income in prior years and then files an amended return claiming half of the community income, the apparent under-reporting can trigger penalties. *See* Patricia Cain, *The Senate Eight*, SAME SEX TAX L. BLOG (June 22, 2011, 1:10 PM), http://law.scu.edu/blog/samesextax/the-senate-eight.cfm [hereinafter Cain, *The Senate Eight*]. In April 2011, the IRS added a section to its penalties and interest rules specifically addressing California RDPs and allowing for penalties to be waived in these cases. I.R.M. 20.1.2.2.6.1 (Apr 19, 2011).

Cain wrote that, "we are now on a very important step forward in resolving many of the unanswered questions."[241] Armed with this new guidance, tax practitioners in community property states set out to educate same-sex couples about the new rules for filing their taxes.[242]

On February 24, 2011, the IRS released the revised version of Publication 555, which included some guidance to same-sex couples regarding the effect of the 2010 CCA.[243] According to the revised guide, the income-splitting rules applied to RDPs in California, Nevada, and Washington as well as same-sex married couples in California.[244] Further, the guide made it clear that the rules were not optional for 2010.[245] In addition, the guide offered tips for same-sex couples on how to physically file their returns under the new rules.[246]

Even with the new guidance, however, same-sex couples throughout California, Nevada, and Washington were finding it difficult to accurately file their taxes under the new rules.[247] Many taxpayers had to "ditch their old tax preparers or software and hire accountants who specialize in same-sex taxes."[248] Taxpayers were forced to apply for extensions because the

241 Patricia Cain, *IRS National Office Personnel Provide Critical Advice for Community Property Same-Sex Couple Returns*, SAME SEX TAX L. BLOG (Jan. 21, 2011, 5:47 PM), http://law.scu.edu/blog/samesextax/irs-national-office-personnel-provide-critical-advice-for-community-property-same-sex-couple-returns.cfm.

242 *See* James, *Should Gays Be Taxed*, *supra* note 236 (discussing tax lawyer Deb Kinney and her peers who "[b]etween personal appearances and online seminars . . . reached about 6000 gay taxpayers and their accountants to instruct them about the recent IRS change").

243 INTERNAL REVENUE SERV., U.S. DEP'T OF TREAS., PUB. NO. 555, COMMUNITY PROPERTY 1, 2, 9 (2010), *available at* http://www.irs.gov/pub/irs-pdf/p555.pdf [hereinafter COMMUNITY PROPERTY]. As a result of this official guidance from the IRS, Lambda Legal revised its FAQs. LAMBDA LEGAL, THE IRS APPLIES "INCOME-SPLITTING" TO CALIFORNIA'S REGISTERED DOMESTIC PARTNERS AND SAME-SEX SPOUSES: PRELIMINARY ANSWERS TO SOME FREQUENTLY ASKED QUESTIONS (FAQS) 1–9 (2011), *available at* http://data.lambdalegal.org/publications/downloads/fs_the-irs-applies-income-splitting-community-property.pdf; *see also supra* notes 171, 177–97 and accompanying text.

244 COMMUNITY PROPERTY, *supra* note 243, at 2.

245 *Id.* ("These rules apply to RDPs in Nevada, Washington, and California in 2010 because they have full community property rights in 2010.").

246 *Id.* at 9–10.

247 *See* James, *Same-Sex Couples*, *supra* note 230, at 21A (discussing the problems that same-sex filers encountered while trying to file their 2010 federal income taxes). Ironically, Mr. Rey, the taxpayer at the center of the 2010 CCA, "faced a barrage of bureaucracy" when he tried to file his taxes under the new rules that he helped precipitate. *Id.*

248 Pender, *Tax Woes*, *supra* note 231, at D1; *see also* Scott James, *From I.R.S. To Gay Couples, Headaches and Expenses*, N.Y. TIMES, June 11, 2011, at 35A [hereinafter James, *Headaches and Expenses*] ("Interviews with more than a dozen Bay Area tax preparers and same-sex couples have revealed that the new rule has proved to be cumbersome and expensive. It is too complex for do-it-yourself tax filing computer software, and many couples were forced to hire tax professionals."); *supra* note 239.

implementation guidance was issued so late.[249] About 300 same-sex taxpayers in California "had their returns rejected with terse letters signed by an enigmatic I.R.S. employee named J. Bell from Fresno."[250] In addition, many taxpayers who did manage to file on time faced penalties for under-reporting their income.[251] Further, there remained serious questions regarding "who should pay self employment taxes and be given social security credits for the community earnings of a self-employed partner."[252] In response to these problems, a group of eight Senators, including California Senators Barbara Boxer and Dianne Feinstein, wrote a letter to the Commissioner of the IRS explaining the hurdles their gay constituents were facing and asking the IRS to provide more guidance.[253]

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249 Pender, *TurboTax*, *supra* note 239, at D1 (quoting Patricia Cain as saying "I've had some people e-mail me who are angry at TurboTax because they have been waiting (for guidance). Professionals are charging more now. Many of them are already booked and will only take clients on extension").

250 *See* James, *Headaches and Expenses*, *supra* note 248, at 35A. In a public apology, the IRS later blamed a processing error for these letters and stated that it "sincerely regrets any inconvenience to taxpayers." *Id.*

251 *See* James, *Same-Sex Couples*, *supra* note 230, at 21A. Mr. Rey's partner was assessed $20,000 in penalties and interest when he filed amended tax returns per the new rules. *Id.* The IRS issued revised guidance for abating penalties for same-sex couples affected by the new rules, *see supra* note 240, however, in many cases, receiving the abatement requires additional, costly correspondence with the IRS. *See* Cain, *The Senate Eight*, *supra* note 240.

252 *See* Cain, *The Senate Eight*, *supra* note 240. In March 2011, a group of tax professionals, including Patricia Cain and Donald Read, sent a letter to the IRS urging them to revise Publication 555 to correct "a misstatement of the law . . . relating to self-employment tax for certain . . . same-sex couples." *See* Memorandum from Donald H. Read, Patricia A. Cain, Pan Haskins, and Karen K. Stogdill to William J. Wilkins, Chief Counsel, Internal Revenue Serv., and Richard E. Byrd, Jr., Commissioner, Wage and Investment Division, Internal Revenue Serv. (Mar. 2, 2011), *reprinted in* Document No. 2011-5066, Tax Analysts, Inc.

253 *See* News Release, U.S. Senator Patty Murray, Senators Murray, Cantwell Urge IRS to Fix Tax-Filing Problems Faced by Same-Sex Couples (June 21, 2011), http://murray.senate.gov/public/index.cfm?p=NewsReleases&ContentRecord_id=5623d453-b792-4c83-a9cc-2eaa8b6f3932. The letter noted that:

> [i]t is . . . imperative that the IRS address the specific problems encountered by couples in California, Washington, and Nevada, where state community property laws apply. In each of these States, same-sex couples who are married or in registered domestic partnerships must pool and then divide their incomes to calculate their tax liability. The federal tax system, however, currently has no means of linking an individual's tax return to that of his or her spouse or domestic partner. As a result, underpayment penalties may be wrongly assessed or the system may incorrectly register that overpayments have been made. Similarly, when one person is self-employed, social security credits and tax liabilities may be wrongly attributed to the taxpayer who is not self-employed. These administrative difficulties threaten to add additional, unacceptable burdens to couples that already went to great lengths to file accurate returns.

Id.

In September 2011, the IRS issued three information letters in response to inquiries from gay taxpayers who were struggling to apply the new rules.[254] In a sign that the message was getting through, two of the letters noted that the IRS was "aware that the extension of community property laws to same-sex couples in California has caused some taxpayers to incur increased tax return preparation fees and has raised some additional legal and compliance issues."[255] Also in September 2011, the IRS issued an extensive Q&A document designed to supplement Publication 555 and answer many of the questions taxpayers and tax practitioners still had about the new rules.[256]

There are still unanswered questions and uncertainty surrounding the implementation of the 2010 CCA.[257] Some of these issues arise as a direct result of DOMA rather than because of how the IRS is implementing the new rules.[258] However, some tax practitioners who have been struggling to apply the new rules are becoming frustrated because they believe that there are many smaller, sub-regulatory changes that the IRS could make *now* that would improve processing for same-sex couples.[259] For example, there are many places in the code where the word "spouse" is merely descriptive rather than normative, such as where the reason for the designation is not based on

254 I.R.S. Info. Ltr. 2011-066 (July 27, 2011), *available at* http://www.irs.gov/pub/irs-wd/11-0066.pdf; I.R.S. Info. Ltr. 2011-0068 (July 27, 2011), *available at* http://www.irs.gov/pub/irs-wd/11-0068.pdf; I.R.S. Info. Ltr. 2011-63 (June 22, 2011), *available at* http://www.irs.gov/pub/irs-wd/11-0063.pdf.

255 I.R.S. Info. Ltr. 2011-066 (July 27, 2011), *available at* http://www.irs.gov/pub/irs-wd/11-0066.pdf; I.R.S. Info. Ltr. 2011-0068 (July 27, 2011), *available at* http://www.irs.gov/pub/irs-wd/11-0068.pdf.

256 *Questions and Answers for Registered Domestic Partners in Community Property States and Same-Sex Spouses in California*, IRS.GOV, http://www.irs.gov/newsroom/article/0,,id=245869,00.html (last updated Sept. 16, 2011).

257 *See, e.g.*, Patricia A. Cain, *Planning For Same-Sex Couples in 2011* (Santa Clara Univ. Sch. of Law, Accepted Paper No. 14-11, 2011), *available at* http://ssrn.com/abstract=1860217.

258 *See* Amy S. Elliott, *IRS's Definition of Marriage-Where It Stands Now*, Document No. 2011-4459, Tax Analysts, Inc., *available at* http://law.scu.edu/blog/samesextax/file/Amy%20Elliott%20story%20on%20DOMA.pdf (analyzing the various tax issues affected by DOMA); Patricia Cain, *My Birthday Present*, SAME SEX TAX L. BLOG (June 11, 2011, 5:53 PM), http://law.scu.edu/blog/samesextax/my-birthday-present.cfm ("The IRS wants to do the right thing. It wants to tax each citizen on the right amount of income under existing law. That is its job. However, the IRS is seriously hampered from promulgating rules that apply to same-sex couples by . . . DOMA.").

259 *See* Patricia Cain, *IRS Guidance on Tax Reporting for Community Property RDPs*, SAME SEX TAX L. BLOG (Sept. 19, 2011, 10:08 AM), http://law.scu.edu/blog/samesextax/irs-guidance-on-tax-reporting-for-community-property-rdps.cfm (disagreeing with the IRS's position regarding self-employment tax reporting for same-sex couples and concluding that "[i]f the IRS persists in its current position . . . then the only way to resolve this is through litigation"). Deb Kinney believes that on some issues, the IRS is "hiding behind DOMA" in its refusal to help same-sex taxpayers. Telephone Interview with Deb Kinney, DLK Law Group (Nov. 9, 2011) [hereinafter Kinney Interview].

spousal privilege or a marriage deduction.[260] According to some tax experts, the IRS does not have to construe these sections as only applying to opposite-sex married couples.[261] In addition, there are huge processing issues still affecting same-sex couples under the new income splitting rules that can be fixed even under DOMA.[262]

As predicted, the new rules have drawn national attention to the inequities that exist in the taxation of same-sex couples. There is still much to be done in the fight for tax equality. However, as in the past, the story of the implementation of the 2010 CCA is the story of a small group of dedicated individuals stepping up to force the government to treat all taxpayers fairly.

260 Kinney Interview, *supra* note 259. An example of this is the self-employment tax issue. For self-employment tax purposes, section 1402 of the Tax Code allocates self-employment earnings to the "spouse" who manages the business despite the fact that half of those earnings are allocated to the other spouse for income tax purposes. I.R.C. § 1402(a)(5)(A) (2010). Citing DOMA, the IRS has refused to apply this exception to cover same-sex couples because the statute uses the word "spouse." *See supra* note 252. However, according to some analysts, the word "spouse" in section 1402 is arguably equivalent to the word "taxpayer" because there was no intent or reason to create special rules for splitting self-employment taxes only for spouses when that code section was enacted. Thus, the IRS does not have to require same-sex couples in community property states to split the self-employment tax. Rather, the IRS could construe that code section generally and apply it to same-sex couples allowing them to retain all of their social security tax credits. *See* Kinney Interview, *supra* note 259; Patricia Cain, *Community Property RDPs and Self-Employment Taxes*, SAME SEX TAX L. BLOG (Apr. 12, 2011, 10:56AM), http://law.scu.edu/blog//samesextax/community-property-rdps-and-self-employment-taxes.cfm.

261 *See* Cain, *Community Property RDPs and Self-Employment Taxes*, *supra* note 260; Cain, *The Senate Eight*, *supra* note 240 ("But even with DOMA on the books, it is possible to construe basic tax principles in a way that recognizes the reality of couples who are married or in a state-recognized relationship that carries the same benefits and burdens of marriage.").

262 *See supra* note 251. According to Deb Kinney, many of the delays and processing errors could be fixed if the IRS would "link" or "relate" the returns filed by same-sex couples, the returns that two taxpayers in a same-sex partnership file. This would allow one partner's tax liability to be offset by the other partner's estimated taxes which would dramatically decrease the interest and penalties that same-sex couples are facing as a result of the implementation of the new rules. Further, developing this internal linking mechanism would allow couples to e-file using commercial tax software. *See* Kinney Interview, *supra* note 259.