REGENT UNIVERSITY LAW REVIEW

ARTICLES

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VOLUME 25 2012–2013 NUMBER 1

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REFLECTIONS ON *JEWS FOR JESUS*: TWENTY-FIVE YEARS LATER

Jay Alan Sekulow[*] *and Erik M. Zimmerman*[**]

INTRODUCTION

Sometimes government restrictions on First Amendment rights can be shocking, and often religious speakers are the victims of such restrictions. My experience[1] with such restrictions began in 1983 when an airport officer at Los Angeles International Airport ("LAX") ordered a man to stop distributing religious tracts on airport premises. The man was acting peaceably and was not interfering with the airport's operations; rather, the city of Los Angeles had banned all First Amendment activities in the airport's Central Terminal Area ("CTA"). As a result, this man, a member of a Messianic evangelical organization called "Jews for Jesus," found himself violating the law by simply handing out religious pamphlets on public property. Jews for Jesus decided to challenge the Board of Airport Commissioners' ban, and that case was the first I argued before the Supreme Court.

This Article marks the twenty-fifth anniversary of the Supreme Court's decision in *Board of Airport Commissioners v. Jews for Jesus, Inc.*[2] The Court held, in a unanimous decision, that LAX Resolution No. 13787 ("the Resolution") declaring that LAX's CTA "is not open for First

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[1] This Article, although co-authored, is written from Jay's first-person perspective.

[2] 482 U.S. 569 (1987).

Amendment activities by any individual and/or entity"[3]—which airport officials interpreted to allow "airport-related" expression and forbid other expression, such as religious leafleting[4]—violated the Free Speech Clause of the First Amendment.[5] More broadly, *Jews for Jesus* contributed to the fight to provide equal footing for religious speech in the free speech arena, a development that has become all the more important since the Supreme Court abandoned the application of strict scrutiny in free exercise cases in 1990.[6]

This Article discusses the *Jews for Jesus* litigation and the Supreme Court decision's impact on First Amendment jurisprudence. Part I provides legal background for the case, discussing various Supreme Court cases decided before *Jews for Jesus* that addressed restrictions on leafleting or assembly, laws that provided government officials with unfettered discretion, or claims of a free speech right to access various types of public property for expressive activities. Part II discusses the *Jews for Jesus* litigation, from the enactment of the Resolution to the issuance of the Supreme Court's decision. Part III discusses the impact and continued legal relevance of *Jews for Jesus*. Part IV describes the effect of *Jews for Jesus* over the past twenty-five years from a legal, practical, and personal perspective, as well as the developments in the law of religious speech since the 1987 decision.

I. LEGAL BACKGROUND OF *JEWS FOR JESUS*

The Resolution implicated two different lines of Supreme Court First Amendment cases. First, *Jews for Jesus* was the latest in a line of cases reviewing statutes, ordinances, or policies that prevented individuals from distributing written materials on public property or that required prior approval from the government to do so. In particular, the Resolution and its enforcement raised concerns that it gave airport officials arbitrary, uncontrolled discretion to grant or deny permission to speak, similar to other policies that the Supreme Court had invalidated. Second, the case presented another opportunity for the Court to address how the First Amendment applies to a specific type of public property (airports) as it had done with numerous other types of public property (schools, fairgrounds, military bases, etc.).

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3 *Id.* at 570–71.

4 *See id.* at 576.

5 *Id.* at 577.

6 *See infra* Part III.

A. Cases Addressing Restrictions on Leafleting or Assembly or Laws Providing Broad Enforcement Discretion to the Government

Some of the Supreme Court's earliest cases addressing the scope of the First Amendment's protections involved restrictions on the distribution of literature. In *Lovell v. City of Griffin*, the Court held that a city ordinance that prohibited the distribution of any literature within city limits without the prior written approval of the city manager, including the distribution of free religious literature, was unconstitutional.[7] The Court observed that "[t]he liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."[8]

Similarly, in *Hague v. Committee for Industrial Organization*, the Court held that an ordinance under which city officials prohibited the distribution of newspapers and pamphlets concerning federal labor law but allowed literature addressing other subjects to be distributed was unconstitutional.[9] Although the city argued that its "ownership of streets and parks is as absolute as one's ownership of his home, with consequent power altogether to exclude citizens from the use thereof,"[10] the Court stated:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[11]

Numerous other cases decided after *Lovell* and *Hague* upheld the right to leaflet or hold meetings in traditional public fora, such as public sidewalks and parks, and invalidated ordinances that gave local government officials discretion to arbitrarily grant or deny permission to speak.[12]

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[7] 303 U.S. 444, 451 (1938).

[8] *Id.* at 452.

[9] 307 U.S. 496, 501–02, 505–06, 518 (1939).

[10] *Id.* at 514.

[11] *Id.* at 515. *Hague* and subsequent cases effectively overruled *Davis v. Massachusetts*, 167 U.S. 43, 46, 48 (1897) (upholding an ordinance requiring a permit from the mayor to make a public address on the Boston Common). *E.g.*, City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 785–86 (1988) (White, J., dissenting); City of Seattle v. Mighty Movers, Inc., 96 P.3d 979, 982–83 (Wash. 2004); *In re* Hoffman, 434 P.2d 353, 355 n.4 (Cal. 1967).

[12] *E.g.*, Poulos v. New Hampshire, 345 U.S. 395, 402, 404, 414 (1953) (upholding a requirement to obtain a permit before holding religious services in public parks because it "require[d] uniform, nondiscriminatory and consistent administration of the granting of

In addition, in the half-century prior to *Jews for Jesus*, the Court reviewed numerous ordinances and statutes that restricted or prohibited door-to-door literature distribution or solicitation,[13] once stating that

licenses" and "left to the licensing officials no discretion as to granting permits, no power to discriminate, no control over speech"); Fowler v. Rhode Island, 345 U.S. 67, 69–70 (1953) (invalidating an ordinance that prohibited the giving of a political or religious address in any public park, which, when applied, prohibited an address given by a Jehovah's Witness minister while allowing other religious groups to hold more orthodox forms of religious services); Kunz v. New York, 340 U.S. 290, 293 (1951) (holding that an ordinance prohibiting public worship meetings or speeches on city streets without a permit, which lacked any standards for deciding when permits should be granted or denied, was unconstitutional); Niemotko v. Maryland, 340 U.S. 268, 271–73 (1951) (holding that a city's unwritten practice of having the park commissioner and the city council grant or deny permission to use city parks for events, with no standards limiting their discretion, was unconstitutional); Jamison v. Texas, 318 U.S. 413, 414, 417 (1943) (holding that an ordinance prohibiting the distribution of handbills on city sidewalks was unconstitutional); Cox v. New Hampshire, 312 U.S. 569, 575–76 (1941) (upholding a requirement to obtain a permit before conducting a parade or procession on a public street or sidewalk that had been applied in a non-discriminatory manner, noting that the provision did not restrict the distribution of literature and was a reasonable time, place, and manner regulation); Schneider v. State, 308 U.S. 147, 162–65 (1939) (holding that several ordinances that prohibited the distribution of literature on sidewalks or in parks, or that required prior approval from the police before materials could be distributed house to house, were unconstitutional); *see also* Org. for a Better Austin v. Keefe, 402 U.S. 415, 417, 419–20 (1971) (overturning an injunction that prohibited individuals from leafleting anywhere within a town after they distributed leaflets near an individual's home and church criticizing his business practices); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 149–51, 153–54 (1969) (holding that an ordinance prohibiting any parade, procession, or public demonstration without a permit was unconstitutional as written because it authorized the government to consider the "public welfare, peace, safety, health, decency, good order, morals or convenience" in reviewing an application, but that a much narrower interpretation of the law provided by the state supreme court that eliminated arbitrary discretion would be constitutional).

[13] *E.g.*, Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 622 (1980) (holding that an ordinance that prohibited the door-to-door solicitation of charitable contributions by organizations that did not use at least seventy-five percent of their income for charitable purposes was unconstitutional); Hynes v. Mayor of Oradell, 425 U.S. 610, 611, 620 (1976) (holding that an ordinance requiring individuals engaged in door-to-door solicitation for charitable or political causes to first identify themselves to local police was impermissibly vague); Tucker v. Texas, 326 U.S. 517, 518–20 (1946) (holding that a state law requiring peddlers of goods to leave the premises after having been told to do so by the occupant or owner was unconstitutional to the extent that it authorized the manager of a village to exclude religious speakers from the entire village at his discretion); Follett v. Town of McCormick, 321 U.S. 573, 576–77 (1944) (holding that applying a license tax for book salesmen to a minister who sold religious books in furtherance of his religious beliefs was unconstitutional); Largent v. Texas, 318 U.S. 418, 422 (1943) (holding that an ordinance prohibiting the sale of books or merchandise in residential areas without first obtaining the mayor's approval, who had authority to grant permits if he "deem[ed] it proper or advisable," was unconstitutional); Cantwell v. Connecticut, 310 U.S. 296, 305 (1940) (holding that a statute that prohibited door-to-door solicitation (including for a religious cause) without obtaining the prior approval of a state official, who granted or

"[d]oor to door distribution of circulars is essential to the poorly financed causes of little people."[14] For example, in *Murdock v. Pennsylvania*, the Court held an ordinance that required individuals to obtain a license and pay a license fee before soliciting orders for goods or merchandise, including offering religious materials in exchange for donations, was unconstitutional.[15] The Court explained:

> The hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses. It has been a potent force in various religious movements down through the years. This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents to their faith. It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press.[16]

The Court also stated:

> The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books. The right to use the press for expressing one's views is not to be measured by the protection afforded commercial handbills. It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge.[17]

In light of these cases, a key issue presented to the Court in *Jews for Jesus* was whether the Resolution violated the free speech rights of those seeking to distribute religious literature because it too broadly restricted a fundamental right or gave arbitrary discretion to those responsible for its enforcement.[18]

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denied permission based upon his determination of whether the cause was truly a religious one, was unconstitutional); *see also* Staub v. City of Baxley, 355 U.S. 313, 314 n.1, 325 (1958) (holding that an ordinance requiring the approval of the mayor and city council before soliciting membership in an organization that requires the payment of membership dues was unconstitutional).

[14] Martin v. City of Struthers, 319 U.S. 141, 146 (1943).

[15] 319 U.S. 105, 106–08, 110 (1943).

[16] *Id.* at 108–09 (footnotes omitted).

[17] *Id.* at 111.

[18] Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 570, 574–76 (1987).

B. Cases Addressing Free Speech Rights on Particular Types of Public Property

Although the Supreme Court recognized strong First Amendment protection for religious speech (including leafleting) in the previously cited cases, another line of cases addressed the often difficult question of the extent to which the public has a right to leaflet or engage in other expressive activities on various types of government property. Since *Hague*, which recognized a robust First Amendment right to use public parks and sidewalks for speech activities, the Court has addressed restrictions on picketing, leafleting, and other speech activities at, among other places, residences,[19] schools,[20] businesses,[21] courthouses,[22] the sidewalks around the Supreme Court's grounds,[23] state capitol grounds,[24] state fairgrounds,[25] jails,[26] company-owned towns,[27] military bases,[28] mailboxes,[29] city buses,[30] and public school internal mail

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[19] Carey v. Brown, 447 U.S. 455, 457, 459–60 (1980) (holding that a state law prohibiting the picketing of residences or dwellings, except for the picketing of a business involved in a labor dispute, is unconstitutional).

[20] Grayned v. City of Rockford, 408 U.S. 104, 119–21 (1972) (upholding a local ordinance that prohibited the making of noises near a school building that tend to be disruptive of the school's functions while it is in session); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 92–94 (1972) (holding that an ordinance prohibiting picketing near a school around school hours, except for labor picketing, was unconstitutional because it distinguished between types of picketing based upon their content).

[21] Thornhill v. Alabama, 310 U.S. 88, 91–92, 101 (1940) (invalidating an ordinance that prohibited picketing near a place of business for the purpose of encouraging individuals to not patronize that business).

[22] Cameron v. Johnson, 390 U.S. 611, 612, 622 (1968) (upholding a statute prohibiting picketing that obstructs or unreasonably interferes with entry to or exit from county courthouses); Cox v. Louisiana, 379 U.S. 536, 537–38, 545, 547 (1965) (overturning convictions for disturbing the peace and obstructing public passages stemming from a peaceful demonstration outside of a courthouse).

[23] United States v. Grace, 461 U.S. 171, 172–73, 183 (1983) (holding that a ban on the display of banners or signs relating to a party, organization, or movement on the grounds of the Supreme Court was unconstitutional as applied to the public sidewalks around the Court's grounds).

[24] Edwards v. South Carolina, 372 U.S. 229, 234–35, 238 (1963) (overturning convictions for breach of the peace for a demonstration held on state capitol grounds).

[25] Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 643, 654–55 (1981) (holding that it was constitutional for the organizers of a state fair to require all organizations desiring to distribute or sell literature, or to solicit donations, to obtain a license and do so only at an assigned location).

[26] Adderley v. Florida, 385 U.S. 39, 40, 47–48 (1966) (upholding trespass convictions for demonstrations held on the grounds of a city jail reserved for jail uses).

[27] Marsh v. Alabama, 326 U.S. 501, 508–10 (1946) (overturning a conviction for distributing religious literature on the premises of a company-owned town that was open to the general public).

[28] Greer v. Spock, 424 U.S. 828, 830–31, 839–40 (1976). Fort Dix was an enclosed military reservation that permitted open civilian access to some unrestricted areas

systems.[31] For example, in *Heffron v. International Society for Krishna Consciousness, Inc.*, the Court held that it was constitutional for the organizers of a state fair to require all organizations desiring to distribute or sell literature, or to solicit donations, to obtain a license and do so only at an assigned location.[32]

Additionally, in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, the Court held that a school district's internal mail system was not a public forum, and the First Amendment did not require the district to give a teacher group that was not the recognized teachers' union access to the system.[33] In what has become an oft-cited passage in subsequent cases, the Court outlined three categories of public property for purposes of the First Amendment:

> The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.
>
> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks . . . . In these quintessential public forums, the government may not prohibit all communicative activity. . . .
>
> A second category consists of public property which the State has opened for use by the public as a place for expressive activity. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. . . .
>
> Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an

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including streets and sidewalks. *Id.* at 830. The Court upheld a regulation that prohibited partisan speeches and demonstrations of a political nature on the base and required prior approval for the distribution of literature due to the traditionally high level of control that military commanders have over bases. *Id.* at 831, 839.

[29] U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 115–16 133–34 (1981) (upholding a prohibition on the placement of unstamped literature in the mailboxes of individual homes).

[30] Lehman v. City of Shaker Heights, 418 U.S. 298, 299, 304 (1974) (plurality opinion) (upholding a ban on political advertising via car cards on city buses).

[31] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 39–40, 53 (1983) (holding that a teacher group, an unrecognized teachers' union, was not entitled to access a school district's internal mail system because the system was not a public forum).

[32] 452 U.S. 640, 643, 654–55 (1981).

[33] 460 U.S. at 39–40, 53.

effort to suppress expression merely because public officials oppose the speaker's view.[34]

Concerning the public forum status of airports, numerous lower court decisions from the mid-1960s to the mid-1980s invalidated all or portions of various ordinances and regulations that restricted or prohibited the distribution of literature or the solicitation of funds inside of airports.[35] The predominant view among the lower courts was that "airport terminals owned and administered by governmental entities are public forums in which efforts to regulate speech or religious activity must comport with First Amendment guarantees."[36] Recognizing these principles, an FAA regulation enacted in 1980 stated:

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[34] *Id.* at 44–46 (citations omitted) (quoting *Council of Greenburgh*, 453 U.S. at 129).

[35] *See, e.g.*, U.S. Sw. Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760, 761, 774 (D.C. Cir. 1983) (concluding that the FAA's refusal to approve advertisement displays at Washington National Airport and Dulles International Airport due to their political nature violated the First Amendment); Fernandes v. Limmer, 663 F.2d 619, 623, 633 (5th Cir. 1981) (holding that an ordinance governing literature distribution and solicitation of funds in the Dallas–Fort Worth Airport was unconstitutional); Rosen v. Port of Portland, 641 F.2d 1243, 1244–45, 1252 (9th Cir. 1981) (invalidating an ordinance requiring individuals to register in advance and identify their sponsor before distributing literature in a public airport terminal); Int'l Soc'y for Krishna Consciousness of Atlanta v. Eaves, 601 F.2d 809, 816, 832–34 (5th Cir. 1979) (holding that the penalty provision of an ordinance governing the solicitation of funds and distribution of literature in airports owned by the City of Atlanta was unconstitutional); Int'l Soc'y for Krishna Consciousness, Inc. v. Rochford, 585 F.2d 263, 268–70 (7th Cir. 1978) (holding that some provisions of regulations governing the solicitation of funds and distribution of literature in Chicago's municipal airports were unconstitutional); Chi. Area Military Project v. City of Chi., 508 F.2d 921, 926 (7th Cir. 1975) (upholding an injunction that allowed the distribution of literature in O'Hare Airport terminal buildings but not in the corridors leading to the arrival and departure gates); Kuszynski v. City of Oakland, 479 F.2d 1130, 1130–31 (9th Cir. 1973) (per curiam) (holding that an ordinance restricting the distribution of written materials at the Oakland airport was unconstitutional); Int'l Soc'y for Krishna Consciousness, Inc. v. Wolke, 453 F. Supp. 869, 871, 874 (E.D. Wis. 1978) (holding that an ordinance requiring individuals seeking to distribute or sell written materials inside airports to obtain the permission of the airport director was unconstitutional); Int'l Soc'y for Krishna Consciousness of W. Pa., Inc. v. Griffin, 437 F. Supp. 666, 668, 670–73 (W.D. Pa. 1977) (holding that some provisions of an ordinance governing the solicitation of funds and distribution of literature at the Greater Pittsburgh International Airport were unconstitutional); Int'l Soc'y for Krishna Consciousness, Inc. v. Engelhardt, 425 F. Supp. 176, 178–80 (W.D. Mo. 1977) (holding that an ordinance requiring the permission of the director of the Kansas City International Airport before solicitation of funds or distribution of literature may occur was unconstitutional); *see also* Wolin v. Port of N.Y. Auth., 392 F.2d 83, 86 n.4, 93 (2d Cir. 1968) (holding that regulations prohibiting the distribution of literature inside public bus terminals without the permission of the terminal manager were unconstitutional); *In re* Hoffman, 434 P.2d 353, 353–54, 358 (Cal. 1967) (holding that a provision of an ordinance prohibiting loitering in a railway station or airport longer than reasonably necessary to travel or transact business was unconstitutional because it prohibited the distribution of literature).

[36] *Fernandes*, 663 F.2d at 626.

> [T]here is a considerable amount of social and commercial interchange in the terminals and, in many respects, the terminals are like any other public thoroughfare where there is no question that the Constitutional guarantees of freedom of speech, the exercise of religion and the right to peaceable assembly apply. [Soliciting funds and distributing written material] enjoy the protection of the First Amendment, and they may not be regulated by airport authorities in the same manner as commercial activity.[37]

The Resolution reflected an opposing viewpoint, similar to the government's position in *Hague*,[38] that the government's authority to control the airport included the ability to exclude individuals seeking to leaflet. As such, *Jews for Jesus* posed the question of what type of forum, if any, are the areas of a public airport that are open to the general public.

II. THE *JEWS FOR JESUS* CASE

A. Enactment of Resolution No. 13787

In the 1980s, LAX was a large, high-volume airport as it is today.[39] As of the mid-1980s, the CTA of LAX consisted of eight terminal facilities that contained large areas to which the general public had unrestricted access.[40] In 1983, LAX handled over thirty-three million passengers, and "at least an equal number of 'meeters and greeters' enter[ed] the CTA to pick up or drop off airline passengers."[41] Over eight million passengers each year had layovers in LAX and never used the sidewalk area outside of the CTA facilities.[42]

Prior to 1983, when various groups seeking to engage in First Amendment activities in the CTA requested permission to do so, the Board of Airport Commissioners ("Board") denied them permission.[43] Nevertheless, various religious and political groups used the CTA to distribute literature and solicit funds without advance notice to or permission from the Board.[44] In response, with the 1984 Los Angeles Summer Olympics around the corner, the Board adopted Resolution

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[37] *U.S. Sw. Africa/Namibia Trade & Cultural Council*, 708 F.2d at 765 (quoting Solicitation and Leafletting Procedures at National and Dulles International Airports, 45 Fed. Reg. 35314 (May 27, 1980)).

[38] Hague v. Comm. for Indus. Org., 307 U.S. 496, 514 (1939).

[39] Jews for Jesus, Inc. v. Bd. of Airport Comm'rs, 661 F. Supp. 1223, 1227 (C.D. Cal. 1985).

[40] *Id.* at 1226.

[41] *Id.* at 1227.

[42] *See id.* (noting LAX handled more than 33 million passengers in 1983 and approximately twenty-five percent of those passengers did not use the sidewalk area due to layovers).

[43] *Id.* at 1229–30.

[44] *Id.* at 1228.

13787 on July 13, 1983,[45] seeking to "limit the use of the terminal facilities to those uses which [the Board] believes directly aid the traveling public and thereby promote and accommodate air commerce and air navigation."[46]

Resolution 13787's preamble asserted that "individuals and/or entities engaging in . . . First Amendment activities have significantly interfered with the free flow of passenger traffic in the [CTA] at [LAX] and substantially contributed to the congestion in said [CTA]."[47] The preamble further declared that "engaging in First Amendment activities in the [CTA] at [LAX] is incompatible with the character and function of said [CTA]."[48]

The Resolution's operative language stated, "[CTA] at [LAX] is not open for First Amendment activities by any individual and/or entity."[49] The Resolution also stated, "[I]f any individual or entity engages in First Amendment activities within the [CTA] at [LAX], the City Attorney of the City of Los Angeles is directed to institute appropriate litigation against such individual and/or entity to ensure compliance with this Policy statement of the Board . . . ."[50] The Resolution further stated that "if any entity or individual seeks to engage in First Amendment activities in the vicinity of the [CTA], those activities must be conducted only on the sidewalks in front of the ticketing buildings and in such a manner so as to not interfere with other persons."[51]

The Board did not "attempt to restrict members of the general public who [had] no purpose or desire to utilize the transportation-related facilities within the terminal areas at LAX from walking, reading, shopping, eating, drinking, and conversing with other members of the general public in the interior of terminal areas."[52] In addition, the Board did not "prohibit persons wearing T-shirts or other articles of clothing imprinted with slogans, statements, or other forms of religious or political communication from walking in the interior terminal areas."[53] The Board also continued to allow a Christian Science organization to lease and operate a reading room inside one of the terminals that was open to the public and displayed Christian Science literature,[54] and one of the LAX terminals continued to include a

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45 *Id.* at 1223–24.

46 *Id.* at 1228.

47 *Id.* at 1233.

48 *Id.*

49 *Id.* at 1234.

50 *Id.*

51 *Id.*

52 *Id.* at 1229.

53 *Id.*

54 *Id.* at 1232.

permanent display entitled "Think Before You Buy" that contained information relating to protected species.[55]

B. Factual Background and Lower Court Litigation

Founded in 1973 by Messianic Jewish evangelist Moishe Rosen,[56] the mission of Jews for Jesus is to "make the messiahship of Jesus an unavoidable issue to our Jewish people worldwide."[57] I first became involved with Jews for Jesus in February 1975 when a college friend invited me to go hear their singing group, The Liberated Wailing Wall. Though I was attending a Baptist college at the time, I came from a Jewish family. Born and raised in Brooklyn, New York, my Jewish heritage played an important role in my life, and I entered my Christian college with the notion that I could disprove any idea that Jesus was the Messiah. Listening to the choir on that February night, however, was the culmination of a journey that led me to believe that Jesus was indeed the Jewish Messiah. This young evangelical organization had an impact on my personal life—a lasting impact that motivates and inspires all I do. Little did I know that, in less than a decade, Jews for Jesus would again influence my career by igniting the start of a life-long vocation of fighting to protect religious liberties.

An important part of Jews for Jesus' ministry has always been the distribution of religious leaflets in public places.[58] Alan Snyder, one of the organization's missionaries located in Los Angeles, furthered this mission by distributing evangelistic tracts at LAX.[59] Members of Jews for Jesus, such as Snyder, had "distributed free religious literature within the terminal facilities at LAX" since 1973.[60] "Distribution of religious literature and leaflets, free of charge by members of Jews for Jesus, including Snyder, provides information to the general public about the religious teachings of Christianity and is a method by which [they] evangelize."[61]

After the Board enacted the Resolution, Snyder distributed religious literature on a pedestrian walkway in the CTA without obstructing the free flow of pedestrian traffic.[62] An airport officer handed Snyder a copy of the Resolution, ordered him to stop distributing literature in the CTA,

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55 *Id.* at 1228.

56 RUTH A. TUCKER, NOT ASHAMED: THE STORY OF JEWS FOR JESUS 11, 85 (1999).

57 *About Jews for Jesus: Our Mission Statement*, JEWS FOR JESUS, http://www.jewsforjesus.org/about (last visited Oct. 22, 2012).

58 *What We Do: We Communicate Creatively!*, JEWS FOR JESUS, http://www.jewsforjesus.org/about/what-we-do (last visited Oct. 22, 2012).

59 *Jews for Jesus*, 661 F. Supp. at 1229.

60 *Id.*

61 *Id.* at 1231.

62 *Id.*

and advised Snyder that a failure to do so would subject him to legal action by the city attorney.[63] Snyder complied[64] and, along with Jews for Jesus, later sued the Board and the City of Los Angeles, alleging that the Resolution was unconstitutional.[65]

Jews for Jesus made a strategic decision to rely upon the freedom of speech rather than the free exercise of religion. Free exercise claims raised outside the context of unemployment benefits had limited success before the Supreme Court,[66] while reliance upon the Free Speech Clause provided an opportunity to reinforce the idea that religious speakers stand on equal footing with non-religious speakers in the use of public property.

Jews for Jesus asked me to represent them in the case. During the almost ten years that had gone by since my first encounter with Jews for Jesus as a young college student, I had stayed in touch with the organization and eventually joined its board of directors. After receiving my law degree from Mercer Law School in 1980, I worked as a trial attorney for the Internal Revenue Service before opening a successful tax law practice in Atlanta, Georgia. LAX's crackdown on evangelism concerned me, but, at first, I declined to represent Jews for Jesus in its suit. I told Jews for Jesus to get a lawyer in Los Angeles since the case would not likely go far considering that every court to address the issue had decided that airports are appropriate for evangelism. While others kept telling me that they believed God wanted me to take the case, I remained resolved in my decision and focused on my Atlanta practice and business ventures.

Jews for Jesus eventually took the case to trial where it alleged that the Resolution violated its members' First Amendment rights for three reasons:

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[63] *Id.*

[64] *Id.*

[65] *Id.* at 1223–24.

[66] *See, e.g.*, Bowen v. Roy, 476 U.S. 693, 695, 712 (1986) (rejecting a free exercise challenge to government agency's use of an individual's social security number in administering welfare benefits); Goldman v. Weinberger, 475 U.S. 503, 504 (1986) (rejecting a free exercise challenge to an Air Force regulation prohibiting the wearing of a yarmulke while in uniform); United States v. Lee, 455 U.S. 252, 254 (1982) (rejecting a free exercise challenge to compulsory participation in the social security system); Gillette v. United States, 401 U.S. 437, 439–40, 448, 463 (1971) (rejecting free exercise challenges to the government's refusal to provide military service exemptions for individuals who conscientiously object to participation in a particular war rather than to participation in all wars); Braunfeld v. Brown, 366 U.S. 599, 600–01, 609 (1961) (rejecting a free exercise challenge to state law prohibiting the sale of certain goods on Sundays). *But see* McDaniel v. Paty, 435 U.S. 618, 620, 629 (1978) (holding that a state law prohibiting ministers from serving as delegates in a state constitutional convention violated the Free Exercise Clause); Wisconsin v. Yoder, 406 U.S. 205, 207 (1972) (holding that a state compulsory school attendance law violated the free exercise rights of Amish families).

> (1) . . . [I]t is unconstitutional on its face because it totally bans First Amendment activity in a public forum; (2) . . . the Resolution is unconstitutional as applied to plaintiffs because it only has been used to ban certain kinds of communicative conduct such as leafletting by plaintiffs; and (3) . . . it is unconstitutionally vague and overbroad because the term "First Amendment activities" does not give guidance to officials or the public as to what activity is prohibited.[67]

The district court held that the Resolution was unconstitutional on its face and did not address the other two arguments.[68] The court determined that the key question was "whether a municipally owned and operated airport terminal is a public forum" and concluded that "[t]he question is easily answered" in light of the various courts of appeals decisions holding that airport terminals are public fora.[69] The court held that "LAX is a public forum and the challenged Resolution is unconstitutional. . . . First Amendment activity cannot be banned at LAX."[70]

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed.[71] The court stated, "Both parties agree that the determinative legal issue in this case is whether the CTA is a public forum."[72] In light of the court's prior cases, as well as similar cases decided in other circuits, the court concluded that "the [CTA] at LAX is a traditional public forum."[73] The court concluded that the Board had not narrowly tailored the Resolution to achieve a compelling government interest, stating, "The Board has not shown that its desire to limit the uses of the terminal facilities to airport-related purposes is sufficiently compelling to justify the uniform and absolute prohibition on all First Amendment activity in the CTA."[74] The court noted that "[t]he Board is free to promulgate reasonable time, place, and manner restrictions on the distribution of literature in the CTA," but "[b]ecause the 1983 resolution proscribes all First Amendment activity rather than setting forth reasonable time, place, and manner restrictions on such activity, it is unconstitutional on its face."[75] At the time, it seemed as if Jews for Jesus had won a major victory for religious freedom.

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67 *Jews for Jesus*, 661 F. Supp. at 1224.

68 *Id.*

69 *Id.* at 1224–25.

70 *Id.* at 1225–26.

71 Jews for Jesus, Inc. v. Bd. of Airport Comm'rs, 785 F.2d 791, 791–92 (9th Cir. 1986).

72 *Id.* at 793.

73 *Id.* at 795.

74 *Id.*

75 *Id.*

C. Supreme Court Litigation

Jews for Jesus and I were disappointed to hear that the Supreme Court granted the Board's petition for a writ of certiorari to review the case. Review by the Supreme Court is rare, and a grant of certiorari often bodes well for the losing side at the lower court. Consequently, there was genuine concern that the Court would rule for the Board and reverse the Ninth Circuit's decision.

At that time, my own practice had taken an unforeseen turn for the worse. Changes to the tax code contributed to the closure of my young practice and the evaporation of my construction business. Three hundred employees lost their jobs, and my family lost everything, including our home. Meanwhile, people had continued to tell me that they sensed that God wanted me to take on Jews for Jesus' case. I finally got the message. In 1986, I became general counsel for Jews for Jesus, and I spent the next six months preparing for my encounter with the Supreme Court.

Jews for Jesus presented the Court with three questions: (1) Was the Resolution an impermissible regulation of a forum; (2) Did the Resolution provide impermissible enforcement discretion, making it an improper prior restraint; and (3) Did the Resolution authorize impermissible content and religious discrimination?[76]

In our brief, we argued that the CTA at LAX was a traditional public forum because it was "open to members of the general public without restriction, regardless of their intent or desire to utilize the transportation related facilities."[77] We wrote:

> Places such as a middle eastern market, or a street like the arcades of Paris and London, or the Galleria Vittorio Emanuele II of Milan, would, were they to be transplanted into an American city, doubtless be "quintessentially public forums." Indeed, the historical places from which the modern metaphor of "forum" derives [such as the Roman basilicas and the Greek agora] were often enclosed spaces.[78]

In addition, we wrote, "Today, major airports are the primary gateways to the cities, if not cities in themselves, and they have supplanted waterfronts and railroad terminals as primary public forums."[79] Our brief also discussed numerous lower court decisions and FAA regulations recognizing that airport areas that are open to the general public are forums for speech.[80] Furthermore, while the Board asserted that it needed the Resolution to prevent disruption of airport

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[76] Brief for Respondents at i–ii, Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569 (1987) (No. 86-104).

[77] *Id.* at 1.

[78] *Id.* at 10.

[79] *Id.* at 16.

[80] *Id.* at 17–23.

functions, we noted, "There is not even a scintilla of evidence of 'disruption' put forth by the Board in support of its position. . . . To the contrary, the record clearly shows the compatibility of the expressive First Amendment activities with the operation of the airport at LAX."[81]

Our brief also discussed numerous Supreme Court cases holding that government officials may not exercise arbitrary discretion to decide who may speak and who may not.[82] The Resolution did not define or provide guidelines for determining what types of speech were prohibited under its restriction of "First Amendment activities" that did not "directly aid the travelling public."[83] Additionally, we argued that the Resolution was discriminatory because it prevented one-on-one evangelism by Jews for Jesus but permitted the continuation of evangelism and religious activity in the Christian Science Reading Room.[84] Various organizations across the ideological spectrum, from the American Federation of Labor and Congress of Industrial Organizations to the Christian Legal Society, filed amici curiae briefs supporting our position.[85]

On the morning of March 3, 1987, I ascended the steps of the Supreme Court in Washington D.C. I made sure to arrive early, and I lowered the courtroom podium to allow the nine Justices to see my five-foot, seven and a half-inch frame without me having to stand on tip-toes for the entirety of my argument. After six months of preparation, I knew that my time before the Court would be brief and intense. Despite nervousness during the previous couple of weeks that had, for a while, left me physically sick, I experienced a calmness on the day of the argument—I felt God's presence. Before the arguments began, I looked at the back row and saw my friends and family who were there in support of me and Jews for Jesus. Sitting there were my good friends, Moishe Rosen (founder of Jews for Jesus) and three other members from Jews for Jesus' Board of Directors. Most important to me was seeing the support of my wife, Pam, and my parents who were also present.

When the nine Justices walked into the courtroom, they began the proceedings by announcing their verdicts in previous cases. Sitting next to Barry Fisher, a civil rights attorney who was assisting me, I waited anxiously for them to begin that day's business—our case was first on the docket. Finally, I heard the announcement: "We will hear arguments first this morning in No. 86-104, Board of Airport Commissioners of the

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81 *Id.* at 23, 32 n.40.

82 *Id.* at 35–39.

83 *Id.* at 39.

84 *Id.* at 46.

85 Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 570 (1987).

City of Los Angeles versus Jews for Jesus and others."[86] The time of reckoning was finally here.

James Kapel, arguing on behalf of the Board, was the first to present arguments.[87] I had met Kapel a few days before when I came to D.C. for the argument. When we met, I asked him why the Board had bothered to take this case all the way to the Supreme Court. As Kapel shrugged in response, what I perceived as his rationale was an indictment of me and all American Christians. From our conversation, I gathered that the Board never thought that Christians would put up a fight. The Board members wanted to test a regulation, and they thought they had found an easy target in Christians who would do little more than fold their hands and fret. Well, we had shown them that we were willing to fight, that we were confident in our rights, and that we were willing to defend those rights in the highest court of the land.

Kapel began by arguing that the Resolution was a permissible regulation of speech in a non-public forum.[88] He asserted that the dispositive issue was what type of forum the CTA was, but the Justices repeatedly questioned him about the potential for arbitrary discretion as they noted that the ban on First Amendment activities could encompass all conversations inside an airport if applied literally.[89] As Kapel argued, Barry and I began changing the focus of our argument based on the dialogue we were hearing between Kapel and the Court.

Finally, Kapel sat down and I heard someone say, "Mr. Sekulow?" I stood up, walked to the podium, and quickly collected myself before I began my argument. I opened my argument with a carefully crafted statement, knowing that it would likely be my best chance to succinctly state Jews for Jesus' position:

> Local governments have important responsibilities concerning their efficient operation of airports under their control.
>
> However, the record in this case is clear. There is no justification for a sweeping ban on First Amendment activities which would subordinate cherished First Amendment freedoms.
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> In fact, four circuit courts and numerous district courts have determined that airport terminals are public fora.[90]

That was all of my prepared argument I got to share. A question from the Chief Justice cut short my intention of launching into a speech

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[86] Transcript of Oral Argument at *1, *Jews for Jesus*, 482 U.S. 569 (No. 86-104), 1987 U.S. Trans. LEXIS 80.

[87] *Id.*

[88] *Id.* at *3–4, *6.

[89] *Id.* at *16–20.

[90] *Id.*

concerning the American history and tradition of free speech.[91] For the next thirty minutes, the Justices hit me with a barrage of questions.

The first half of the questions dealt with the forum status of the terminals at LAX.[92] The Justices then shifted their questioning to the discretion the Board exercised to decide what "airport-related" expression and activities would be permitted[93] and concluded back on the public forum issue.[94] One legal commentator characterized my argument presentation as "'rude, aggressive, and obnoxious,'"[95] although my mother said I was only rude and aggressive. Looking back, I probably was a little rude—I cut off the Chief Justice in the middle of one of his questions! Having been cut off in the middle of my opening, I felt determined to deliver my closing with the two minutes I had remaining. Though I have been able to finely tune my style of delivery before the Supreme Court after much practice, I still find that the aggression—or passion—behind the argument empowers it by giving it purpose and by engaging the heart of the listener. I had determination to prove that Christians not only cherished their religious freedoms, they could also fight for those freedoms with a passion.

As I left the courtroom that day, I felt both a huge sense of relief and confidence. I had just survived the most intense thirty minutes of my life, and I believed that our arguments had withstood scrutiny. As we stood at the courthouse after the arguments, Moishe Rosen turned to me and said, rather prophetically, "You will be back here often." I laughed, knowing that very few lawyers get the chance to argue even once before the Supreme Court. Little did I know that this would be the first of many such trips to the Court. For now, I was just glad that the arguments were over, and I prepared to play the waiting game over the next few months before the Court announced its decision.

On June 15, 1987, I called the Supreme Court from a payphone in Chicago to check the status of the case (there was no remote electronic access to case dockets in 1987). The clerk said that a unanimous decision had been reached in favor of Jews for Jesus. Christians, in their defense against encroachment of their religious free speech, had not only fought back—they had won! The win was not only significant for defending free speech for Christians, but also for all those desiring to share their message on public property.

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91 *Id.* at *24.

92 *Id.* at *24–37.

93 *Id.* at *38–40.

94 *Id.* at *46–52.

95 David G. Savage, *Evangelicals' Champion to Argue Case at High Court*, L.A. TIMES, Dec. 2, 2003, at A1.

The opinion for the Court, authored by Justice O'Connor, stated, "Because we conclude that the resolution is facially unconstitutional under . . . the First Amendment overbreadth doctrine regardless of the proper standard, we need not decide whether LAX is indeed a public forum, or whether the *Perry* standard is applicable when access to a nonpublic forum is not restricted."[96] The Court explained:

> On its face, the resolution . . . reaches the universe of expressive activity, and, by prohibiting *all* protected expression, purports to create a virtual "First Amendment Free Zone" at LAX. The resolution does not merely regulate expressive activity in the [CTA] that might create problems such as congestion or the disruption of the activities of those who use LAX . . . . The resolution . . . does not merely reach the activity of respondents at LAX; it prohibits even talking and reading, or the wearing of campaign buttons or symbolic clothing. Under such a sweeping ban, virtually every individual who enters LAX may be found to violate the resolution by engaging in some "First Amendment activit[y]." We think it obvious that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech.[97]

The Court also addressed the Board's assertion that the Resolution should be interpreted narrowly to allow airport-related speech while excluding other speech:

> Such a limiting construction . . . is of little assistance in substantially reducing the overbreadth of the resolution. Much nondisruptive speech—such as the wearing of a T-shirt or button that contains a political message—may not be "airport related," but is still protected speech even in a nonpublic forum . . . . The line between airport-related speech and nonairport-related speech is, at best, murky . . . . In essence, the result of this vague limiting construction would be to give LAX officials alone the power to decide in the first instance whether a given activity is airport related. Such a law that "confers on police a virtually unrestrained power to arrest and charge persons with a violation" of the resolution is unconstitutional because "[t]he opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident."[98]

In short, the decision was a major victory for all groups and individuals that seek to share a religious, political, or other message through the time-tested means of distributing literature to passersby on public property.

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[96] Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 573–74 (1987).

[97] *Id.* at 574–75 (second alteration in original).

[98] *Id.* at 576 (citation omitted) (quoting Lewis v. City of New Orleans, 415 U.S. 130, 135–36 (1974) (Powell, J., concurring)).

III. THE IMPACT AND CONTINUED RELEVANCE OF *JEWS FOR JESUS*

One obvious question is the extent to which *Jews for Jesus*, arising from a dispute over access to airport terminals for speech activities by non-passengers, retains factual relevance in a post-September 11 world. Although much has changed in American law and culture since 1987, the decision in *Jews for Jesus* continues to have an impact.

The airports of the 1970s and 1980s, which were often widely open to, and visited by, countless members of the general public who had no travel-related business for activities like shopping, exercise, and meals, seem like a distant memory. The vast majority of the terminals and common areas of most modern airports are limited to ticketed passengers and those who work at the airport in some capacity, and *Jews for Jesus* does not guarantee non-passengers a right to enter these restricted areas for speech purposes. Additionally, in 1992, the Supreme Court held that public airport terminals are non-public fora,[99] giving the government broader leeway to restrict speech there than in a traditional public forum.

A key principle of *Jews for Jesus*, however, is that government officials cannot exercise arbitrary discretion to decide that some types of speech, but not others, will be permitted on its property under overbroad or vague statutes or rules.[100] That holding is not limited to airport terminals opened to the general public, but it extends to numerous public properties. For instance, courts considering various factual circumstances have relied upon or cited *Jews for Jesus* concerning the doctrine of overbreadth.[101] Other cases have relied upon or cited *Jews for Jesus* in the context of standing,[102] facial challenges,[103] applying a

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[99] Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992) (concluding that a public airport terminal is a non-public forum, not a traditional public forum, and a ban on repetitive solicitation of money within terminals was reasonable).

[100] *Jews for Jesus*, 482 U.S. at 576.

[101] *See, e.g.*, United States v. Stevens, 130 S. Ct. 1577, 1585 (2010); Imaginary Images, Inc. v. Evans, 612 F.3d 736, 750–51 (4th Cir. 2010); Berger v. City of Seattle, 569 F.3d 1029, 1049, 1055–57 (9th Cir. 2009); Preminger v. Sec'y of Veterans Affairs, 517 F.3d 1299, 1316–18 (Fed. Cir. 2008); Initiative & Referendum Inst. v. U.S. Postal Serv., 417 F.3d 1299, 1315–17 (D.C. Cir. 2005); Odle v. Decatur Cnty., 421 F.3d 386, 393 (6th Cir. 2005); Huminski v. Corsones, 396 F.3d 53, 92–93 (2d Cir. 2005); Ways v. City of Lincoln, 274 F.3d 514, 518 (8th Cir. 2001); Schultz v. City of Cumberland, 228 F.3d 831, 848 (7th Cir. 2000); Nat'l Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 748 (1st Cir. 1995); Kreimer v. Bureau of Police, 958 F.2d 1242, 1265 (3d Cir. 1992); ACORN v. City of Tulsa, 835 F.2d 735, 743–44 (10th Cir. 1987).

[102] *See, e.g.*, Massachusetts v. Oakes, 491 U.S. 576, 581 (1989) ("The First Amendment doctrine of substantial overbreadth is an exception to the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others." (citing *Jews for Jesus*, 482 U.S. at 574)); *Odle*, 421 F.3d at 393; J&B Entm't, Inc. v. City of Jackson, 152 F.3d 362, 366 (5th Cir. 1998).

narrowing construction to uphold otherwise unconstitutional laws,[104] and the exercise of unrestrained power.[105] In other words, the legal principles discussed and applied in *Jews for Jesus* retain relevance today in many contexts despite the innumerable changes made at airports over the past twenty-five years.

In addition, the decision to emphasize free speech over free exercise of religion in the *Jews for Jesus* litigation took on added significance after the Supreme Court's decision three years later in *Employment Division v. Smith*.[106] Prior to *Smith*, the Court required government actions that substantially burdened religious practice to be justified by a compelling governmental interest (at least in some circumstances).[107] In *Smith*, however, the Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[108] In hindsight, had the Court been presented with solely a free exercise claim in *Jews for Jesus*, rather than a free speech claim, it may have considered issuing a *Smith*-like decision in favor of the Board (although the arbitrary discretion retained by the Board may have justified the application of strict scrutiny even under the *Smith* standard).

In any event, the *Smith* decision signaled a sea change in litigation involving religious individuals or groups seeking to share or exercise their faith, making the Free Exercise Clause effectively irrelevant in many situations. In addition, although Congress enacted the Religious Freedom Restoration Act to bolster free exercise protections,[109] it only

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[103] *See, e.g.*, Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 129 (1992) (relying on *Jews for Jesus* for the proposition that an overbroad regulation is subject to a facial challenge); Griffith v. Lanier, 521 F.3d 398, 400 (D.C. Cir. 2008) (citing *Jews for Jesus* for the proposition that even "[a] limiting construction that is 'fairly' possible can save a regulation from facial invalidation"); Parks v. Finan, 385 F.3d 694, 702–03 (6th Cir. 2004) (relying, in part, on *Jews for Jesus* to hold that a regulation that required individuals to obtain a permit prior to engaging in "activities of a broad public purpose" was unconstitutional).

[104] *See, e.g.*, Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 946 (9th Cir. 2011) (relying on *Jews for Jesus* for the proposition that a court may apply a narrowing construction when a law faces a constitutional challenge); Metro. Wash. Airports Auth. Prof'l Fire Fighters Ass'n Local 3217 v. United States, 959 F.2d 297, 306 (D.C. Cir. 1992).

[105] *See, e.g.*, Stewart v. D.C. Armory Bd., 789 F. Supp. 402, 406 (D.D.C. 1992) (citing *Jews for Jesus* in holding that stadium operators had impermissibly broad power to decide whether certain activities "pertain[ed] to the event" at hand).

[106] 494 U.S. 872 (1990).

[107] *Id.* at 883; Sherbert v. Verner, 374 U.S. 398, 403 (1963).

[108] *Smith*, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

[109] 42 U.S.C. § 2000bb(a)–(b) (2006).

applies to actions taken by the federal government in light of the Court's decision in *City of Boerne v. Flores*.[110] The freedom of speech has become the principal source of protection for religious actors in many situations, further cementing the importance of *Jews for Jesus* to religiously motivated individuals and organizations.

IV. TWENTY-FIVE YEARS LATER: RELIGIOUS LIBERTIES BATTLES CONTINUE

On a personal note, *Jews for Jesus* helped send my career in a new direction, contributing to the creation of the American Center for Law and Justice in 1990.[111] *Jews for Jesus* was the first of many Supreme Court arguments for me involving a range of issues from equal access for student religious groups on public school campuses to, most recently, a local government's authority to select and permanently display monuments and historical items of its choosing on public property.[112] In working on these and other cases since *Jews for Jesus*, it has become apparent to me that the need for continued defense of religious liberty is unmistakable.

My first Supreme Court argument after *Jews for Jesus* was in *Board of Education v. Mergens*, in which I represented a high school student, Bridget Mergens.[113] Her public school had denied her permission to start a Christian club at her school, even though the school allowed many other non-academic clubs to organize.[114] In *Mergens*, we defended this student's rights using the Equal Access Act,[115] a federal

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[110] 521 U.S. 507, 511, 536 (1997); *see also* Henderson v. Kennedy, 265 F.3d 1072, 1073 (D.C. Cir. 2001).

[111] *About the American Center for Law & Justice*, ACLJ, http://aclj.org/our-mission/about-aclj (last visited Oct. 22, 2012).

[112] *See, e.g.*, Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1129–30, 1138 (2009) (holding that the Free Speech Clause does not require the government to accept counter-monuments when it has a war memorial or Ten Commandments monument on its property); McConnell v. FEC, 540 U.S. 93, 231 (2003) (holding that minors have a First Amendment right to support political candidates); Schenck v. Pro-Choice Network, 519 U.S. 357, 361, 377, 380 (1997) (holding that injunction provisions prohibiting free speech activities opposing abortion within fifteen feet of individuals heading to or from an abortion clinic violated the First Amendment); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 387, 393–94 (1993) (holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); Bd. of Educ. v. Mergens, 496 U.S. 226, 232–34 (1990) (holding that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause).

[113] 496 U.S. at 230–32.

[114] *Id.* at 231–32, 243–45.

[115] 20 U.S.C. §§ 4071–4074 (2006) ("It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.").

statute enacted to protect students from this kind of discrimination.[116] The policy under which the school denied Mergens's request stated that all clubs must have a faculty sponsor, but a religious club could not be formed because the policy prevented such clubs from having a faculty sponsor.[117] Although the Court issued four separate opinions, it held by an 8-1 vote that the school violated the Equal Access Act by allowing secular clubs to meet while rejecting a proposed religious club.[118]

A few years later, in *Lamb's Chapel v. Center Moriches Union Free School District*, I represented an evangelical church. A public school board policy had denied the church after-hours use of school facilities, providing that "[t]he school premises shall not be used by any group for religious purposes."[119] The school board had a policy allowing use of school facilities for "social, civic, or recreational uses,"[120] and Lamb's Chapel wanted to show a film series produced by a Christian psychologist and professor discussing his "views on the undermining influences of the media that could only be counterbalanced by returning to traditional, Christian family values instilled at an early stage."[121] Although there were two concurrences, all nine Justices agreed that the school board violated the Constitution by prohibiting Lamb's Chapel from showing its film series merely because it "appeared to be church related."[122]

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[116] *See Mergens*, 496 U.S. at 233.

[117] *Id.* at 232–33. School officials also asserted that allowing a "religious club at the school would violate the Establishment Clause." *Id.* at 233. The Court squarely rejected this contention. *Id.* at 253 ("[W]e hold that the Equal Access Act does not on its face contravene the Establishment Clause"); *see also id.* at 261 (Kennedy, J., concurring) ("[N]o constitutional violation occurs if the school's action is based upon a recognition of the fact that membership in a religious club is one of many permissible ways for a student to further his or her own personal enrichment."); *id.* at 263 (Marshall, J., concurring) ("The Establishment Clause does not forbid the operation of the Act").

[118] *Id.* at 229–30, 246–47, 258, 262, 270 (plurality opinion).

[119] 508 U.S. 384, 387–88 (1993). The school district offered numerous justifications in support of its discriminatory exclusion of Lamb's Chapel. State law permitted after-hours use of school facilities for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community," *id.* at 386, but a New York appellate court ruled that the statute prohibited religious uses because the statute did not list them as a permitted activity. *Id.* at 386–87 (citing Trietley v. Bd. of Educ., 409 N.Y.S.2d 912, 915 (App. Div. 1978)). The school district's policy had been drafted with this interpretation in mind, and both the Second Circuit and the New York Attorney General agreed with this interpretation. *Id.* at 387. Additionally, the school district argued that it was justified in excluding Lamb's Chapel because the church was "radical" and allowing it to meet at the school "would lead to threats of public unrest and even violence." *Id.* at 395.

[120] *Id.* at 387.

[121] *Id.* at 387–88.

[122] *Id.* at 396–97.

Jews for Jesus, *Mergens*, *Lamb's Chapel*, and other cases decided in the past twenty-five years[123] illustrate that religious (often Christian) individuals and groups have continued to face obstacles in obtaining equal footing to promote their messages. The Free Speech Clause has proven to be a successful tool for churches and other religious organizations in defending their ability to express their religious viewpoints.

CONCLUSION

The decision in *Jews for Jesus* not only opened the door for speakers to access an audience of millions of people every year, it helped to further reinforce the prominent role of the Free Speech Clause in litigation concerning the expression and exercise of religious faith. In particular, it continues to impact free speech jurisprudence regarding laws and policies that allow public officials to arbitrarily decide who may, and who may not, use public property to speak. Despite the countless changes that have occurred in American law and society over the past twenty-five years, the recurring conflict between individuals and groups seeking access to various types of public property for speech purposes and those seeking to exclude speakers from those properties ensures that *Jews for Jesus* and the principles it stands for will continue to remain a fixture of First Amendment jurisprudence.

While much progress has been made in the fight to protect religious freedom and expression since *Jews for Jesus*, the fight is not over. Governmental entities continue to restrict the use of public facilities by religious organizations, and in some instances courts have permitted the exclusion of organizations seeking to engage in religious speech that is deemed to be religious worship.[124] My hope is that Christians will continue to peaceably battle for equal treatment when faced with violations of their rights to assemble, speak, and worship.

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[123] *E.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 103, 120 (2001) (holding that an elementary school engaged in viewpoint discrimination by excluding a religious group from hosting after-school activities such as "singing songs, hearing a Bible lesson and memorizing scripture"); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 822, 827, 837 (1995) (holding that the University of Virginia violated the First Amendment by refusing to fund a student newspaper dedicated to publishing a Christian viewpoint in the same manner that it funded other student newspapers that published from a secular perspective).

[124] *See, e.g.*, Bronx Household of Faith v. Bd. of Educ., 650 F.3d 30, 36, 39–40 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 816 (2011) (upholding a school board rule prohibiting after-hours use of school facilities for "religious worship services"); Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 911 (9th Cir. 2007) (holding that "exclusion of [a religious group's] religious worship services from the Antioch Library meeting room is a permissible limitation on the subject matter that may be discussed in the meeting room, and that it is not suppression of a prohibited perspective from an otherwise permissible topic").

A FIFTY-STATE SURVEY OF THE COST OF FAMILY FRAGMENTATION

Lynne Marie Kohm[*] *and Rachel K. Toberty*[**]

Government support in America is a growing trend[1] largely observable in broken households,[2] creating "a nation of welfare families"[3]

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[1] *See* MICHAEL TANNER, CATO INST., THE AMERICAN WELFARE STATE: HOW WE SPEND NEARLY $1 TRILLION A YEAR FIGHTING POVERTY—AND FAIL 1 (2012), *available at* http://www.cato.org/pubs/pas/PA694.pdf ("[T]his year the federal government will spend more than $668 billion on at least 126 different programs to fight poverty. And that does not even begin to count welfare spending by state and local governments, which adds $284 billion to that figure. In total, the United States spends nearly $1 trillion every year to fight poverty."). For example, the Supplemental Nutrition Assistance Program, or food stamps, will be a cost focus of this Article. The Congressional Budget Office ("CBO") stated in 2012 that food stamp expenditures have increased by seventy percent over the last four years and are expected to continue to rise until 2014. *See* Damian Paletta, *Food Stamp Rolls to Grow Through 2014, CBO Says*, WSJ BLOGS (Apr. 19, 2012, 1:58 PM), http://blogs.wsj.com/economics/2012/04/19/food-stamp-rolls-to-grow-through-2014-cbo-says/?mod=e2tw.

> 45 million people in 2011 received Supplemental Nutrition Assistance Program [SNAP] benefits, a 70% increase from 2007. [The CBO] said the number of people receiving the benefits, commonly known as food stamps, would continue growing until 2014.
>
> Spending for the program, not including administrative costs, rose to $72 billion in 2011, up from $30 billion four years earlier. The CBO projected that one in seven U.S. residents received food stamps last year.

Id. For the CBO report on SNAP, see CONG. BUDGET OFFICE, THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (2012), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/04-19-SNAP.pdf. For a historical summary of United States welfare policy, see MICHAEL D. TANNER, THE POVERTY OF WELFARE: HELPING OTHERS IN CIVIL SOCIETY 13–34 (2003). Suggesting that the best solutions are fueled by American innovation and ingenuity, George Mason Associate Professor of Economics Alex Tabarrok discusses his concern about America's welfare problem in ALEXANDER TABARROK, LAUNCHING THE INNOVATION RENAISSANCE: A NEW PATH TO BRING SMART IDEAS TO MARKET FAST, at *Innovation Nation Versus the Warfare-Welfare State* (TED Books 2011) ("Together the warfare and welfare states, counting only the big four of defense, Medicaid, Medicare and Social Security, eat up $2.2 trillion, or nearly two-thirds of the U.S. federal budget.").

[2] CONG. BUDGET OFFICE, *supra* note 1, at 1 ("By fiscal year 2022, CBO projects, 34 million people (or about 1 in 10 U.S. residents) will receive SNAP benefits each month . . . and SNAP expenditures, at about $73 billion, will be among the highest of all non-health-related federal support programs for low-income households."). Moreover, "[t]he food stamp program is old and fossilized. Aside from enormous increases in cost, it has remained basically unchanged since its creation in the 1960s. Unaffected by welfare reform

that are fragmented and relying on state and federal financial assistance. The cost of family fragmentation was first studied and published in 2008 ("2008 Report").[4] The 2008 Report found that family breakdown had cost American taxpayers $112 billion per year.[5] The 2008 Report, detailing for the first time the enormous expense of divorce and unwed childbearing, revealed that broken families are no longer simply about individual privacy choices.[6] The economics of family fragmentation has a price tag.

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in the 1990s, it remains a program that discourages work, rewards idleness, and promotes long-term dependence." ROBERT RECTOR & KATHERINE BRADLEY, HERITAGE FOUND., REFORMING THE FOOD STAMP PROGRAM 2 (2012), *available at* http://thf_media.s3.amazonaws.com/2012/pdf/b2708.pdf.

[3] Stephanie Coontz, *A Nation of Welfare Families*, HARPER'S MAG., Oct. 1992, at 13, 13. Although Coontz's article suggests that government aid does not harm families, its title affirms the existence of a trend toward national household reliance on government assistance. *See id.* at 16.

[4] BENJAMIN SCAFIDI, INST. FOR AM. VALUES, INST. FOR MARRIAGE & PUB. POLICY, GA. FAMILY COUNCIL & FAMILIES NW., THE TAXPAYER COSTS OF DIVORCE AND UNWED CHILDBEARING: FIRST-EVER ESTIMATES FOR THE NATION AND ALL FIFTY STATES 5 (2008), *available at* www.healthymarriageinfo.org/about/faq/download.aspx?id=77. The study and its claims generated reporting. *See, e.g.*, David Crary, *Study: "Family Fragmentation" Costs $112B*, SEATTLE TIMES, Apr. 15, 2008, http://seattletimes.nwsource.com/html/businesstechnology/2004349460_families15.html ("The study was conducted by Georgia College & State University economist Ben Scafidi. His work was sponsored by four groups who consider themselves part of a nationwide 'marriage movement'—the New York-based Institute for American Values, the Institute for Marriage and Public Policy, Families Northwest of Redmond, and the Georgia Family Council, an ally of the conservative ministry Focus on the Family.").

[5] SCAFIDI, *supra* note 4. The study states that the "$112 billion figure represents a 'lower-bound' or minimum estimate. Given the cautious assumptions used throughout this analysis, we can be confident that current high rates of family fragmentation cost taxpayers *at least* $112 billion per year." Indeed, these taxpayer costs total "more than $1 trillion each decade." *Id.*

[6] *See* Crary, *supra* note 4. According to Institute for American Values President David Blankenhorn, "[w]e keep hearing this from state legislators, 'Explain to me why this is any of my business? Aren't these private matters?' . . . Take a look at these numbers and tell us if you still have any doubt." *Id.*

Individualism and the rights that stem from that concept are part of the American identity. Individualism is such a fundamental concept that it is endorsed by the courts—especially with regard to the liberty interest of the individual. *See* L.M. KOHM, FAMILY MANIFESTO: WHAT WENT WRONG WITH THE MORAL BASIS FOR THE FAMILY AND HOW TO RESTORE IT 29–31 (2006).

One of the most infamous discussions of the intersection of personal choice with family fragmentation was then Vice President Dan Quayle's remarks on Murphy Brown. The title character in a CBS sitcom intentionally made a lifestyle choice to have a child as a single parent, and Quayle remarked that "mocking the importance of fathers" and "[b]earing babies irresponsibly is simply wrong." *See* Isabel Sawhill, *Why Dan Quayle Was Right About Murphy Brown*, WASH. POST, May 27, 2012, at B3.

> Twenty years later, Quayle's words seem less controversial than prophetic. The number of single parents in America has increased dramatically: The proportion of children born outside marriage has risen from roughly 30 percent

Family fragmentation occurs when individuals experience domestic breakdown caused by divorce or non-marital childbearing.[7] The 2008 Report stated that "[t]o the extent that the decline of marriage increases the number of children and adults eligible for and in need of government services, costs to taxpayers will grow."[8] These calculations were based on differences in poverty rates by household types, which reveal that those headed by a single female have relatively high poverty rates,[9] which lead to higher spending on welfare, health care, criminal justice, and education.[10]

Although it is already a well-documented fact that family fragmentation is harmful to children,[11] the 2008 Report highlighted that

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> in 1992 to 41 percent in 2009. For women under age 30, more than half of babies are born out of wedlock. A lifestyle once associated with poverty has become mainstream.

Id.

Recent articles indicate this phenomenon has somewhat set down roots. *See* Kevin Hartnett, *When Having Babies Beats Marriage*, HARVARD MAG., July–Aug. 2012, at 11, 11–12 ("The decoupling of marriage from childbearing among lower-income Americans is arguably the most profound social trend in American life today . . . ."); W. Bradford Wilcox, *Father's Day: Are Dads Really Disposable?*, DESERET NEWS (June 14, 2012, 2:34 PM), http://www.deseretnews.com/article/print/865557457/Fathers-Day-Are-dads-really-disposable.html (discussing women having children without fathers and the social science research that indicates children are less likely to thrive without fathers).

[7] Family fragmentation falls within two categories: *broken* families are caused by divorce or a separation of cohabiting adults while *unformed* families occur in unwed childbearing where one parent is not living with the child, causing the family to never form, or producing a lack of family formation. We, like the 2008 Report, use the term "family fragmentation" to encompass both broken families and families that never formed. SCAFIDI, *supra* note 4, at 39 n.9. "Throughout the analysis, individuals who are not married or who have experienced a divorce or a nonmarital birth are considered to be living in a 'fragmented' family." *Id.*

[8] SCAFIDI, *supra* note 4, at 8. The study noted that "[p]ublic debate on marriage in this country has focused on the 'social costs' of increases in divorce and unmarried childbearing"; in contrast, the 2008 Report focused on real costs, actual expenditures, and lost tax revenue caused by fragmented families. *Id.* at 7–8, 12.

[9] *See* SCAFIDI, *supra* note 4, at 12, 31; *see also* Maria Cancian & Deborah Reed, *Family Structure, Childbearing, and Parental Employment: Implications for the Level and Trend in Poverty*, *in* CHANGING POVERTY, CHANGING POLICIES 92, 109 (Maria Cancian & Sheldon Danziger eds., 2009).

[10] SCAFIDI, *supra* note 4, at 8. Indeed, the "$112 billion annual estimate includes the costs of federal, state, and local government programs and foregone tax revenues at all levels of government." *Id.* at 17.

[11] A broken family brings higher rates of childhood poverty, government intervention, child distress, inadequate education, substance abuse, teen crime, and teen pregnancy, among other results. NAT'L COMM'N ON AM.'S URBAN FAMILIES, FAMILIES *FIRST* 1, 4, 32–33, 36 (1993).

> The family trend of our time is the deinstitutionalization of marriage and the steady disintegration of the mother–father childraising unit. This trend of family fragmentation is reflected primarily in the high rate of divorce among parents and the growing prevalence of parents who do not marry. No domestic

reducing the costs of family fragmentation "is a legitimate concern of government, policymakers, and legislators."[12] While the 2008 Report did not offer specific formal recommendations, it did mention some state initiatives,[13] suggesting that state and federal lawmakers consider investing more money in programs intended to bolster marriages to be a combatant to the costs of family fragmentation.[14] As an incentive for reducing the rate of family fragmentation, the 2008 Report advised that "even very small increases in stable marriage rates would result in very large returns to taxpayers. For example, a mere 1 percent reduction in rates of family fragmentation would save taxpayers $1.12 billion annually."[15]

Now, nearly five years later, we set out to discover if that research was heeded in some way by the various states. This Article provides a more recent snapshot of the costs of family fragmentation on a state-by-state basis by examining states' efforts to correct the rising costs of family fragmentation. It reviews basic family-welfare costs and legislative and public-policy initiatives directed at reducing family

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trend is more threatening to the well-being of our children and to our long-term national security.

Id. at 19.

There is a rich literature on the harm to children or others of non-marital families. *See* PAUL R. AMATO & ALAN BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL 9–15, 67–83, 106–19, 137–46, 172–81, 195–208, 218–28 (1997); SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS (1994); KRISTIN ANDERSON MOORE ET AL., CHILD TRENDS, MARRIAGE FROM A CHILD'S PERSPECTIVE: HOW DOES FAMILY STRUCTURE AFFECT CHILDREN, AND WHAT CAN WE DO ABOUT IT? (2002), *available at* http://www.childtrends.org/files/marriagerb602.pdf; Paul R. Amato & Rebecca A. Maynard, *Decreasing Nonmarital Births and Strengthening Marriage to Reduce Poverty*, FUTURE OF CHILDREN, Fall 2007, at 117; Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, FUTURE OF CHILDREN, Fall 2005, at 75; Cynthia C. Harper & Sara S. McLanahan, *Father Absence and Youth Incarceration*, 14 J. RES. ON ADOLESCENCE 369 (2004); Robert I. Lerman, *The Impact of the Changing US Family Structure on Child Poverty and Income Inequality*, 63 ECONOMICA (SUPPLEMENT) S119 (1996); Robert J. Sampson et al., *Does Marriage Reduce Crime? A Counterfactual Approach to Within-Individual Causal Effects*, 44 CRIMINOLOGY 465 (2006); Adam Thomas & Isabel Sawhill, *For Richer or for Poorer: Marriage as an Antipoverty Strategy*, 21 J. POL'Y ANALYSIS & MGMT. 587, 587–88, 594–95, 597 (2002).

[12] SCAFIDI, *supra* note 4, at 20.

[13] For example, it mentions some federal government-funded programs, an Oklahoma marriage-skills initiative, and Texas marriage-strengthening initiatives. Indeed, no fewer than "nine states have publicly adopted a goal of strengthening marriage." SCAFIDI, *supra* note 4, at 8–9, 20.

[14] *Id.* at 20. Marriage creates wealth and stability for many sectors of society. *See* Lynne Marie Kohm, *Does Marriage Make Good Business? Examining the Notion of Employer Endorsement of Marriage*, 25 WHITTIER L. REV. 563, 564, 568–69, 573–82 (2004) (discussing the benefits to employers of married employees and the law surrounding marital-status employment discrimination).

[15] SCAFIDI, *supra* note 4, at 20 (emphasis omitted).

fragmentation by state. Consulting with influential persons in the field[16] and utilizing almost the same measurements and indicators originally used to compile the 2008 Report,[17] but not being economists, we endeavor to report the facts and any observable difference in law and policy made in these past five years.

This Article begins with an explanation in Part I of the research included in this study, giving descriptors and indicators for each expense category calculated. Part II offers an overview of various available federal, state, and private-sector family-strengthening initiatives. Part III then examines the raw information by state, providing some straightforward analysis of this raw data. Findings are not necessarily prescriptive but seek to highlight the basic policies that states are using to strengthen families, which can result in decreased family fragmentation costs. Although this brief survey cannot make direct connections, Part IV offers a general analysis as a catalyst for states to appropriately alter policies toward family-strengthening policies. The great expense to states of family fragmentation, whether from divorce or unwed childbearing, reveals that broken families are not simply fixed by providing more federal funding or protecting individual privacy choices but, rather, are a matter of authentic concern for researchers, taxpayers, legislatures, and government officials.

I. FAMILY FRAGMENTATION INDICATORS

"[T]he smooth functioning of families [is] vital for the success of any society."[18] Healthy marriages tend to foster happiness in individuals

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[16] Telephone Interview with Chris Gersten, Co-Chairman, Coal. for Divorce Reform (June 8, 2012); Telephone Interview with Alan Hawkins, Professor, Brigham Young Univ. (June 8, 2012); Telephone Interview with Randy Hicks, President, Ga. Fam. Council (June 2, 2012); Telephone Interview with Benjamin Scafidi, Assoc. Professor, Ga. Coll. (June 8, 2012); E-mail from W. Bradford Wilcox, Assoc. Professor, Univ. of Va. (June 7, 2012, 3:57 PM) (on file with the Regent University Law Review).

[17] *See* SCAFIDI, *supra* note 4, at 12–13.

[18] DAVID CHEAL, FAMILY AND THE STATE OF THEORY 4 (1991) (describing—although not endorsing—the functionalist theory, which claims, in part, that functional families are essential to an efficacious society). The family unit in the law, or, as Professor Janet L. Dolgin uses the term, the "traditional family," is "a social construct, forged in the early years of the Industrial Revolution. . . . Ironically, this construct of family was actualized most firmly in the United States during the 1950s, just before it was widely challenged by alternative constructs." Janet L. Dolgin, *Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of Family*, 32 CONN. L. REV. 523, 524 (2000) (discussing the relationship between reproductive technologies and the legal family). Professor Dolgin also notes that alternative constructs are based in individual liberty. "[S]ociety and law invoke certain aspects of the ideology of traditional families in some contexts, but not in others. Other aspects are forgotten almost completely in deference to the contemporary obsession in the United States with the preservation of liberty and choice." *Id.* at 525. That obsession has apparently led to vast family fragmentation.

while simultaneously perpetuating a society with children who will be responsible individuals in future generations.[19] Despite this fact, the legal system in America has unwittingly aided in the breakdown of the family.[20] The welfare system attempts to bridge expense gaps created by family fragmentation.[21] The process of family breakdown, however, is fueled by a subtle devaluing of the family unit, particularly as less significant than individual rights, as evidenced by the high numbers of unwed cohabitants, unwed childbearing, and divorce rates.[22] Expansion

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We offer, however, that while the family may be a socio-legal construct useful for family law, it is more ontological in nature by Supreme design. *See* Lynne Marie Kohm, *Response: Reply to Arthur S. Leonard*, *in* MARRIAGE AND SAME-SEX UNIONS: A DEBATE 78, 80 (Lynn D. Wardle et al. eds., 2003); Lynne Marie Kohm, *Essay Two: Marriage by Design*, *in* MARRIAGE AND SAME-SEX UNIONS: A DEBATE, *supra*, at 81.

[19] An anthropological perspective views a family relationship as one of "*enduring, diffuse solidarity*." DAVID M. SCHNEIDER, AMERICAN KINSHIP: A CULTURAL ACCOUNT 52 (2d ed. 1980).

> *Solidarity* because the relationship is supportive, helpful, and cooperative; it rests on trust and the other can be trusted. *Diffuse* because it is not narrowly confined to a specific goal or a specific kind of behavior. Two athletes may cooperate and support each other for the duration of the game and for the purpose of winning the game, but be indifferent to each other otherwise. Two members of the family cannot be indifferent to one another, and since their cooperation does not have a specific goal or a specific limited time in mind, it is *enduring*.

Id.

[20] *See, e.g.*, Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. REV. 1, 7–30 (discussing the constitutionally developed concept of autonomy and the decline of family interests toward a favoring of contractual relationships in family law). *See generally* JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW, at xiii, xv (2000) (mentioning the participation of family law in marriage breakdown). "Today, courts and legislatures have largely abolished the definitions of parenthood that depend on marriage, and the law—together with the rest of society—is struggling, one piece at a time, to rebuild the idea of obligation to children." *Id.* at xiii.

The United States is apparently not alone in experiencing breakdown through domestic relations law. *See, e.g.*, SOC. POLICY JUSTICE GRP., THE STATE OF THE NATION REPORT: FRACTURED FAMILIES 10–13 (2006), *available at* http://www.centreforsocialjustice.org.uk/client/downloads/BB_family_breakdown.pdf (discussing family breakdown in the UK and suggesting the government do more to strengthen families).

[21] Those expense gaps include lost support from an absent spouse or parent. *See* MCLANAHAN & SANDEFUR, *supra* note 11, at 23–26 (explaining the lack of economic resources in single-parent families).

[22] *See* Helen M. Alvaré, *Saying "Yes" Before Saying "I Do": Premarital Sex and Cohabitation as a Piece of the Divorce Puzzle*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 7, 9 (2004) (discussing the connections among divorce, cohabitation, and premarital sex as well as the growing belief that sexual choices are inherently private). Professor Dolgin also notes that alternative family constructs are based in individual liberty: "[S]ociety and the law invoke certain aspects of the ideology of traditional families in some contexts, but not in others. Other aspects are forgotten almost completely in deference to the contemporary obsession in the United States with the preservation of liberty and choice." Dolgin, *supra* note 18, at 525.

of individual rights has, therefore, resulted in an increased demand for "state interference"[23] and an increased reliance on state funds.[24]

Designed by the federal government, many of these support programs meant to stand in the gap for fragmented families are implemented by the states via federal mandate[25] and have become a regular part of states' budgets. As will be seen in Part IV, taxpayer costs are driven by increases in poverty from family fragmentation, the "most widely accepted and best quantified consequence of divorce and unmarried childbearing."[26] These programs result in an increase of expenditures at all levels—local, state, and federal—and present direct costs to taxpayers. "In fiscal year 2011, total federal expenditures on [the Supplemental Nutrition Assistance Program]—$78 billion—and participation in the program . . . were the highest they have ever been. In an average month that year, nearly 45 million people (or one in seven U.S. residents) received SNAP benefits."[27] This is just one of the programs considered as a cost of family fragmentation.

In addition to the Supplemental Nutrition Assistance Program ("SNAP") (previously known as "food stamps"),[28] taxpayer-funded programs designated as indicators of family fragmentation, as discussed

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[23] KOHM, *supra* note 6, at 28.

[24] As already discussed, individualism has contributed toward undermining the family. *See supra* note 6 and accompanying text. Of course, this creates demand for state funds. *See infra* Part IV.

[25] For an explanatory examination of how federal Temporary Assistance for Needy Families ("TANF") benefits work with state implementation, see GINA ADAMS ET AL., CHILD CARE SUBSIDIES FOR TANF FAMILIES: THE NEXUS OF SYSTEMS AND POLICIES, at vii, 59–68 (2006), *available at* http://www.urban.org/UploadedPDF/311305_nexus.pdf.

[26] SCAFIDI, *supra* note 4, at 13 ("It is important to recognize that if family fragmentation has additional negative effects on child and adult well-being that operate independently of income—and if these effects increase the numbers of children or adults who need and are served by taxpayer-funded social programs—then our methodology will significantly *underestimate* taxpayer costs."). For further discussion of costs associated with government programs, see *id.* at 13–16.

[27] CONG. BUDGET OFFICE, *supra* note 1, at 1. States typically implement SNAP through the use of Electronic Benefit Transfers or EBT cards, disseminating the benefits electronically; beneficiaries can often make cash ATM withdrawals using these cards. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-535, TANF ELECTRONIC BENEFIT CARDS: SOME STATES ARE RESTRICTING CERTAIN TANF TRANSACTIONS, BUT CHALLENGES REMAIN 1 (2012). Due to reports that individuals were using EBT benefits at liquor stores, adult businesses, or casinos, the federal government and some states have acted to reduce the possibility of abuse. *Id.* at 1–2. In addition, some food stamp recipients unlawfully sell their cards and then request replacements, causing the government to incur even more costs. Sam Hananel, *USDA Cracking Down on Food Stamp Fraud*, WASH. POST, May 29, 2012, at A9.

[28] CONG. BUDGET OFFICE, *supra* note 1, at 1.

below, include Temporary Assistance for Needy Families ("TANF");[29] Housing Assistance;[30] Low Income Home Energy Assistance Program;[31] Medicaid;[32] Women, Infants, and Children assistance ("WIC");[33] Children's Health Insurance Program ("CHIP");[34] Child Welfare programs;[35] Head Start;[36] School Lunch and Breakfast Programs;[37] and the Justice System.[38]

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[29] *See generally* OFFICE OF FAMILY ASSISTANCE, U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF FAMILY ASSISTANCE (OFA) (2009).

[30] *See generally* U.S. DEP'T OF HOUS. & URBAN DEV., HUD STRATEGIC PLAN: FY 2010 – 2015 (2010).

[31] *See generally* DIV. OF ENERGY ASSISTANCE, U.S. DEP'T OF HEALTH & HUMAN SERVS., LIHEAP HOME ENERGY NOTEBOOK FOR FISCAL YEAR 2009 (2011).

[32] *See* W. Bradford Wilcox, *Suffer the Little Children: Marriage, the Poor, and the Commonweal*, *in* THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS 242, 252 (Robert P. George & Jean Bethke Elshtain eds., 2006) (observing that estimates of welfare spending would be significantly larger if they included "the costs of family breakdown for medicaid, housing, family courts, and the criminal justice system"). The recent Supreme Court decision regarding the Patient Protection and Affordable Care Act of 2010 has left states with the option of choosing whether to opt into the Medicaid expansion program. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2608 (plurality opinion) (Roberts, C.J., op.); *see id.* at 2666–67 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). Medicaid expansion would be paid by the federal government for the first several years. *Id.* at 2601 (Roberts, C.J., op.). With such an expansion, it could cost states more when the number of people receiving Medicaid benefits greatly increases. In response, several states are weighing their options and have indicated they will not be opting into the program. Robert Pear & Michael Cooper, *Reluctance in Some States over Medicaid Expansion*, N.Y. TIMES, June 30, 2012, at A1.

[33] *See generally* WIC, U.S. DEP'T OF AGRIC., NUTRITION PROGRAM FACTS (2011), *available at* http://www.fns.usda.gov/wic/WIC-Fact-Sheet.pdf.

[34] *See generally* JENNIFER RYAN, NAT'L HEALTH POLICY FORUM, THE CHILDREN'S HEALTH INSURANCE PROGRAM (CHIP): THE FUNDAMENTALS (2009), *available at* http://www.nhpf.org/library/background-papers/BP68_CHIPFundamentals_04-23-09.pdf. CHIP was previously known as SCHIP, the State Children's Health Insurance Program. *Id.* at 3.

[35] For an overview of spending on child welfare programs, see generally CYNTHIA ANDREWS SCARCELLA ET AL., THE URBAN INST., THE *COST* OF PROTECTING VULNERABLE CHILDREN *V*: UNDERSTANDING STATE VARIATION IN CHILD WELFARE FINANCING (2006).

[36] For a study evaluating the impact of Head Start, see generally ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., HEAD START IMPACT STUDY: FINAL REPORT: EXECUTIVE SUMMARY (2010).

[37] For information on federal school breakfast and lunch programs, see generally FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., THE SCHOOL BREAKFAST PROGRAM (2011), *available at* http://www.fns.usda.gov/cnd/breakfast/AboutBFast/SBPFactSheet.pdf; FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., NATIONAL SCHOOL LUNCH PROGRAM (2012), *available at* http://www.fns.usda.gov/cnd/Lunch/AboutLunch/NSLPFactSheet.pdf.

[38] *See* SCAFIDI, *supra* note 4, at 12–13. Scafidi did not feel comfortable including other costs of family fragmentation "such [as] the Earned Income Tax Credit, remedial school programs, and special education programs" because reasonable estimates of costs were not possible based on available literature. *Id.* at 41 n.26.

Specifically regarding the justice system, one report "infer[s] that the annual incidence of crime attributable to poverty is . . . 20 percent." HARRY J. HOLZER ET AL., THE

In considering the cost fluctuations of family fragmentation, we chose to focus on three main programs. Table A includes TANF costs by state over the past five years, Table B details SNAP costs, and Table C details WIC costs. Each program has unique requirements and objectives in providing resources for fragmented families.

TANF was created by the 1996 welfare-reform legislation.[39] Intended to replace previous welfare plans known as the Job Opportunities and Basic Skills Training program, the Aid to Families with Dependent Children program, and the Emergency Assistance program, TANF is a federal block grant to states, territories, and Native American tribes.[40] TANF has four purposes: (1) "assisting needy families so that children can be cared for in their own homes"; (2) "reducing the dependency of needy parents by promoting job preparation, work and marriage"; (3) "preventing out-of-wedlock pregnancies"; and (4) "encouraging the formation and maintenance of two-parent families."[41] Effectuating these four main goals through various means, TANF also has a work requirement such that recipients of TANF funds "must work as soon as they are job-ready or no later than two years after coming on assistance."[42] With a general five-year maximum benefit period for participants, TANF also requires states to have programs such as on-the-job training, assistance in job searching and job preparedness, community-service opportunities, vocational training, or even child-care services for community-service participants.[43]

SNAP, formerly known as the "Food Stamps Act," is run by the Department of Agriculture and has existed in some form since May 16, 1939.[44] The program has adapted throughout its lifespan to meet the nation's changing demands, but providing assistance to needy people

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ECONOMIC COSTS OF POVERTY IN THE UNITED STATES: SUBSEQUENT EFFECTS OF CHILDREN GROWING UP POOR 13 (2007), *available at* http://www.americanprogress.org/issues/2007/01/pdf/poverty_report.pdf.

[39] OFFICE OF FAMILY ASSISTANCE, *supra* note 29, at 1.

[40] *Id.*

[41] *Id.* at 1–2.

[42] *Id.* at 2 (describing work requirements of thirty hours a week for a single parent, twenty hours a week for a single parent with a child under the age of six, thirty-five hours a week for a two-parent household, and fifty-five hours a week for a two-parent household that receives Federal child care assistance).

[43] *Id.* at 2–3.

[44] FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP): COMMUNITY PARTNER OUTREACH TOOLKIT 10 (2011) [hereinafter SNAP], *available at* http://www.fns.usda.gov/snap/outreach/pdfs/toolkit/2011/Community/toolkit_complete.pdf; U.S. DEP'T OF AGRIC., FROM FOOD STAMPS TO THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM: LEGISLATIVE TIMELINE 1 [hereinafter LEGISLATIVE TIMELINE], *available at* http://www.fns.usda.gov/snap/rules/Legislation/timeline.pdf.

and families has remained SNAP's primary goal.[45] For example, the Farm Bill of 2008 renewed commitment of federal funds to food assistance with a $10 billion increase over the next ten years[46] and changed the name of the program from the "Food Stamp Act" to the "Supplemental Nutrition Assistance Program" to decrease what Congress felt was an increasing stigmatization of recipients.[47] "[N]early 45 million people (or one in seven U.S. residents) received SNAP benefits" in 2011 for a national cost of $78 billion.[48]

WIC was established as a pilot program in 1972 and made permanent in 1975.[49] WIC's mission is "to safeguard the health of low-income women, infants, and children up to age 5 who are at nutritional risk, by providing nutritious foods to supplement diets, nutrition education, and referrals to health care and other social services."[50] WIC is offered to a subsection of SNAP recipients, including low-income pregnant, breastfeeding, and non-breastfeeding postpartum women who need additional assistance in the form of food, healthcare referrals, and nutrition education.[51]

The 2008 Report included several other indicators of family fragmentation.[52] Although very valuable, such indicators are not included here purely to simplify the understanding of three of the most basic and substantial state costs of family fragmentation.[53] Reviewing the initiatives becomes the next focus.

II. AN OVERVIEW OF THE INITIATIVES

Several private entities have taken the lead in studying the problem of family fragmentation.[54] Through research, analysis, and education,

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[45] *See* SNAP, *supra* note 44, at 13; *see generally* LEGISLATIVE TIMELINE, *supra* note 44.

[46] RENÉE JOHNSON & JIM MONKE, CONG. RESEARCH SERV., RS22131, WHAT IS THE "FARM BILL"? 1–2, 4 (2011).

[47] *See* SNAP, *supra* note 44, at 1–2.

[48] *See* CONG. BUDGET OFFICE, *supra* note 1, at 1. SNAP has also become fairly accessible, has grown dramatically over the past four years, and is expected to see substantial growth into 2014. *Id.* at 1, 5.

[49] VICTOR OLIVEIRA ET AL., U.S. DEP'T OF AGRIC., THE WIC PROGRAM: BACKGROUND TRENDS, AND ISSUES, at iii (Sept. 2002) [hereinafter WIC], *available at* http://www.ers.usda.gov/media/327957/fanrr27_1_.pdf.

[50] *Id.* at 1.

[51] *Id.* at 2–4.

[52] *See* SCAFIDI, *supra* note 4.

[53] Those areas offer a significant field of research for state social scientists to explore cost effects.

[54] The Institute for American Values is one of the foremost national organizations active in family public policy. *The Marriage Index* reports and tracks marital stability in the United States. *See* INST. FOR AM. VALUES AND NAT'L CTR. ON AFRICAN AM. MARRIAGES & PARENTING, THE MARRIAGE INDEX: A PROPOSAL TO ESTABLISH LEADING MARRIAGE

these private actors influence and shape state public policy.[55] Some government agencies have noted the value of grass-root efforts advocating family-strengthening public policy and proposing ways to curb family fragmentation.[56] As shown in Part III, a few initiatives have led the way.

Federally-funded family programs are administered by the Department of Health and Human Services ("HHS") through the Administration for Children and Families ("ACF").[57] The federal Healthy Marriage Initiative ("HMI") is featured in the quest to make family strengthening a federal priority.[58] National programs offer resources across the United States through the National Healthy Marriages Resource Center.[59] A specific example of one of these national programs is the HMI for African–American families by which the federal government recognized the need for minority-family support and provided initiatives focused on strengthening families.[60]

INDICATORS (2009), *available at* http://www.nationalmarriageweekusa.org/images/research/IAV_Marriage_Index_09_25_09.pdf. Offshoots from the work of the Institute for American Values are numerous and include efforts like the National Marriage Week. *See* SHEILA WEBER, NAT'L MARRIAGE WEEK, FEBRUARY 7–14 NATIONAL MARRIAGE WEEK USA: LET'S STRENGTHEN MARRIAGE, *available at* http://app.razorplanet.com/acct/42355-8789/resources/2012_Marriage_Week.pdf.

The National Marriage Project at the University of Virginia in conjunction with the Institute for American Values has put out an annual report that details what is happening with marriage aspects of family fragmentation. *See* THE STATE OF OUR UNIONS: WHEN BABY MAKES THREE: HOW PARENTHOOD MAKES LIFE MEANINGFUL AND HOW MARRIAGE MAKES PARENTHOOD BEARABLE, at iii (W. Bradford Wilcox ed. 2011), *available at* http://www.stateofourunions.org/2011/SOOU2011.pdf; THE STATE OF OUR UNIONS: WHEN MARRIAGE DISAPPEARS: THE NEW MIDDLE AMERICA, at iii–iv (W. Bradford Wilcox et al. eds., 2010), *available at* http://stateofourunions.org/2010/SOOU2010.pdf.

[55] The Family Research Council is one of the most active private family policy groups with organizations in a vast majority of states. *See* FAMILY RESEARCH COUNCIL, 25 PRO-FAMILY POLICY GOALS FOR THE NATION, at Introduction (2008), *available at* http://downloads.frc.org/EF/EF08H78.pdf. The Family Foundation of Virginia has been very active in legislation relating to families and their strength or instability. *See About The Family Foundation of Virginia*, THE FAMILY FOUND. VA., http://familyfoundation.org/about/ (last visited Oct. 18, 2012).

[56] *See infra* Part III.

[57] *See* ADMIN. FOR CHILDREN & FAMILIES, DEP'T OF HEALTH & HUMAN SERVS., JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEES 1 (2012).

[58] *See* THEODORA OOMS, CTR. FOR LAW & SOC. POLICY, ADAPTING HEALTHY MARRIAGE PROGRAMS FOR DISADVANTAGED AND CULTURALLY DIVERSE POPULATIONS: WHAT ARE THE ISSUES? 1 (2007), *available at* http://www.clasp.org/admin/site/publications_archive/files/0211.pdf.

[59] *See* NAT'L HEALTHY MARRIAGE RES. CTR., DEP'T OF HEALTH & HUMAN SERVS., HEALTHY MARRIAGE AND RELATIONSHIP PROGRAMS: PROMISING PRACTICES GUIDE 1 (2009).

[60] "The [African American Healthy Marriage Initiative ('AAHMI')] is a component of the ACF Healthy Marriage Initiative and more specifically promotes a culturally competent strategy for fostering healthy marriage and responsible fatherhood, improving child well-being, and strengthening families within the African American Community."

From HMIs to Responsible Fatherhood Initiatives, ACF has worked to provide a framework for public education and public support.[61] Various grants have provided the support necessary to develop Fatherhood Initiatives across the country.[62] Fatherhood programs have existed since the late 1980s,[63] and there have been significant studies to evaluate the effect of these and other programs.[64] One study in particular found positive associations between marital stability and strong fathering.[65] The National Responsible Fatherhood Clearinghouse, established by the HHS, has launched several state affiliates.[66] Other private national initiatives have been influential in public policy debates surrounding family strengthening, foremost among which has been the National Fatherhood Initiative, a community resource designed to support fatherhood for the betterment of children's lives.[67] Using facts, statistics, and research to show the effect of father absence in the lives of children, the National Fatherhood Initiative has called absent fatherhood the "most consequential social problem of our time."[68] While

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What Is the African American Healthy Marriage Initiative (AAHMI)?, ADMIN. FOR CHILD. & FAMILIES., http://www.acf.hhs.gov/healthymarriage/aa_hmi/AAHMI.html (last visited Sept. 7, 2012); *see also* AFRICAN AM. HEALTHY MARRIAGE INITIATIVE, FRAMING THE FUTURE: A FATHERHOOD AND HEALTHY MARRIAGE FORUM 3–5 (2005) [hereinafter AAHMI].

[61] *See* ALAN J. HAWKINS & THEODORA OOMS, NAT'L HEALTHY MARRIAGE RES. CTR., WHAT WORKS IN MARRIAGE AND RELATIONSHIP EDUCATION? A REVIEW OF LESSONS LEARNED WITH A FOCUS ON LOW-INCOME COUPLES 2, 4–5, 8 (n.d.).

[62] *See* MARGUERITE ROULET, FATHERHOOD PROGRAMS AND HEALTHY MARRIAGE FUNDING 7–8 (2009), *available at* http://www.cffpp.org/publications/policy_marriage.pdf.

[63] *Id.* at 7.

[64] *See, e.g.*, Alan J. Hawkins et al., *Increasing Fathers' Involvement in Child Care with a Couple-Focused Intervention During the Transition to Parenthood*, 57 FAM. REL. 49, 49–50, 58 (2008) (discussing research on fatherhood intervention). *But see* Erin K. Holmes et al., *Meta-analysis of the Effectiveness of Resident Fathering Programs: Are Family Life Educators Interested in Fathers?*, 59 FAM. REL. 240, 240, 249 (2010) (finding the need for more father-education research because such approaches afford reason for optimism).

[65] Kay Bradford & Alan J. Hawkins, *Learning Competent Fathering: A Longitudinal Analysis of Marital Intimacy and Fathering*, 4 FATHERING 215, 215 (2006) (finding associations between competent fathering and marital intimacy and commitment).

[66] JUSTPARTNERS, INC., 40+ TOP FATHERHOOD RESOURCES (2011), *available at* http://www.aecf.org/~/media/Pubs/Topics/Special%20Interest%20Areas/Responsible%20Fatherhood%20and%20Marriage/40TopResources/40TopResourcesFINAL5%2011%2011.pdf; *Connect with Programs*, NAT'L RESPONSIBLE FATHERHOOD CLEARINGHOUSE, http://www.fatherhood.gov/for-dads/connect-with-programs (last visited Oct. 18, 2012).

[67] JUSTPARTNERS, *supra* note 66 ("National Fatherhood Initiative . . . works in every sector and at every level of society to engage fathers in the lives of their children.").

[68] *For the Media*, NAT'L FATHERHOOD INITIATIVE, http://www.fatherhood.org/media (last visited Oct. 18, 2012).

> Children who live absent their biological fathers are, on average, at least two to three times more likely to be poor, to use drugs, to experience educational, health, emotional and behavioral problems, to be victims of child

research programs reveal the financial impact of absentee fathers,[69] individual programs fight for specific goals, such as the rehabilitation of incarcerated fathers.[70] The National Center for Fathering, a private resource, research, and educational organization based in Kansas City, Missouri, has established programs around the country that promote responsible fatherhood.[71] The Family Strengthening Policy Center, funded by the Annie E. Casey Foundation, is another private national initiative focusing on child welfare.[72] In addition, independent private actors influence new approaches for social and economic stability for families.[73]

Research and policy-relevant studies for family strength are underway,[74] followed by requests for more inquiry and analysis. "The association between marriage and well-being has led to policies that promote marital interventions and discourage divorce," including "federal initiatives specifically targeting poor couples and couples of color."[75] Informative and instructive research is still needed in the quest

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abuse, and to engage in criminal behavior than their peers who live with their married, biological (or adoptive) parents.

NAT'L FATHERHOOD INITIATIVE, A RAPID ETHNOGRAPHIC ASSESSMENT OF PROGRAMS AND SERVICES (READS) FOR FATHERS IN STARK COUNTY, OHIO 1 (2011), *available at* http://www.fatherhood.ohio.gov/LinkClick.aspx?fileticket=FgFU5LwqUBM%3D&tabid=93.

[69] *See, e.g.*, STEVEN L. NOCK & CHRISTOPHER J. EINOLF, NAT'L FATERHOOD INITIATIVE, THE ONE HUNDRED BILLION DOLLAR MAN: THE ANNUAL PUBLIC COSTS OF FATHER ABSENCE 13 (2008), *available at* http://www.fatherhood.org/Document.Doc?id=136 (reporting that federal services to fatherless households cost taxpayers $99.8 billion per year).

[70] *See, e.g.*, RUTGERS UNIV., ASSESSING THE IMPACT OF INSIDEOUT DAD™ ON NEWARK COMMUNITY EDUCATION CENTERS (CEC) RESIDENTIAL REENTRY CENTER RESIDENTS: EXECUTIVE SUMMARY 2 (2011), *available at* http://www.fatherhood.org/document.doc?id=296.

[71] FATHERS.COM, NATIONAL CENTER FOR FATHERING, *available at* http://fathers.com/documents/pressroom/National_Center_for_Fathering_Overview.pdf.

[72] NAT'L HUMAN SERVS. ASSEMBLY, FAMILY STRENGTHENING POLICY CTR., INTRODUCTION TO FAMILY STRENGTHENING 1–2 (2004), *available at* http://www.aecf.org/upload/publicationfiles/ec3655k740.pdf.

[73] For example, the Family Independence Initiative ("FII") uses qualities of self-determination, mutuality, and choice in their private family-strengthening initiative. ANNE STUHLDREHER & ROURKE O'BRIEN, THE FAMILY INDEPENDENCE INITIATIVE: A NEW APPROACH TO HELP FAMILIES EXIT POVERTY 1, 5 (2011), *available at* http://www.fiinet.org/writable/resources/documents/newamericafiipaper-1.pdf; *see also* programs discussion *infra* Part III.California.

[74] *See, e.g.*, UNIVERSITY-BASED CHILD & FAMILY POLICY CONSORTIUM, http://childpolicyuniversityconsortium.com (last visited Oct. 18, 2012) (providing a forum designed to foster social, behavioral, and health research toward effective child and family policy engagement).

[75] Matthew D. Johnson, *Healthy Marriage Initiatives: On the Need for Empiricism in Policy Implementation*, 67 AM. PSYCHOLOGIST 296, 296 (2012) (detailing concerns with past initiatives that have largely focused on empirical evidence from white middle-class

to understand how family fragmentation affects future national strength. A review of various state initiatives and basic costs of family fragmentation is informative and allows government officials to evaluate past successes and determine a state's future direction.

III. STATE BY STATE

States have created their own programs in an effort to address the issue of increasing fragmentation of households and the documented rising costs to taxpayers incurred as a result. This Part gives an overview of legislation and public policy initiatives in each state that are directly dedicated to addressing the issue of family fragmentation. This research is not meant to be an exhaustive list of all programs in each state. Rather, this information is offered as a picture of state activity addressing marriage strength, divorce reduction, and needs of father-absent households in efforts to tackle family-fragmentation concerns. Using the same coefficient as the 2008 Report's research presupposing that family fragmentation is responsible for 31.7% of the costs expended,[76] we calculate the overall cost of family fragmentation for each state for the three categories of TANF, SNAP, and WIC for the past five years.[77]

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families and recommending ways to "enhance the effectiveness" of initiatives for poor and minority couples); *see generally* AAHMI, *supra* note 60, at 2, 4 (recognizing efforts made by ACF, as part of the HHS, to work with AAHMI).

[76] SCAFIDI, *supra* note 4, at 14.

> [T]he proportion of poverty that can be attributed to family fragmentation is equal to the proportion of expenditures on a variety of government programs that are caused by family fragmentation. . . . [I]f marriage would lift 60 percent of single-mother households out of poverty, then the total number of persons in poverty would decline by 31.7 percent and the total number of children in poverty would decline by 36.1 percent. By virtue of [this assumption], marriage would reduce the costs of some government programs by 31.7 percent and the costs of government programs that are exclusively for children by 36.1 percent. Put another way, this assumption suggests that family fragmentation is responsible for 31.7 percent of the costs of government antipoverty programs and is responsible for 36.1 percent of the costs of government programs that are exclusively for children.

Id. (footnotes omitted). The 2008 Report also notes that this "crucial assumption seems cautious not only because single-parent households have higher rates of poverty and other negative outcomes but also because, at the same income level, single-parent households are much more likely than married households to make use of government benefits." *Id.* As the 2008 Report clarifies, these costs are conservative and more likely are lower than actual costs. *Id.* We use the 31.7% coefficient because our statistics are tracking anti-poverty programs.

[77] In other words, we have calculated the costs by state and then multiplied that total by 31.7% to get a closer (but very conservative) measure of the costs that family fragmentation is responsible for in each state. *See infra* Table D.

Alabama

Alabama has a marriage and family initiative known as the "Alabama Healthy Marriage and Relationship Education Initiative."[78] The initiative, formerly known as the "Alabama Community Healthy Marriage Initiative,"[79] was started in 2002 due to Alabama's "persistent history of high levels of marital and family instability."[80] The initiative has been funded by several grants from the HHS Office of Family Assistance and is "a partnership between Auburn University, Family Resource Centers, Mental Health Centers, and many other agencies and individuals at the [s]tate and [l]ocal levels who have joined together to build and sustain healthy relationships and stable marriages throughout Alabama."[81] The research arm of Auburn University has been integral in addressing state concerns[82] and operates in conjunction with national research scholars focusing on marriage and relationship education.[83] In 2004, the Governor's Task Force to Strengthen Alabama Families was created through a grant from the Annie E. Casey Foundation to "redesign and strengthen" health and human services.[84] That task force recommended "the creation of family service centers in every Alabama county" for ease of resource distribution.[85] "Six state agencies in these counties are using an automated common benefits and services screening tool to create a one-stop entry point for services regardless of which

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[78] *The Initiative*, ALA. HEALTHY MARRIAGE & RELATIONSHIP EDUC. INITIATIVE, http://www.alabamamarriage.org/initiative.php (last visited Oct. 18, 2012).

[79] *Id.*

[80] ALA. CMTY. HEALTHY MARRIAGE INITIATIVE, LET'S GET REAL: HEALTHY TEENS, HEALTHY FAMILIES, AND RESPONSIBLE FATHERHOOD REGIONAL SUMMIT (2010), *available at* http://alabamamarriage.org/2010summit/2010program.pdf.

[81] *The Initiative*, *supra* note 78. Its objectives have been to invest in curricula to target at-risk populations for training in building healthy relationships for strong marriages and strong families. Amy Weaver, *Auburn's College of Human Sciences Receives $7.5 Million Grant to Continue Alabama Healthy Marriage and Relationship Education Initiative*, AUBURN UNIV. (Oct. 12, 2011, 9:27 AM), http://wireeagle.auburn.edu/news/3919.

[82] Auburn was awarded a three-year $7.5 million grant in 2011 to continue the Healthy Marriage and Relationship Education Initiative, which follows a 2006 grant for $9.2 million, with an additional $1 million grant, all from the HHS. Weaver, *supra* note 81.

[83] *The Science Behind Healthy Marriage*, ALA. HEALTHY MARRIAGE & RELATIONSHIP EDUC. INITIATIVE, http://www.alabamamarriage.org/research.php (last visited Oct. 18, 2012).

[84] NAT'L HUMAN SERVS. ASSEMBLY, FAMILY STRENGTHENING POLICY CTR., STATE AND LOCAL GOVERNMENT FAMILY STRENGTHENING INITIATIVES 1 (2006), *available at* http://www.nationalassembly.org/fspc/documents/PolicyBriefs/Brief16.pdf. The focus of this report was to summarize government support for families in their quest for financial stability, concluding that "[l]ow-income families face many barriers to accessing government programs that can help lift them out of poverty." *Id.* at 7.

[85] *Id.* at 1–2.

agency a family first contacts."[86] Alabama has also made efforts to strengthen African–American families.[87] The Alabama Legislature has made some proposals to strengthen families by putting forward legislation toward these ends. For example, one resolution proposed recognition of a "National Marriage Week"[88] while another bill proposed the creation of covenant marriage in the state.[89] Additionally, the Alabama Policy Institute studies and publishes reports to strengthen families.[90] Since 2007, Alabama had a 21% increase in TANF expenditures,[91] households had a 148% increase in annual SNAP,[92] and the state had an 18% increase in food costs for WIC.[93] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Alabama is $1,862,132,119.[94]

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[86] *Id.* at 2.

[87] *See* ALA. CMTY. HEALTHY MARRIAGE INITIATIVE, HAPPY, ENDURING AFRICAN AMERICAN MARRIAGES (2010), *available at* http://www.alabamamarriage.org/documents/lovenotes/africanamericanmarriages.pdf (discussing how to deal with family-related stress, and how to see marriage as a source of strength).

[88] H.R. Res. 75, 2012 Reg. Sess. (Ala. 2012) (recognizing "the sacred bond that enhances personal growth, mutual fulfillment, and family well-being"). This seems to offer more legitimate authority as a "State Marriage Week," but we did not make the proposal.

[89] S. 270, 2012 Reg. Sess. (Ala. 2012), *available at* http://alisondb.legislature.state.al.us/acas/searchableinstruments/2012rs/bills/sb270.htm. Although the concept has not created a sustained legislative movement, covenant marriage generally consists of four elements including an oath of lifetime declaration, premarital counseling, pre-divorce counseling, and an extended waiting period for no-fault divorce. Alabama's proposal includes all of these elements with a two-year waiting period. *Id.* For a comprehensive review of the concept of covenant marriage and related state legislation, see Lynne Marie Kohm, *A Comparative Survey of Covenant Marriage Proposals in the United States*, 12 REGENT U. L. REV. 31 (1999); Samuel Pyeatt Menefee, *The "Sealed Knot": A Preliminary Bibliography of "Covenant Marriage,"* 12 REGENT U. L. REV. 145 (1999). Other states have considered covenant marriage legislation as well. *See* James L. Musselman, *What's Love Got to Do with It? A Proposal for Elevating the Status of Marriage by Narrowing Its Definition, While Universally Extending the Rights and Benefits Enjoyed by Married Couples*, 16 DUKE J. GENDER L. & POL'Y 37 (2009); Daniel W. Olivas, Comment, *Tennessee Considers Adopting the Louisiana Covenant Marriage Act: A Law Waiting to Be Ignored*, 71 TENN. L. REV. 769 (2004). For another view on marriage-strengthening efforts, see James Herbie DiFonzo, *Customized Marriage*, 75 IND. L.J. 875 (2000).

[90] *See About Us*, ALA. POL'Y INST., www.alabamapolicy.org/about.php (last visited Oct. 18, 2012).

[91] *See infra* Table A.

[92] *See infra* Table B.

[93] *See infra* Table C.

[94] *See infra* Table D.

Alaska

In 2006, Alaska touted the federal TANF award to assist families,[95] and it appears the state had some movement to promote a healthy-marriage initiative in 2004 through its Department of Public Assistance.[96] Also, some efforts for strengthening marriages among Native Americans were put forth in 2008.[97] Our research, however, did not reveal any other relevant initiatives to report. Since 2007, Alaska had a 23% decrease in TANF expenditures,[98] households had a 105% increase in annual SNAP costs,[99] and the state had a 10% increase in food costs for WIC.[100] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Alaska is $274,886,637.[101]

Arizona

Arizona adopted covenant-marriage legislation in 1998 in an effort to strengthen marriage.[102] The Center for Arizona Policy advocates implementation of family-strengthening policies.[103] During the past decade, Arizona has also offered financial-literacy services in Phoenix through its Department of Human Services, mostly designed to educate residents on using their Earned Income Tax Credit refunds to pay off

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[95] *See* Clay Butcher, *Welfare Reform Reauthorized*, DPAWEB (Feb. 13, 2006, 3:19 PM), http://dpaweb.hss.state.ak.us/node/373; *see also* OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, U.S. DEP'T OF HEALTH & HUMAN SRVS., CHARACTERISTICS OF AMERICAN INDIANS AND ALASKA NATIVES PARTICIPATING IN TEMPORARY ASSISTANCE FOR NEEDY FAMILIES PROGRAMS 1–6 (2009), *available at* http://aspe.hhs.gov/hsp/09/AI-NA-TANF/rb.pdf.

[96] *See* Clay Butcher, *My Turn: Healthy Relationships Help Alaska's Children*, DPAWEB (Sept. 9, 2004, 11:18 AM), http://dpaweb.hss.state.ak.us/node/300; *see also* ALASKA DEP'T OF HEALTH & SOCIAL SERVS., HEALTHY MARRIAGE INITIATIVE PROJECTS HELP STRENGTHEN MARRIED TWO PARENT FAMILIES (2005), *available at* http://www.hss.state.ak.us/press/2005/pdf/pr071205healthymarriagesfactsheet.pdf.

[97] *Native American Healthy Marriage Initiative,* U.S. DEPT. OF HEALTH & HUM. SERVS., http://www.hhs.gov/grantsforecast/cfda/employment/job/acf37.html (last visited Sept. 1, 2012).

[98] *See infra* Table A.

[99] *See infra* Table B.

[100] *See infra* Table C.

[101] *See infra* Table D.

[102] ARIZ. REV. STAT. ANN. §§ 25-901 to -906 (2011); *see also* CTR. FOR ARIZ. POLICY, HOW TO: PROMOTE COVENANT MARRIAGE IN ARIZONA; ARIZ. SUPREME COURT, COVENANT MARRIAGE IN ARIZONA 1, *available at* http://www.supreme.state.az.us/dr/pdf/covenant.pdf.

[103] CTR. FOR ARIZ. POLICY, MARRIAGE AND FAMILY: WHY MARRIAGE MATTERS (2011), *available at* http://www.azpolicypages.com/wp-content/uploads/Marriage-Family_WhyMarriageMatters.pdf ("[The center] successfully supported legislation that requires marital status to be considered in adoption placements and establishes a preference for children to be adopted by a married man and woman when all other relevant factors are equal.").

debt and "potentially move toward economic stability."[104] Since 2007, Arizona had a 16% increase in TANF expenditures,[105] households had a 155% increase in annual SNAP,[106] and the state had a 27% increase in food costs for WIC.[107] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Arizona is $2,354,438,823.[108]

Arkansas

The National Extension Relationship and Marriage Education Network[109] started the Arkansas Healthy Marriage Initiative.[110] Past efforts include the 2006–2008 Marriage and Fatherhood Education for Arkansans project and the 2005–2006 Arkansas Healthy Marriage Study, both through the state's Cooperative Extension System.[111] Additionally, the Arkansas Family Council promotes family-strengthening public policies.[112] Since 2007, Arkansas had a 12% increase in TANF expenditures,[113] households had a 75% increase in annual SNAP costs,[114] and the state had a 32% increase in food costs for WIC.[115] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Arkansas is $1,097,417,263.[116]

California

The California Healthy Marriage Coalition has achieved significant results in marriage education and family strengthening by providing resources and tools for couples and families and by being awarded with

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[104] Heidi Goldberg, *Cities Visit Phoenix to Learn About Financial Education Programs*, NATION'S CITIES WKLY., Oct. 31, 2005, at 4, 4.

[105] *See infra* Table A.

[106] *See infra* Table B.

[107] *See infra* Table C.

[108] *See infra* Table D.

[109] *See* NAT'L EXTENSION RELATIONSHIP & MARRIAGE EDUC. NETWORK, WHO IS NERMEN?, *available at* http://www.nermen.org/documents/whoisnermen_web.pdf.

[110] *See State Initiatives – Arkansas*, NERMEN, http://www.nermen.org/StateInitiatives-Arkansas.php (last updated July 7, 2011) ("Arkansas Cooperative Extension is working with faith, university, and community partners across the state to improve the health of marriages by providing common vision, up to date research, and information on proven marriage resources."). We were unable to confirm these efforts and results in our research, which may simply mean the program is not well-publicized yet.

[111] *See id.*

[112] *About*, ARK. FAM. COUNCIL, https://familycouncil.org/?page_id=13 (last visited Oct. 18, 2012) (emphasizing, for instance, its success in "secur[ing] passage of a state law that prevents adoptive or foster children from being placed with unmarried couples").

[113] *See infra* Table A.

[114] *See infra* Table B.

[115] *See infra* Table C.

[116] *See infra* Table D.

large federal grants accordingly.[117] Another private program in California is the Family Independence Initiative ("FII"), a group founded by a researcher and adapted for a small group of struggling families.[118] "[I]ts approach is radically different from the American social service model. Although it is still quite small—working with a few hundred families—its results are so striking that the White House has taken notice."[119] FII provides "a structure for families that encourages the sense of control, desire for self-determination, and mutual support that have characterized the collective rise out of poverty for countless communities in American history"[120] in order to strengthen struggling families economically and socially. Similarly, the California Family Council is a private, not-for-profit, family-strengthening policy organization.[121] Since 2007, California had a 13% increase in TANF expenditures,[122] households had a 152% increase in annual SNAP costs,[123] and the state had a 51% increase in food costs for WIC.[124] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for California is $13,889,399,807.[125]

Colorado

Colorado participated in a demonstration for Healthy Marriage and Responsible Fatherhood with ACF,[126] developing a "Partner Up" program.[127] In 2008, Colorado received federal funding for the Promoting Responsible Fatherhood programs, which have yielded some fairly good results in terms of "increas[ing] father involvement through

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[117] *Mission & Purpose*, CAL. HEALTHY MARRIAGES COALITION, http://www.camarriage.com/home/index.ashx?nv=3 (last visited Oct. 18, 2012) (noting a 2006 federal grant of $2.4 million per year for marriage education).

[118] *See* STUHLDREHER & O'BRIEN, *supra* note 73, at 1–3.

[119] David Bornstein, *Out of Poverty, Family-Style*, N.Y. TIMES OPINIONATOR (July 14, 2011, 9:15 PM), http://opinionator.blogs.nytimes.com/2011/07/14/out-of-poverty-family-style/.

[120] *Id.*; *see also* STUHLDREHER & O'BRIEN, *supra* note 73, at 1.

[121] *About CFC*, CAL. FAM. COUNCIL, http://www.californiafamilycouncil.org/about-us (last visited Oct. 18, 2012) ("Our mission is to protect and promote Judeo–Christian principles in California's culture for the benefit of its families.").

[122] *See infra* Table A.

[123] *See infra* Table B.

[124] *See infra* Table C.

[125] *See infra* Table D.

[126] *See* PAMELA JOSHI ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., PILOTING A COMMUNITY APPROACH TO HEALTHY MARRIAGE INITIATIVES IN FIVE SITES: MINNEAPOLIS, MINNESOTA; LEXINGTON, KENTUCKY; NEW ORLEANS, LOUISIANA; ATLANTA, GEORGIA; AND DENVER, COLORADO, at ES-1, ES-6 (2010), *available at* http://www.acf.hhs.gov/sites/default/files/opre/piloting_five.pdf.

[127] *Id.* at ES-6.

relationship- and parenting-skills education."[128] The Colorado Department of Human Services launched the "Be There for Your Kids" campaign in 2007 to promote healthy parent stability and provide web resources and hotline support.[129] The private Colorado Family Institute offers public-policy guidance,[130] and Focus on the Family, a national, privately funded organization located in Colorado Springs, provides "help and resources for couples to build healthy marriages."[131] Since 2007, Colorado had a 66% increase in TANF expenditures,[132] households had a 146% increase in annual SNAP costs,[133] and the state had a 41% increase in food costs for WIC.[134] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Colorado is $1,133,294,089.[135]

Connecticut

Connecticut's Fatherhood Initiative is part of the national family-strengthening effort promoted by ACF.[136] Connecticut has also focused on child-support enforcement[137] and made efforts to lower expenditures for family programs as well as for other social services to women,

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[128] NAT'L RESPONSIBLE FATHERHOOD CLEARINGHOUSE, U.S. DEP'T OF HEALTH & HUMAN SERVS., RESPONSIBLE FATHERHOOD STATE PROFILE: COLORADO 1 (2008), *available at* http://www.coloradodads.com/UserFiles/File/NFclearinghouse%20colorado%20profile.pdf; *Colorado Promoting Responsible Fatherhood Initiative Releases Report Revealing Significant Gains in Paternal Involvement in the State*, FRESHINK (June 20, 2011, 2:27 PM) [hereinafter FRESHINK], *available at* http://www.csfreshink.com/group/oldcoloradocity/forum/topics/colorado-promoting-responsible-178 (noting that the Promoting Responsible Fatherhood Initiative "has helped thousands of fathers in the state be there for their kids").

[129] *See* THE LEWIN GRP., COLORADO'S PROMOTING RESPONSIBLE FATHERHOOD COMMUNITY ACCESS GRANT: WINTER 2011 EVALUATION REPORT, at iv, 17–18 (2011), *available at* http://www.coloradodads.com/UserFiles/File/s%20PRF%20Community%20Access%20Grant%20-%20Winter%202011%20Evaluation%20Report%202.3.11.pdf.

[130] *Mission*, COLO. FAM. INST., http://www.cofamily.org/mission/ (last visited Oct. 18, 2012) ("Our goal is to support families by restoring the foundational values essential for the wellbeing of society.").

[131] *About Focus on the Family*, FOCUS ON FAM., http://www.focusonthefamily.com/about_us.aspx (last visited Oct. 18, 2012).

[132] *See infra* Table A.

[133] *See infra* Table B.

[134] *See infra* Table C.

[135] *See infra* Table D.

[136] *See* JOHN S. MARTINEZ FATHERHOOD INITIATIVE OF CONN., TEACH LOVE INSPIRE: PROMOTING RESPONSIBLE FATHERHOOD 1 (2011), *available at* http://www.cga.ct.gov/coc/PDFs/fatherhood/2011_fatherhood_directory.pdf; *Promoting Responsible Fatherhood (PRF) Grant*, FATHERHOOD INITIATIVE CONN., http://www.ct.gov/fatherhood/cwp/view.asp?a=4122&q=481670&fatherhoodNav=| (last modified June 22, 2011).

[137] *See* S. 791, Jan. 2011 Sess. (Conn. 2011) ("To establish a network of private employers and other entities to help noncustodial parents meet their child support obligations.").

children, and families (in addition to other government services delivery).[138] The private Family Institute of Connecticut encourages implementation of "marriage strengthening projects, educational efforts, and research."[139] Our research, however, did not reveal any other relevant initiatives to report. Since 2007, Connecticut had only a 4% increase in TANF expenditures,[140] households had a 156% increase in annual SNAP costs,[141] but the state had only a 7% increase in food costs for WIC.[142] The conservative five-year cost of family fragmentation for TANF, SNAP, and WIC for Connecticut is $1,130,062,178.[143]

Delaware

Delaware has followed the model for building family financial stability by establishing several programs offering financial education to satisfy the work activity requirement for TANF recipients as well as programs promoting economic self-sufficiency by adopting "an economic self-sufficiency standard to calculate what it takes to raise a family without any public support."[144] Since 2007, Delaware had a 28% increase in TANF expenditures,[145] households had a 175% increase in annual SNAP costs,[146] and the state had a 52% increase in food costs for WIC.[147] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Delaware is $274,502,219.[148]

District of Colombia

Washington, D.C. was the other beneficiary of a 2008 federal grant for the strengthening of families and the father–child relationship.[149] Current research on funding for HMIs has indicated positive outcomes of marriage education, particularly for Washington D.C. residents.[150] The

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[138] *See* H.R. 5557, 2012 Reg. Sess. (Conn. 2012).

[139] *About FIC*, FAMILY INST. CONN., http://www.ctfamily.org/about.html (last visited Oct. 18, 2012).

[140] *See infra* Table A.

[141] *See infra* Table B.

[142] *See infra* Table C.

[143] *See infra* Table D.

[144] FAMILY STRENGTHENING POLICY CTR., NAT'L HUMAN SERVS. ASSEMBLY, INDIVIDUAL DEVELOPMENT ACCOUNTS: A TOOL FOR ACHIEVING FAMILY ECONOMIC SUCCESS 6 (2005), *available at* http://www.nassembly.org/fspc/documents/PolicyBriefs/Brief11.pdf.

[145] *See infra* Table A.

[146] *See infra* Table B.

[147] *See infra* Table C.

[148] *See infra* Table D.

[149] *See* FRESHINK *supra* note 128.

[150] Alan J. Hawkins et al., *Are Government-Supported Healthy Marriage Initiatives Affecting Family Demographics? A State-Level Analysis* (May 2012) (unpublished manuscript) (on file with the Regent University Law Review).

private Coalition for Marriage, Family and Couples Education is located in Washington, D.C. and focuses on making marriage education "user-friendly, affordable, and accessible."[151] Since 2007, the District of Columbia had a 45% increase in TANF[152] expenditures, households had a 121% increase in annual SNAP costs,[153] and the District of Colombia had a 31% increase in food costs for WIC.[154] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for the District of Columbia is $418,487,815.[155]

Florida

In 2003, Florida passed Senate Bill 480 to promote healthy family initiatives throughout the state,[156] but that program was abandoned in 2008 due to budgetary constraints.[157] Notwithstanding such budgetary constraints, help for low- and moderate-income families is available in Hillsborough and Pinellas Counties to offer tax preparation and educational assistance for families to encourage investment in safe housing and to eliminate debt.[158] Similarly, the Florida Family Policy Council advocates family-strengthening public policy.[159] Florida also "mandates relationship education for high-school students with the hope of helping youth set a positive trajectory toward a healthy marriage in the future."[160] Since 2007, Florida had a 7% increase in TANF

> Cumulative per capita funding for HMIs between 2005–2010 was positively associated with small changes in the percentage of married adults in the population and children living with two parents, and it was negatively associated with the percentage of children living with one parent, non-marital births, and children living in poverty.

Id. at 2.

[151] *See About the Coalition*, SMART MARRIAGES, http://www.smartmarriages.com/about_cmfce.html (last visited Oct. 18, 2012).

[152] *See infra* Table A.

[153] *See infra* Table B.

[154] *See infra* Table C.

[155] *See infra* Table D.

[156] FLA. STAT. ANN. § 383.0115 (West 2007) (creating the Commission on Marriage and Family Support Initiatives) (repealed 2011).

[157] OFFICE OF PROGRAM POLICY ANALYSIS & GOV'T ACCOUNTABILITY, THE FLA. LEGISLATURE, THE COMMISSION ON MARRIAGE AND FAMILY SUPPORT INITIATIVES DISBANDED DUE TO STATE BUDGET REDUCTIONS (2009), *available at* http://www.floridasunsetreviews.gov/UserContent/docs/File/Marriage%20and%20Family%20Support%20Initiatives.pdf.

[158] NAT'L HUMAN SERVS. ASSEMBLY, *supra* note 84, at 5.

[159] *Who We Are*, FLA. FAM. POL'Y COUNCIL, http://flfamily.org/who-we-are/ (last visited Oct. 18, 2012) ("Our mission is to strengthen Florida's families through public policy education, issue research, and grassroots advocacy.").

[160] Alan J. Hawkins et al., *Recent Government Reforms Related to Marital Formation, Maintenance, and Dissolution in the United States: A Primer and Critical Review*, 8 J. COUPLE & RELATIONSHIP THERAPY 264, 266–67 (2009).

expenditures,[161] households had a massive 268% increase in annual SNAP costs,[162] and the state had a 22% increase in food costs for WIC.[163] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Florida is $6,094,667,526.[164]

Georgia

The Georgia Family Council ("GFC"), a private, not-for-profit organization,[165] led the way in family, marriage, and fatherhood initiatives long before it provided the impetus to the 2008 Report.[166] Before the release of the 2008 Report, the GFC initiated the Georgia Healthy Marriage Initiative, partnering with Georgia's Department of Human Services to secure state funding for marriage education and to develop strategies for providing fragmented families with services and resources.[167] The GFC took the lead with a host of state agencies involved in the project.[168] Pivotal in this effort was the community of

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[161] *See infra* Table A.

[162] *See infra* Table B.

[163] *See infra* Table C.

[164] *See infra* Table D.

[165] *See* JOSHI ET AL., *supra* note 126, at ES-5.

[166] *See, e.g.*, Randy Hicks, *Mr. President, Please Tell the Whole Story*, GA. FAM. COUNCIL, http://www.georgiafamily.org/press/column/mr-president-please-tell (last visited Oct. 18, 2012) (discussing the message of marriage as essential to the message of healthy fatherhood); *see also* Telephone Interview with Benjamin Scafidi, *supra* note 16.

[167] *See* JOSHI ET AL., *supra* note 126, at ES-5, 5-3, 5-12. See *id.* at 5-5 fig. 5-1, for a flow chart illustrating the partnership and its objectives.

[168] HHS describes the efforts of GFC:

> The Georgia Healthy Marriage Initiative (GAHMI) is a first-time partnership between the Georgia Department of Human Services (DHS), Division of Child Support Services (DCSS), and the Georgia Family Council (GFC), which is based in Atlanta. The GFC is a nonprofit research and education organization that engages in family-focused public policy development and advocacy, disseminates information about marriage and families in the media, and develops community coalitions and organizational capacity focused on healthy marriage and relationship educational services. The GFC leads responsibility for carrying out the project.
>
> The GFC's approach to the Community Healthy Marriage Initiative (CHMI) program focused on developing a large-scale community saturation effort of healthy marriage and relationship (HMR) services in multiple counties utilizing three core strategies:
>
> - using media outlets and public information campaigns, raise individual and community awareness about family issues, such as the negative consequences of divorce and out-of-wedlock births;
> - coordinating and building capacity among local communities to provide HMR educational activities known as the "My Thriving Family" program; and
> - building a network of certified HMR trainers.

faith-based participants.[169] In addition, the state court system has implemented policies to help fragmented families. In 2006, the Georgia Supreme Court, then under the leadership of Chief Justice Leah Ward Sears, established the Georgia Supreme Court Commission on Children, Marriage and Family Law, to deal more effectively and comprehensively with broken families in the judicial context.[170] Since 2007, Georgia had a 19% increase in TANF expenditures,[171] households had a 157% increase in annual SNAP costs,[172] and the state had a 53% increase in food costs for WIC.[173] The conservative five-year cost of family fragmentation in TANF, SNAP, and WIC for Georgia is $4,003,132,943.[174]

Hawaii

Established in 2003,[175] Hawaii's Commission on Fatherhood operates without any government funding and provides numerous resources to promote healthy families.[176] The not-for-profit Hawaii Family Forum encourages implementation of family-strengthening public policy.[177] Since 2007, Hawaii held the line on TANF costs with a 0.3% decrease in TANF expenditures,[178] but households had a 164% increase in annual SNAP costs,[179] and the state had an 8% increase in

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> Reflecting the GFC philosophy that "there is no one-size-fits-all approach" to HMR service delivery, the GAHMI emphasizes tailoring initiatives to reflect community needs.

Id. at 5-1 (footnotes omitted). Atlanta and several surrounding Georgia counties were targeted communities. *Id.* at 5-3.

[169] *Id.* at 5-13 tbl.5-2.

[170] Leah Ward Sears, *The "Marriage Gap": A Case for Strengthening Marriage in the 21st Century*, 82 N.Y.U. L. REV. 1243, 1263 (2007). These types of court-affiliated programs are very likely to produce positive results. *See generally* Tamara A. Fackrell et al., *How Effective are Court-Affiliated Divorcing Parents Education Programs? A Meta-analytical Study*, 49 FAM. CT. REV. 107 (2011) (noting that, given the success of divorcing-parents education programs, "we probably know enough to justify continuing and even increasing support for this recent social policy innovation").

[171] *See infra* Table A.

[172] *See infra* Table B.

[173] *See infra* Table C.

[174] *See infra* Table D.

[175] H.R. 689, 26th Leg. (Haw. 2011).

[176] *See* HAWAII COMMISSION ON FATHERHOOD, http://hawaii.gov/dhs/fatherhood/ (last visited Sept. 8, 2012).

[177] HAW. FAM. FORUM, http://www.hawaiifamilyforum.org/ (last visited Oct. 18, 2012) ("Our Mission is to strengthen and defend Hawaii's families . . . by mobilizing Hawaii's Christian churches and people of good will through research, education and communication.").

[178] *See infra* Table A.

[179] *See infra* Table B.

food costs for WIC.[180] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Hawaii is $649,633,231.[181]

Idaho

The not-for-profit Cornerstone Family Council in Idaho works "to provide . . . up-to-date resources that target issues affecting the family,"[182] but our research did not reveal any relevant initiatives to report. Since 2007, Idaho had a strong 47% decrease in TANF expenditures;[183] households, however, had the highest increase in SNAP expenditures at a shocking 277% increase,[184] and the state had a 37% increase in food costs for WIC.[185] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Idaho is $402,577,760.[186]

Illinois

The Illinois legislature made some comprehensive amendments to several state acts for more efficient and economical delivery of social services, particularly to children.[187] The private, not-for-profit Illinois Family Institute "works to reduce the[] factors that threaten family stability and strives to create a political and social environment where families can thrive and prosper."[188] Similarly, the Illinois Fatherhood Initiative is a private organization "promoting responsible fatherhood."[189] Since 2007, Illinois had an 11% increase in TANF expenditures,[190] households had a 91% increase in annual SNAP costs,[191] and the state had a 27% increase in food costs for WIC.[192] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Illinois is $4,804,827,434.[193]

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180 *See infra* Table C.

181 *See infra* Table D.

182 CORNERSTONE FAM. COUNCIL, http://www.cfcidaho.org/ (last visited Oct. 18, 2012).

183 *See infra* Table A. It is not clear what factors may have worked to bring about this substantial decrease.

184 *See infra* Table B. These substantial increases may have resulted from TANF decreases, but that connection could not be made for certain from our research.

185 *See infra* Table C.

186 *See infra* Table D.

187 *See, e.g.*, H.R. 5363, 97th Gen. Assemb., Reg. Sess. § 2 (Ill. 2012).

188 *About*, ILL. FAM. INST., http://illinoisfamily.org/about/ (last visited Oct. 18, 2012).

189 *Illinois Fatherhood Initiative*, ILL. DEP'T. HUM. SERVS., http://www.dhs.state.il.us/page.aspx?item=31981 (last visited Oct. 18, 2012).

190 *See infra* Table A.

191 *See infra* Table B.

192 *See infra* Table C.

193 *See infra* Table D.

Indiana

The Indianapolis Family Strengthening Coalition, funded by the city government, was designed to convene "Family Circles" to facilitate small community discussions on family strength in order to support health, safety, community engagement, and financial security for families.[194] The ACF helped establish a Fatherhood Collaboration Network.[195] The Indiana Family Institute, a private not-for-profit organization,[196] which has led the way on strengthening family policy in Indiana with the *Hoosier Family Fragmentation* report,[197] has been endorsed by the state of Indiana as a "collaborative partner" in administering the state's federally funded Healthy Marriages program since 2008.[198] Since 2007, Indiana had a 17% decrease in TANF expenditures,[199] households had a 105% increase in annual SNAP costs,[200] and the state had a 36% increase in food costs for WIC.[201] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Indiana is $2,029,611,213.[202]

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[194] NAT'L HUMAN SERVS. ASSEMBLY, *supra* note 84, at 6.

[195] *See* NOTES ON THE FATHERHOOD COLLABORATION NETWORK CALL – JULY 18, 2006, at 3–4 (2006), *available at* http://www.opnff.net/Files/Admin/Notes%20for%20July%2018%202006%20Collaboration%20Call.pdf.

[196] *See* IND. FAMILY INST., INDIANA FAMILY REPORT 12.

[197] IND. FAMILY INST., HOOSIER FAMILY FRAGMENTATION: IMAGINE INDIANA WITH STRONGER FAMILIES AND A STRONGER ECONOMY (2010), *available at* www.hoosierfamily.org/docs/Final-Report-4-30-10.doc. This very thorough task force report is complete with graphs, charts, statistics, findings, collaboration suggestions, state policy recommendations, and recommendations for the Indiana Family Institute to undertake; it was rendered almost in direct response to the 2008 Report and made some pointed suggestions for state government in the face of family fragmentation:

> We suggest that because the bureaucracy to-date has compartmentalized social service programs and spending to certain committees, commissions, or departments and fiscal policy issues to others . . . this de-coupling effect has thwarted a complete picture as to the decimation of both families and the budget. We also do not adequately see the impact on families and children when we have allowed issues of political correctness to block discussion of one of the most fundamental reasons these programs are necessary: couples who have children do not marry or stay married. It is a costly denial on not just taxpayer wallets but Hoosier hearts.

Id. at 8. The report proffers that government programs like ACF have operated to further fragmented families. *See id.*

[198] DCS GRANTS, http://www.in.gov/dcs/2873.htm (last visited Oct. 18, 2012).

[199] *See infra* Table A.

[200] *See infra* Table B.

[201] *See infra* Table C.

[202] *See infra* Table D.

Iowa

The Iowa Family Policy Center, established by the Family Leader,[203] appears to be the only active and relevant initiative in the state and educates in family breakdown.[204] The center receives federal funds for its work on marriage in a program called "Marriage Matters."[205] The center also has created the Iowa Family PAC to help elect pro-family state officials.[206] Since 2007, Iowa had a 25% increase in TANF expenditures,[207] households had a 113% increase in annual SNAP costs,[208] and the state had a 19% increase in food costs for WIC.[209] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Iowa is $876,553,765.[210]

Kansas

The Kansas Healthy Marriage Initiative is part of the Kansas Family Strengthening Coalition, a grassroots movement to "better support and improve the adult relationships that children depend on for positive futures."[211] In 2011, Governor Sam Brownback and executives at the Kansas Department of Social and Rehabilitation Services shared marriage program ideas to strengthen marriage and cut divorce rates,[212] revealing that Kansas is at the beginning of a road toward family initiatives to decrease family-fragmentation costs.[213] Since 2007, Kansas

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[203] *See Iowa Family Policy Center (IFPC)*, FAM. LEADER, http://www.thefamilyleader.com/inside-tfl/ifpc (last visited Oct. 18, 2012).

[204] *Id.*

[205] MARRIAGE MATTERS, http://www.healthy-marriage.com/ (last visited Oct. 18, 2012). The IFPC received over $3 million in federal funds for its work. *Tracking Accountability in Government Grants System*, DEP'T HEALTH & HUM. SERVS., http://taggs.hhs.gov/RecipInfo.cfm?SELEIN=LCYqVy0%2FPF5KQzxfWFFaOEsK (last visited Oct. 18, 2012).

[206] *See Iowa Family PAC*, FAM. LEADER, http://www.thefamilyleader.com/inside-tfl/iowa-family-pac (last visited Oct. 18, 2012).

[207] *See infra* Table A.

[208] *See infra* Table B.

[209] *See infra* Table C.

[210] *See infra* Table D.

[211] *About the Coalition*, KAN. FAM. STRENGTHENING COALITION, http://www.kansasfamilycoalition.org/about-the-coalition (last visited Oct. 18, 2012).

[212] Tim Carpenter, *Brownback Program Promotes Marriage*, TOPEKA-CAPITAL J. (July 2, 2011, 5:37 PM), http://cjonline.com/news/2011-07-02/brownback-program-promotes-marriage.

[213] On July 1, 2012, Kansas reorganized its Department for Social and Rehabilitation Services, renaming it the "Department for Children and Families." KAN. DEP'T FOR CHILDREN & FAMILIES, DEPARTMENT FOR CHILDREN AND FAMILIES FACT SHEET (2012) (on file with Regent University Law Review); KAN. DEP'T FOR CHILDREN & FAMILIES, DEPARTMENT FOR CHILDREN AND FAMILIES: MISSION (on file with the Regent University Law Review).

had a 46% increase in TANF expenditures,[214] households had a 135% increase in annual SNAP costs,[215] and the state had a 31% increase in food costs for WIC.[216] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Kansas is $678,390,943.[217]

Kentucky

Kentucky's Bluegrass Healthy Marriage Initiative ("BHMI") "is a . . . partnership between the University of Kentucky's (UK) Department of Family Studies, the Kentucky Cabinet of Health and Family Services' (CHFS) Department of Income Support (DIS) Division of Child Support Enforcement (CSE)," and IDEALS of Kentucky, a nationally known "marriage education provider," and has been heralded as a national model to some extent.[218] "The BHMI [aims] to improve family stability and child well-being by increasing access to marriage and relationship education, promoting awareness of the importance of healthy marriages and relationships among a coalition of community organizations, and improving child-support outcomes among program participants."[219] BHMI works with targeted families to develop strategies for strengthening those families within their communities rather than reacting to the crisis of an individual family.[220] The Kentucky Marriage Movement, a private actor in the state, is also taking the initiative to strengthen marriages and the institution of marriage.[221] Since 2007, Kentucky had a 22% increase in TANF expenditures,[222] households had an 87% increase in annual SNAP costs,[223] and the state had only a 4% increase in food costs for WIC.[224] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Kentucky is $1,886,020,365.[225]

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[214] *See infra* Table A.

[215] *See infra* Table B.

[216] *See infra* Table C.

[217] *See infra* Table D.

[218] *See* JOSHI ET AL., *supra* note 126, at 3-1 to -23.

[219] *Id.* at ES-3.

[220] *Id.* at 3-22. These families were connected to the local police force and local National Guard civil servants. *Id.*

[221] *About*, KY. MARRIAGE MOVEMENT, http://kentuckymarriage.org/about/ (last visited Oct. 18, 2012) (explaining its mission to "serve couples, church and community leaders with the resources to strengthen marriage and reduce divorce and out-of-wedlock pregnancies").

[222] *See infra* Table A.

[223] *See infra* Table B.

[224] *See infra* Table C.

[225] *See infra* Table D.

Louisiana

Louisiana's Healthy Marriage and Responsible Fatherhood Community Demonstration Initiative participated in the ACF-sponsored program, Families Matter!, which provides low-income individuals with family-strengthening services through marriage and relationship education.[226] "Based on research indicating that children in two-parent families have a lower incidence of childhood poverty, the [Families Matter!] educational program . . . was designed to improve relationships and family stability in low-income families."[227] Louisiana's Department of Children and Families has submitted a funding request for commencing this program.[228] In addition, the private, not-for-profit Louisiana Family Forum works on "issues affecting the family through research, communication and networking."[229] Since 2007, Louisiana had a 46% increase in TANF expenditures,[230] households had an 86% increase in annual SNAP costs,[231] and the state had a 41% increase in food costs for WIC.[232] The conservative five-year cost of family

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[226] *See* JOSHI ET AL., *supra* note 126, at 4-1.

> The Louisiana Healthy Marriage and Responsible Fatherhood Community Demonstration Initiative is a first-time partnership between the Louisiana Department of Social Services (DSS), Office of Family Support (OFS), Support Enforcement Services (SES), and Total Community Action (TCA) of New Orleans, a nonprofit community-based agency providing multiple services to low-income families. Families Matter! (FM), TCA's healthy marriage and education program, uses a case management model to provide two principal services: (1) healthy marriage and relationship (HMR) educational classes for mothers, fathers, and couples with incomes below the Federal poverty line and (2) access to TCA's comprehensive services and referrals.

Id.

[227] *Id.* In 2005, Hurricane Katrina forced the program to shut down for over a year. *Id.* at 4-2.

[228] *NGO Funding Request*, LA. ST. LEGISLATURE, http://www.legis.state.la.us/Ngo/NgoDoc.aspx?NgoId=342&search (last visited Oct. 18, 2012).

> Families Matter! Is [sic] a community demonstration project whose primary objective is to create a program and to continue providing services in the area that supports healthy relationships and healthy marriages, as well as, promote responsible fatherhood which will help ensure youths receive parental emotional support necessary for proper development and the financial support to which they are entitled. The overall goal is to increase the involvement of fathers and mothers in the emotional development of their children to provide healthier connections with their fathers and reduce the risk of early parenting, poor academic achievement, substance abuse, and juvenile delinquency.

Id.

[229] *About*, LA. FAM. F., http://www.lafamilyforum.org/about/ (last visited Oct. 18, 2012).

[230] *See infra* Table A.

[231] *See infra* Table B.

[232] *See infra* Table C.

fragmentation of TANF, SNAP, and WIC for Louisiana is $2,148,942,689.[233]

Maine

Maine implemented a pilot program to adopt a Children's Cabinet and has worked to eliminate confusion and duplication over child and family welfare services.[234] Similarly, the Christian Civic League of Maine advocates family-strengthening public policy.[235] Our research, however, did not reveal any relevant marriage initiatives to report.[236] Since 2007, Maine had a 27% increase in TANF expenditures,[237] households had a 124% increase in annual SNAP costs,[238] and the state had a 19% increase in food costs for WIC.[239] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Maine is $589,978,032.[240]

Maryland

The private, not-for-profit Maryland Family Alliance advocates public policy to strengthen families.[241] The City of Baltimore has established some programs designed to assist families in homeownership stability.[242] Although our research did not reveal any relevant marriage

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[233] *See infra* Table D.

[234] NGA CTR. FOR BEST PRACTICES, A GOVERNOR'S GUIDE TO CHILDREN'S CABINETS 13 (2004), *available at* http://www.nga.org/files/live/sites/NGA/files/pdf/0409GOVGUIDECHILD.pdf.

[235] *About the League*, CHRISTIAN CIVIC LEAGUE ME., http://www.cclmaine.org/about-the-league/ (last visited Aug. 22, 2012) (endeavoring "to bring a Biblical perspective to public policy issues" to support "the preservation of the family and Christian family values").

[236] Maine's marriage initiatives were all focused on and consumed with deciding whether to legalize gay marriage; the legislature passed a "gay marriage bill" in 2009 that was eventually overturned. The debate continues to consume Maine marriage energy. *See* Clarke Canfield, *Obama's Support for Same-Sex Marriage Adds Fuel to Debate*, BANGOR DAILY NEWS (May 18, 2012, 3:42 PM), http://www.bangordailynews.com/2012/05/18/politics/obamas-support-for-same-sex-marriage-adds-fuel-to-debate/. For a review of what Maine is considering regarding marriage in the 2012 election, see Lynne Marie Kohm, *Marriage and Grassroots Democracy in 2012*, JURIST (June 26, 2012), http://www.jurist.org/forum/2012/06/lynne-kohm-marriage-referendum.php.

[237] *See infra* Table A.

[238] *See infra* Table B.

[239] *See infra* Table C.

[240] *See infra* Table D.

[241] *About Us*, MD. FAM. ALLIANCE, http://www.mdfamilies.org/about/index.html (last visited Oct. 18, 2012).

[242] These programs were the Employee Homeownership Program, the Healthy Neighborhoods Initiative, and the Live Near Your Work Program. NAT'L HUMAN SERVS. ASSEMBLY, *supra* note 84, at 4.

initiatives to report,[243] Maryland proposed legislation designed to encourage couples to seek premarital counseling.[244] Since 2007, Maryland had a 7% increase in TANF expenditures,[245] households had a 190% increase in annual SNAP costs,[246] and the state had a 52% increase in food costs for WIC.[247] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Maryland is $1,569,619,542.[248]

Massachusetts

The Massachusetts Department of Public Health has some family initiatives but none that deal with family-fragmentation issues.[249] The Massachusetts Family Institute, however, is dedicated to strengthening families.[250] Since 2007, Massachusetts had a 7% increase in TANF expenditures,[251] households had a 174% increase in annual SNAP costs,[252] and the state had a 7% increase in food costs for WIC.[253] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Massachusetts is $2,096,000,653.[254]

Michigan

The Michigan Family Forum, a private organization promoting public policy to strengthen families in Michigan, encourages responsible fatherhood[255] and advocates legislation to strengthen and encourage

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[243] Maryland is currently debating the definition of marriage and its constitutional protection, similar to Maine in 2009. *See* Rebecca Berg, *In Maryland, Gay Marriage Seeks a 'Yes' at the Polls*, N.Y. TIMES, Aug. 26, 2012, at N16. For a review of what Maryland is considering regarding marriage in the 2012 election, see Kohm, *supra* note 236.

[244] H.D. 57, 2000 Leg., Reg. Sess. (Md. 2000); *see also* Hawkins et al., *supra* note 160.

[245] *See infra* Table A.

[246] *See infra* Table B.

[247] *See infra* Table C.

[248] *See infra* Table D.

[249] *See Family Initiatives*, HEALTH & HUM. SERVS., http://www.mass.gov/eohhs/consumer/community-health/family-health/special-health-needs/info-referral-support/family-initiatives.html (last visited Oct. 18, 2012).

[250] *See About MFI*, MASS. FAM. INST., http://www.mafamily.org/about-mfi/ (last visited Oct. 18, 2012) (focusing on such initiatives as strengthening marriage and "[p]roviding resources to help fathers meet the financial and emotional needs of their young families").

[251] *See infra* Table A.

[252] *See infra* Table B.

[253] *See infra* Table C.

[254] *See infra* Table D.

[255] *See Our Purpose: Promoting Responsible Fatherhood*, MICH. FAM. F., http://www.michiganfamily.org/fatherhood.html (last visited Oct. 18, 2012).

adoption of children by married couples.[256] Michigan has dedicated some TANF funds to strengthening marriage.[257] Since 2007, Michigan had a 12% increase in TANF expenditures,[258] households had a 130% increase in annual SNAP costs,[259] and the state had a 27% increase in food costs for WIC.[260] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Michigan is $4,753,524,945.[261]

Minnesota

Minnesota's legislative work on family strengthening is a model approach for other states. The research of Professor William J. Doherty at the University of Minnesota has resulted in some important proposed legislation affecting family policy.[262] Professor Doherty's research received national recognition in the Research Triangle Institute's 2010 report—regarding a community approach to healthy marriage initiatives—for its community approach:

> The Minnesota Healthy Marriage and Responsible Fatherhood (HMRF) Initiative's Family Formation Project (FFP) is a partnership between the University of Minnesota's Department of Family Social Science and the Minnesota Department of Human Services' Child Support Enforcement Division (CSED). The FFP aimed to improve child well-being, child support outcomes, and healthy marriages and relationships among couples who were unmarried when they enrolled in the program, were in committed relationships, had recently had a child and established paternity, and lived in the Minneapolis/St. Paul metropolitan area. The program developers chose to target unmarried parents identified as "fragile families" because, despite their initial interest in maintaining their relationships, once their child is born, research shows that these couples are at high risk of breaking up.[263]

The Second Chances Act, legislation to reduce unnecessary divorce and resulting family fragmentation, included three proposals to work toward that objective.[264] The first was a bill to require a mandatory one-year waiting period for divorce,[265] an effort to curb marital breakdown in

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[256] *See Purpose and Core Beliefs: Protecting Our Children*, MICH. FAM. F., http://www.michiganfamily.org/children.htm (last visited Sept. 15, 2012).

[257] Hawkins et al., *supra* note 160, at 269. It is unclear whether there has been a sustained commitment to these efforts.

[258] *See infra* Table A.

[259] *See infra* Table B.

[260] *See infra* Table C.

[261] *See infra* Table D.

[262] WILLIAM J. DOHERTY & LEAH WARD SEARS, INST. FOR AM. VALUES, SECOND CHANCES: A PROPOSAL TO REDUCE UNNECESSARY DIVORCE 42–48 (2011), *available at* http://www.americanvalues.org/pdfs/dl.php?name=second-chances.

[263] JOSHI ET AL., *supra* note 126, at ES-2 to -3.

[264] DOHERTY & SEARS, *supra* note 262, at 42–47.

[265] *Id.* at 42–44.

a move away from a unilateral rush to divorce.[266] The second proposal—which became state law on July 1, 2010—was a bill to establish a center preventing unnecessary divorce,[267] under the guidance and endorsement of the University of Minnesota, called the "Minnesota Couples on the Brink Project."[268] The third proposal was a bill on education requirements for divorcing parents designed to protect minor children by educating their divorcing parents on the harm of divorce to children and

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[266] John Crouch, *An Early Warning/Prevention System for Divorce: The Divorce Early Warning and Prevention Act*, AMS. FOR DIVORCE REFORM (June 24, 2005), http://www.divorcereform.org/CPAFull.html. This proposal discusses how it is "fundamentally different" from a waiting period and is designed to confront the culture of divorce. *Id.*

> Awaiting [sic] period is typically a burden placed by the government on people who have already decided to do something, in hopes that they will change their minds. It is between the government and the individual. In contrast, the early warning and prevention period is mostly a social and legal duty that married people owe to each other, not to the state. It is a notice requirement, like the widely-accepted norms of two weeks' notice for quitting a job, or one month's notice for eviction. Thus it has the potential to move from the statute books into the realm of common law that people carry around in their heads, that they think of as the rules of life. That is our best hope for using the law to influence decisions people make in their private lives, before they come into contact with the legal system.

Id.

This type of public policy is "intended to make individuals' decisions be more deliberate, considered, and informed." *Id.* Alteration of modern acceptable divorce structures also includes attempts to restore mutuality to the divorce bargain as a matter of fairness in the contractual dialogue of divorce. *See, e.g.*, Lynne Marie Kohm, *On Mutual Consent to Divorce: A Debate with Two Sides to the Story*, 8 APPALACHIAN J.L. 35, 35 (2008) (discussing the mutual contractual obligation in marriage).

[267] DOHERTY & SEARS, *supra* note 262, at 44.

[268] MINN. STAT. ANN. § 137.32 (West 2011). For a description of the legislation, see Sheri Stritof & Bob Stritof, *Minnesota Couples on the Brink Project*, ABOUTMARRIAGE.COM (May 26, 2010), http://marriage.about.com/b/2010/05/26/minnesota-couples-on-the-brink-project.htm. For a fair scholarly discussion of the bill, see *Minnesota "Couples on the Brink" Bill*, FAM. LAW PROF BLOG (Apr. 20, 2010), http://lawprofessors.typepad.com/family_law/2010/04/minnesota-couples-on-the-brink-bill.html. "Doherty . . . said that with better training for counselors and clergy, 10 percent of couples headed for divorce might be able to restore their marriages," while also noting that "[c]ouples with a history of domestic violence would not qualify" for the project. *Id.* It is also noteworthy that divorce lawyers in Minnesota would not back the project, arguing that "there are better uses for this public money. The Minnesota State Bar Association family lawyers narrowly voted against supporting Couples on the Brink, said Pamela Waggoner, chairwoman of the bar's family law section." *Id.* It is disingenuous not to recognize that family law and divorce lawyers tend to profit from family fragmentation, though it is laudable that apparently some (though not enough) in the Minnesota Bar saw the great public policy benefits to reducing family fragmentation through decreased divorce rates. This should cause one to consider honestly the inherent conflict of interest family law lawyers have with reducing state costs of family fragmentation due to their personal conflicting economic interest in the notions such projects present.

their families.[269] Combined with additional legislation designed to encourage couples to seek premarital counseling,[270] these efforts reveal that Minnesota is very active in promoting marriage legislation that strengthens families. The Minnesota Family Council also advocates family-strengthening public policy.[271] Since 2007, Minnesota's TANF expenditures decreased by 2%,[272] households had a 136% increase in annual SNAP costs,[273] and the state had a 24% increase in food costs for WIC.[274] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Minnesota is $1,228,507,696.[275]

Mississippi

Mississippi has a Healthy Marriage Initiative that supported legislation instituting a National Marriage Week.[276] The initiative also works in cooperation with the Department of Human Sciences at Mississippi State University to provide family-strengthening resources.[277] Mississippi proposed abstinence education designed to reduce unmarried pregnancy.[278] In addition, the Mississippi Center for

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[269] DOHERTY & SEARS, *supra* note 262, at 45–46. The proposed bill required divorcing parties to complete "a four-hour marriage dissolution education program." *Id.* at 45. This section was also adopted by the Minnesota Legislature and would have been effective January 1, 2013. *Id.* at 48. However, Minnesota Senate Bill S.F. 1161 was referred to the Judiciary and Public Safety Committee rather than passed. *See* S. 1161, 87th Leg. Sess., (Minn. 2011); *SF 1161 Status in Senate for Legislative Session 87*, MINN. STATE LEGISLATURE, https://www.revisor.mn.gov/revisor/pages/search_status/status_detail.php?b=Senate&f=SF1161&ssn=0&y=2012 (last visited Oct. 18, 2012).

[270] *See* DOHERTY & SEARS, *supra* note 262, at 38. For a review of what Minnesota is considering regarding same-sex marriage in the 2012 election, see Kohm, *supra* note 236.

[271] MINN. FAM. COUNCIL, IGNITE: AN ENDURING CULTURAL TRANSFORMATION (on file with Regent University Law Review) (promoting family strength through its primary tenets of education, legislation, and accountability).

[272] *See infra* Table A. The causal connection between Minnesota's marriage legislation and the small decrease in TANF may be related, but further monitoring over a greater length of time would be critical to support that surmise.

[273] *See infra* Table B.

[274] *See infra* Table C.

[275] *See infra* Table D.

[276] H.R. Res. 24, 2012 Reg. Sess. (Miss. 2012); *see also* MISS. HEALTHY MARRIAGE INITIATIVE, DEVELOPING STRONG COUPLES & HEALTHY CHILDREN IN MISSISSIPPI (2008), *available at* http://msucares.com/marriage/hmi/healthymarriagebrochure.pdf (explaining the mission of the Mississippi Healthy Marriage Initiative).

[277] *See* THE NAT'L HEALTHY MARRIAGE INST., MARRIAGE: INCREASE THE JOY (2006) (advising couples on how to strengthen and develop a happy marriage).

[278] H.R. 999, 2011 Reg. Sess. (Miss. 2011). *But see Mississippi Sex Education Bill: New Strategy to Address the State's Poor Adolescent Sexual and Reproductive Health Outcomes Maintains Ineffective Abstinence-Only-Until-Marriage Approach*, SEXUALITY INFO. & EDUC. COUNCIL U.S. (Feb. 2010), *available at* http://www.siecus.org/index.cfm?fuseaction=Feature.showFeature&featureid=1867&pageid=483&parentid=478 (describing the bill as convoluted and ineffective).

Public Policy promotes strong family policy initiatives.[279] Since 2007, Mississippi had a 44% increase in TANF expenditures,[280] households had a 108% increase in annual SNAP costs,[281] and the state had a 23% increase in food costs for WIC.[282] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Mississippi is $1,298,827,950.[283]

Missouri

The Missouri Healthy Marriage Initiative is sponsored by the University of Missouri and Missouri Families, providing resources to strengthen marriages and families.[284] Missouri's Department of Social Services sponsored a Strengthening Families initiative as part of the Center for the Study of Social Policy, mostly designed to protect children from child abuse.[285] Since 2007, Missouri had only a 3% increase in TANF expenditures,[286] households had a 93% increase in annual SNAP costs,[287] and the state had a 35% increase in food costs for WIC.[288] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Missouri is $2,132,161,200.[289]

Montana

The Montana Family Institute is a private organization dedicated to protecting and strengthening Montana's families.[290] Our research, however, did not reveal any other relevant initiatives to report. Since 2007, Montana had a 13% increase in TANF expenditures,[291] households

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279 NAT'L FATHERHOOD INITIATIVE & MISS. CTR. FOR PUB. POLICY, WITH THIS RING ... A SURVEY ON MARRIAGE IN MISSISSIPPI 1 (2005) (working to "improve the well-being of children by increasing the proportion that grow up with involved, responsible and committed fathers").

280 *See infra* Table A.

281 *See infra* Table B.

282 *See infra* Table C.

283 *See infra* Table D.

284 *Missouri Healthy Marriage Initiative*, MISSOURIFAMILIES.ORG, http://missourifamilies.org/marriage/index.htm (last updated May 10, 2010).

285 CTR. FOR THE STUDY OF SOC. POLICY, MISSOURI: STATE INITIATIVE PROFILE, *available at* http://www.cssp.org/reform/strengthening-families/national-network/Missouri-New-Template.pdf.

286 *See infra* Table A.

287 *See infra* Table B.

288 *See infra* Table C.

289 *See infra* Table D.

290 *Why Do We Exist?*, MONT. FAM. INST., http://institute.montanafamily.org/why-we-exist/ (last visited Oct. 18, 2012) ("Strong families get stronger when they are around other strong families. Therefore, we are building local communities of families across the state with the intention of connecting them through local events and online social media.").

291 *See infra* Table A.

had a 116% increase in annual SNAP costs,[292] and the state had a 21% increase in food costs from WIC.[293] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Montana is $278,496,678.[294]

Nebraska

Nebraska participates in the Families Matter Initiative sponsored by ACF[295] and operated by the Nebraska Division of Children and Family Services.[296] The Nebraska Children and Families Foundation is a federally funded private agency that protects against child abuse,[297] and the Fatherhood-Family Initiative is a private community-education initiative that promotes the role of fathers in families.[298] Both the Nebraska Family Forum and Nebraska Family First promote public policy initiatives for family strength.[299] Since 2007, Nebraska had a national high 134% increase in TANF expenditures,[300] households had a 103% increase in annual SNAP costs,[301] and the state had a 29% increase in food costs for WIC.[302] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Nebraska is $386,563,774.[303]

Nevada

Our research did not reveal any relevant family policy initiatives in Nevada. Since 2007, Nevada had a 35% increase in TANF

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[292] *See infra* Table B.

[293] *See infra* Table C.

[294] *See infra* Table D.

[295] *See* DIV. OF CHILDREN & FAMILY SERVS., DEP'T OF HEALTH & HUMAN SERVS., FAMILIES MATTER ACTION PLAN: 2010 THROUGH 2012, *available at* http://dhhs.ne.gov/children_family_services/Documents/Families_Matter_Action_Plan.pdf.

[296] *Id.*

[297] NEB. DEP'T OF HEALTH & HUMAN SERVS., NEBRASKA'S CHILDREN AND FAMILY SERVICES 5 YEAR PLAN (2009–2014), at 29–30 (2009), *available at* http://www.fosteringconnections.org/tools/assets/files/Nebraska-IV-B-Plan-2010-2014.pdf; *Who We Are*, NEB. CHILD. FAMS. FOUND., http://www.nebraskachildren.org/who/index.html (last visited Oct. 18, 2012).

[298] OMAHA MASONIC CMTY. CTR. FOUND., FATHERHOOD-FAMILY INITIATIVE, *available at* http://www.mwsite.org/omccf/Brochure.pdf.

[299] *See* Stephanie Morgan, *The GOALS Initiative: How All the Pieces Fit*, NEB. FAM. F. (Nov. 17, 2011), http://www.nebraskafamilyforum.org/2011/11/goals-initiative-how-all-pieces-fit.html; *About Family First*, FAM. FIRST, http://www.familyfirst.org/about-us (last visited Oct. 18, 2012).

[300] *See infra* Table A.

[301] *See infra* Table B.

[302] *See infra* Table C.

[303] *See infra* Table D.

expenditures,[304] households had a 272% increase in annual SNAP costs,[305] and the state had a national-high 85% increase in food costs for WIC.[306] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Nevada is $603,150,892.[307]

New Hampshire

New Hampshire's Child and Family Services is a private child welfare organization dedicated to protecting children and strengthening family life[308] through child-advocacy legislation and public policy.[309] The organization also promotes a Responsible Fatherhood Initiative.[310] The Couch Family Foundation is a private research-grant organization dedicated to family welfare in New Hampshire,[311] and Cornerstone Action advocates family-strengthening public policy.[312] Since 2007, New Hampshire had a 0.1% decrease in TANF expenditures,[313] households had a 160% increase in annual SNAP costs,[314] and the state had a 4% decrease in food costs for WIC.[315] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for New Hampshire is $258,125,286.[316]

New Jersey

The State of New Jersey Department of Children and Families sponsors a "Father Time" program to encourage responsible fatherhood,[317] and Compassion New Jersey, a faith-based organization,

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304 *See infra* Table A.

305 *See infra* Table B.

306 *See infra* Table C.

307 *See infra* Table D.

308 CHILD & FAMILY SERVS., ANNUAL REPORT 2010, at 2 (2010), *available at* http://www.cfsnh.org/downloads/AR2010.pdf.

309 *Advocacy: General Overview of NH Children's Lobby*, CHILD & FAM. SERVS., http://www.cfsnh.org/pages/advocacy/index.html (last visited Oct. 18, 2012).

310 CHILD & FAMILY SERVS., *supra* note 308, at 26.

311 *See Our Mission,* COUCH FAM. FOUND., http://www.couchfoundation.org/ourmission.html (last visited Oct. 18, 2012) (serving upper New England with a focus on New Hampshire and Vermont).

312 *See Mission,* CORNERSTONE ACTION, http://www.nhcornerstone.org/about/mission (last visited Oct. 18, 2012).

313 *See infra* Table A.

314 *See infra* Table B.

315 *See infra* Table C.

316 *See infra* Table D.

317 *See* Press Release, N.J. Dep't of Children & Families, Men Involved in Fatherhood Support Group Organize Annual Fishing Derby (May 24, 2011), *available at* http://www.state.nj.us/dcf/news/press/2011/approved/110524_fishingderby.html.

coordinates a fatherhood program.[318] Likewise, the New Jersey Family Policy Council encourages family-strengthening policy.[319] Since 2007, New Jersey had a 12% decrease in TANF expenditures,[320] households had a 151% increase in annual SNAP costs,[321] and the state had a 50% increase in food costs for WIC.[322] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for New Jersey is $2,002,722,681.[323]

New Mexico

New Mexico State University runs the Strengthening Families Initiative,[324] and New Mexico is one of at least sixteen states to establish a Children's Cabinet to increase the availability of child care to parents "working their way off welfare."[325] New Mexico established the Fatherhood Initiative Partnership coordinated by its Human Services Department in 2003.[326] In 2010, the New Mexico Fatherhood Forum partnered locally with the New Mexico Alliance for Fathers and Families to hold a federally sponsored forum at the University of New Mexico.[327] Since 2007, New Mexico had a 64% increase in TANF expenditures,[328] households had a 154% increase in annual SNAP costs,[329] and the state had a 2% decrease in food costs for WIC.[330] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for New Mexico is $875,294,005.[331]

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[318] *National Fatherhood Initiative Awards Compassion New Jersey the 24/7 Dad™ Program*, COMPASSION N.J., http://www.compassionnj.org/Compassion_New_Jersey,_Inc./Fatherhood.html (last visited Oct. 18, 2012).

[319] *About Us*, N.J. FAM. POL'Y COUNCIL, http://www.njfpc.org/know-more (last visited Oct. 18, 2012) ("Our mission is to intervene and respond to the breakdown that the traditional family, the cornerstone of a virtuous society, is experiencing.").

[320] *See infra* Table A.

[321] *See infra* Table B. There may be some connection between New Jersey's TANF decreases and SNAP increases, but that link requires further study.

[322] *See infra* Table C.

[323] *See infra* Table D.

[324] N.M. STATE UNIV., STRENGTHENING FAMILIES INITIATIVE, *available at* http://extension.nmsu.edu/documents/ces-insert_strengthening-families.pdf.

[325] NGA CTR. FOR BEST PRACTICES, *supra* note 234, at 7, 15.

[326] Jacqueline Baca, *Fatherhood Initiative Partnership Meeting*, N.M. FATHERHOOD INITIATIVE PARTNERSHIPS, Oct. 2003, at 1.

[327] N.M. FATHERHOOD FORUM, CULTIVATING A CULTURE OF VIBRANT FATHER ENGAGEMENT: NEW PERSPECTIVES FROM RURAL AMERICA 5 (2010), *available at* http://www.earlychildhoodnm.com/images/stories/file-upload/FullNMAFFReport.pdf.

[328] *See infra* Table A.

[329] *See infra* Table B.

[330] *See infra* Table C.

[331] *See infra* Table D.

New York

New York City's Department of Youth and Community Development implements a fatherhood initiative connected with the National Fatherhood Initiative.[332] The Mayor of the City has worked to promote child support responsibility among fathers,[333] and Forestdale Inc., a private foster-services agency, actively supports responsible fatherhood.[334] In addition, the New York State Office of Children and Family Services conducts a fatherhood-education program.[335] Since 2007, New York had a 7% increase in TANF expenditures,[336] households had a 130% increase in annual SNAP costs,[337] and the state had a 29% increase in food costs for WIC.[338] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for New York is $9,948,102,542.[339]

North Carolina

With an objective of preventing child abuse, the Durham Family Initiative collaborates with the Duke Center for Child and Family Policy.[340] Recent preliminary research findings by the Duke Center for Child and Family Policy show that economic standards act as a barrier to marriage, but not to fertility, when studying marriage and parenthood

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[332] Press Release, Nat'l Fatherhood Initiative, National Fatherhood Initiative Awarded Contract by New York City to Deliver Fatherhood Curriculum and Training (Sept. 27, 2011), *available at* http://www.fatherhood.org/Document.Doc?id=299.

[333] Press Release, Office of the Mayor, N.Y.C., Mayor Bloomberg and Human Resources Administration Commissioner Robert Doar Announce New York City Collected Record-Breaking $731 Million in Child Support in 2011 (Feb. 8, 2012), *available at* http://www.nyc.gov/html/hra/downloads/pdf/press_releases/2012/pr_february_2012/record_breaking_child_support_collection.pdf.

[334] Press Release, Forestdale, Inc., Forestdale's Fathering Initiative Celebrate 'Stepping Up' Graduation with Fathers, Friends and Staff (Mar. 27, 2012).

[335] N.Y. STATE OFFICE CHILD & FAMILY SERVS., ANNUAL PROGRESS AND SERVICES REPORT 46–47 (2010), *available at* http://ocfs.ny.gov/main/reports/New%20York%20State%202010%20APSR%20Final.pdf.

[336] *See infra* Table A.

[337] *See infra* Table B.

[338] *See infra* Table C.

[339] *See infra* Table D.

[340] *See* Kenneth A. Dodge et al., *The Durham Family Initiative: A Preventative System of Care*, 83 CHILD WELFARE 109, 109–10 (2004). As a part of the university-based Child and Family Policy Consortium, the Duke Center for Child and Family Policy has noted that since the inception of its work with the Durham Family Initiative, child maltreatment has decreased by 50%. Their collaboration provides support for children and families by fostering integration of public and private services to effectively promote child wellbeing. *Durham Family Initiative*, DUKE CTR. FOR CHILD & FAM. POL'Y, http://childandfamilypolicy.duke.edu/project_detail.php?id=27 (last visited Oct. 18, 2012).

in the lives of adolescents and young adults.[341] Likewise, the North Carolina Family Policy Council is a private, public-policy organization that promotes strengthening families.[342] Since 2007, North Carolina had a 27% increase in TANF expenditures,[343] households had a 144% increase in annual SNAP costs,[344] and the state had a 26% increase in food costs for WIC.[345] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for North Carolina is $3,235,401,330.[346]

North Dakota

The North Dakota Family Alliance works to strengthen marriage and families,[347] and the Dakota Fatherhood Initiative launched an annual summit conference in 2002.[348] North Dakota appears to be at the forefront of foster-care reform to keep children out of foster care with a family-preservation initiative.[349] Since 2007, North Dakota had a 3% decrease in TANF expenditures,[350] households had an 85% increase in annual SNAP costs,[351] and the state had a 9% increase in food costs for WIC.[352] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for North Dakota is $176,339,791.[353]

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[341] *Projects: Marriage and Parenthood in the Lives of Adolescents and Young Adults*, DUKE CTR. FOR CHILD & FAM. POL'Y, http://www.childandfamilypolicy.duke.edu/project_detail.php?id=19 (last visited Oct. 18, 2012).

[342] *About Us*, N.C. FAM. POL'Y COUNCIL, http://ncfpc.org/who.html (last visited Oct. 18, 2012) ("Our mission is to strengthen the family by educating North Carolinians on public policy issues that impact the family and equipping citizens to be voices of persuasion on behalf of traditional family values in their localities.").

[343] *See infra* Table A.

[344] *See infra* Table B.

[345] *See infra* Table C.

[346] *See infra* Table D.

[347] *NDFA Enhances Ability to Carry Out Mission*, NDFA NEWS (N.D. Family Alliance, Fargo, N.D.), Sept. 2010, at 1, 4.

[348] SEAN E. BROTHERSON, DAKOTA FATHERHOOD INITIATIVE, THE DAKOTA FATHERHOOD SUMMIT III: EXECUTIVE SUMMARY AND REPORT 2–5 (2003), *available at* http://www.nd.gov/dhs/services/childfamily/headstart/docs/dfs-3-executive-summary-report.pdf.

[349] *See* Andi Murphy, *ND Officials Aim to Restructure Foster Care System*, WDAY NEWS (Sept. 4, 2010, 11:35 AM), http://www.wday.com/event/article/id/38054/group/homepage/.

[350] *See infra* Table A.

[351] *See infra* Table B.

[352] *See infra* Table C.

[353] *See infra* Table D.

Ohio

The Ohio Family and Children First Cabinet Council "was created in 1993 to help families and their children by coordinating existing government services."[354] Montgomery County committed $440,000 of TANF funds in 2006 for community outreach and education to reduce predatory lending.[355] Ohio also has the Commission on Fatherhood designed to "enhance the well-being of Ohio's children by increasing and promoting involved, nurturing and responsible fatherhood,"[356] and Citizens for Community Values, based in Cincinnati, promotes family-strengthening public policy.[357] Since 2007, Ohio had a 21% decrease in TANF expenditures,[358] households had a 131% increase in annual SNAP costs,[359] and the state had a 7% increase in food costs for WIC.[360] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Ohio is $4,976,310,252.[361]

Oklahoma

Oklahoma has been a leader in family-strengthening through marriage initiatives and policy since 1999.[362] For example, the Oklahoma Marriage Initiative ("OMI")[363] has been endorsed and followed by the federal government in several ways.[364] It was funded through TANF

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[354] *See* OHIO FAMILY & CHILDREN FIRST CABINET COUNCIL, OHIO FAMILY AND CHILDREN FIRST CABINET COUNCIL, *available at* http://www.fcf.ohio.gov/dotAsset/12246.pdf.

[355] *History of the Project*, PREDATORY LENDING SOLUTIONS, http://www.mvfairhousing.com/PredatoryLendingSolutions_files/frame.htm (last visited Oct. 18, 2012).

[356] *See* OHIO COMM'N ON FATHERHOOD, REPORT TO THE COMMUNITY 1 (2011), *available at* http://fatherhood.ohio.gov/LinkClick.aspx?fileticket=liz4-IOjxIg%3D&tabid=68.

[357] *About Us*, CITIZENS FOR COMMUNITY VALUES, http://www.ccv.org/about-us/ (last visited Oct. 18, 2012) (focusing on efforts to "encourage and affect legislation that protects family[] and [to] oppose legislation that is harmful to those Judeo-Christian moral values upon which this country was founded").

[358] *See infra* Table A. This is a significant decrease that could warrant further study for causal connections with state policy.

[359] *See infra* Table B.

[360] *See infra* Table C.

[361] *See infra* Table D.

[362] *See* Rick Lyman, *Prison Marriage Classes Instill Stability*, N.Y. TIMES, Apr. 16, 2005, at A10 ("Perhaps no state program is as ambitious or multifaceted as the Oklahoma Marriage Initiative. . . .").

[363] *See* OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE OKLAHOMA MARRIAGE INITIATIVE 1–2 (2008), *available at* http://aspe.hhs.gov/hsp/06/omi/Guide/rb.pdf (discussing how Oklahoma's work is a pioneer in marriage initiatives).

[364] *Id.* at 1.

funds to support marriage-strengthening strategies[365] and has served as a model for many state and federal marriage initiatives.[366] With ACF assistance, the OMI has provided workshops on how other states can begin marriage initiatives.[367] Oklahoma has "dedicated noticeable amounts of TANF dollars to strengthening marriage,"[368] passing legislation designed to encourage couples to seek premarital counseling[369] and to foster better efficiency in benefits distribution.[370] Oklahoma has accomplished many of its objectives through public policy implementation foremost under the Oklahoma Department of Health and Human Services and by working with other agencies.[371] The OMI focus on marriage was based on a desire to make the State of Oklahoma "a more prosperous state."[372] Its programs are also educational in nature and are delivered in the form of workshops facilitated through pre-established public and private institutions.[373] Oklahoma allocated TANF funds toward these initiatives "to strengthen marriage and reduce divorce."[374] Such initiatives become accessible by making and sustaining significant programs.[375]

The Oklahoma Family Expectations program, an Oklahoma City-based service providing support to financially vulnerable families at the birth of a child, was also determined to be a national leader in family-policy impact, according to a national study on Building Strong Families.[376] Family Expectations, a program designed to provide "relationship skills education throughout the state," is administered by

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[365] *See* THE WELFARE PEER TECHNICAL ASSISTANCE NETWORK, OKLAHOMA MARRIAGE INITIATIVE WORKSHOP 4 (2003), *available at* https://peerta.acf.hhs.gov/pdf/ok_marriage2.pdf.

[366] *See id.* at 1.

[367] *See id.* at 1–2.

[368] Hawkins et al., *supra* note 160, at 269.

[369] *Id.* at 266–67.

[370] *See* THE WELFARE PEER TECHNICAL ASSISTANCE NETWORK, *supra* note 365.

[371] *Id.* The Oklahoma Department of Health and Human Services was part of a state consolidation effort promoting better economic efficiency in state agencies. *See* H.R. 1220, 53d Leg., 1st Sess. (Okla. 2011).

[372] *Issues in TANF Reauthorization: Building Stronger Families: Hearing Before the S. Fin. Comm.*, 107th Cong. 1 (2002) (statement of Howard H. Hendrick, Okla. Cabinet Sec'y of Health & Human Servs., and Dir., Okla. Dep't of Human Servs.).

[373] *See What We Do*, OKLA. MARRIAGE INITIATIVE, http://www.relationshipsok.com/what-we-do.php (last visited Oct. 18, 2012).

[374] Hawkins et al., *supra* note 160, at 267.

[375] *Id.*

[376] *See* Press Release, PRWeb, Rigorous Federal Study Shows Oklahoma's Family Expectations Program Strengthens New Parents' Relationships and Helps Families Stay Together (Aug. 27, 2010), *available at* http://www.prweb.com/pdfdownload/4428104.pdf.

the Oklahoma Department of Human Services.[377] Since 2007, Oklahoma had a 22% increase in TANF expenditures,[378] households had a 106% increase in annual SNAP costs,[379] and the state had a 19% increase in food costs for WIC.[380] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Oklahoma is $1,381,356,038.[381]

Oregon

The Black Parent Initiative supports black families in Portland, Oregon by encouraging educational excellence for their children.[382] Since 2007, Oregon had a 10% increase in TANF expenditures,[383] households had a 149% increase in annual SNAP costs,[384] and the state had a 24% increase in food costs for WIC.[385] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Oregon is $1,687,572,911.[386]

Pennsylvania

Pennsylvania has focused on economic initiatives to achieve family strength[387] and has a fatherhood initiative in seventeen counties.[388] The Pennsylvania Family Institute advocates for public policy to strengthen families.[389] Since 2007, Pennsylvania had a 19% increase in TANF expenditures,[390] households had a 110% increase in annual SNAP

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377 M. ROBIN DION ET AL., THE BUILDING STRONG FAMILIES PROJECT: IMPLEMENTATION OF EIGHT PROGRAMS TO STRENGTHEN UNMARRIED PARENT FAMILIES, at xvi (2010), *available at* http://www.mathematica-mpr.com/publications/PDFs/family_support/BSF_Final_Impl_Rpt.pdf.

378 *See infra* Table A.

379 *See infra* Table B.

380 *See infra* Table C.

381 *See infra* Table D.

382 *Our Work*, BLACK PARENT INITIATIVE, http://thebpi.org/work.html (last visited Oct. 18, 2012).

383 *See infra* Table A.

384 *See infra* Table B.

385 *See infra* Table C.

386 *See infra* Table D.

387 GOVERNOR'S TASK FORCE FOR WORKING FAMILIES, DOLLARS AND SENSE: REALISTIC WAYS POLICYMAKERS CAN HELP PENNSYLVANIA'S WORKING FAMILIES 7 (2005), *available at* http://www.pahouse.com/evans/newsletters/Governors-TaskForce-for-Families.pdf.

388 PA. CHILD WELFARE RES. CTR., PENNSYLVANIA FATHERHOOD INITIATIVE (2004), *available at* http://www.pacwcbt.pitt.edu/familycenters/FatherhoodOverview.pdf.

389 *About PFI*, PA. FAM. INST., http://www.pafamily.org/index.php?pID=6 (last visited Oct. 18, 2012).

390 *See infra* Table A.

costs,[391] and the state had a 53% increase in food costs for WIC.[392] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Pennsylvania is $4,035,892,088.[393]

Rhode Island

The State of Rhode Island's Office of Child Support Services has several fatherhood initiatives to educate and equip men for better fathering,[394] and the Rhode Island Council for Muslim Advancement has established a Healthy Families Initiative.[395] Since 2007, Rhode Island had a 7% increase in TANF expenditures,[396] households had a 207% increase in annual SNAP costs,[397] and the state had a 16% increase in food costs for WIC.[398] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Rhode Island is $417,408,285.[399]

South Carolina

Palmetto Family encourages implementation of family-strengthening public policy.[400] Similarly, the South Carolina Center for Fathers and Families is a faith-based, private organization supporting strong families through successful fatherhood engagement.[401] Since 2007, South Carolina had a 13% increase in TANF expenditures,[402] households had a 117% increase in annual SNAP costs,[403] and the state had a 33% increase in food costs for WIC.[404] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for South Carolina is $1,850,403,452.[405]

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391 *See infra* Table B.

392 *See infra* Table C.

393 *See infra* Table D.

394 *See Fatherhood Initiatives*, R.I. OFF. CHILD SUPPORT, http://www.cse.ri.gov/initiatives/fatherhood/ (last visited Oct. 18, 2012).

395 *See generally* HEALTHY FAMILIES INITIATIVE, http://healthyfamiliesinitiative.blogspot.com (last visited Sept. 5, 2012).

396 *See infra* Table A.

397 *See infra* Table B.

398 *See infra* Table C.

399 *See infra* Table D.

400 *See* PALMETTO FAMILY, SOUTH CAROLINA CULTURAL INDICATORS, *available at* http://www.palmettofamily.org/Indicators.pdf (discussing Palmetto Family's core values in light of cultural conditions in the state).

401 *About*, S.C. CENTER FOR FATHERS & FAMILIES, http://www.scfathersandfamilies.com/about/ (last visited Oct. 18, 2012).

402 *See infra* Table A.

403 *See infra* Table B.

404 *See infra* Table C.

405 *See infra* Table D.

South Dakota

The South Dakota Family Policy Council promotes public policy that strengthens families.[406] There was a Dakota Fatherhood Initiative in 2002,[407] and Fatherhood First is an active private, initiative connected with the National Fatherhood Initiative.[408] Since 2007, South Dakota had a 12% increase in TANF expenditures,[409] households had a 130% increase in annual SNAP costs,[410] and the state had a 45% increase in food costs for WIC.[411] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for South Dakota is $231,602,765.[412]

Tennessee

Tennessee passed legislation encouraging couples to seek premarital counseling.[413] In addition, the Family Action Council of Tennessee advocates family-strengthening public policy,[414] the Center for the Study of Social Policy has established the Strengthening Families initiative to prevent child abuse,[415] and the Greer Campaign is working in conjunction with the National Fatherhood Initiative on education in fatherhood responsibility.[416] Since 2007, Tennessee had a 68% increase in TANF expenditures,[417] households had a 104% increase in annual SNAP costs,[418] and the state had a 4% decrease in food costs for WIC.[419] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Tennessee is $2,872,307,831.[420]

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406 S.D. FAM. POL'Y COUNCIL, http://www.sdfamily.org/welcome (last visited Oct. 18, 2012).

407 BROTHERSON, *supra* note 348, at 2.

408 FATHERHOODFIRST.ORG, http://www.fatherhoodfirst.org/ (last visited Oct. 18, 2012).

409 *See infra* Table A.

410 *See infra* Table B.

411 *See infra* Table C.

412 *See infra* Table D.

413 Hawkins et al., *supra* note 160.

414 *Our Organization*, FAM. ACTION COUNCIL TENN., www.factn.org/about-us/ (last visited Sept. 1, 2012).

415 CTR. FOR THE STUDY OF SOC. POLICY, TENNESSEE: STATE INITIATIVE PROFILE, *available at* http://www.cssp.org/reform/strengthening-families/national-network/other-resources/Tennessee-New-Template.pdf.

416 *The Greer Campaign's Fatherhood Program*, GREER CAMPAIGN (Sept. 14, 2011), http://thegreercampaign.wordpress.com/2011/09/14/the-greer-campaigns-fatherhood-program/.

417 *See infra* Table A.

418 *See infra* Table B.

419 *See infra* Table C.

420 *See infra* Table D.

Texas

Texas allocated about one percent of unrestricted TANF funds toward "initiatives to strengthen marriage and reduce divorce," primarily through premarital education.[421] For example, in 2007, the Texas legislature passed legislation—funded by discretionary TANF funds—encouraging couples to seek premarital counseling by waiving the $60 marriage-license fee and the 72-hour waiting period for couples who participate in eight hours of premarital education by a state-approved counselor.[422] Furthermore, a Family Strengthening Summit was held in Texas that highlighted the work of pre-established state and federal programs focused on family strength and asset-building.[423] The Texas House of Representatives honored a delegation of the Texas Catholic Conference and Catholic Family Life Ministries for their work in building strong, healthy families.[424] Texas also has the Faithful Fathering Initiative, which is designed "to encourage and equip men to be faithful fathers."[425] Since 2007, TANF expenditures in Texas increased by 17%,[426] households had a 120% increase in annual SNAP costs,[427] and the state had a 10% increase in food costs for WIC.[428] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Texas is $8,316,723,945.[429]

Utah

From 2007 to 2011, Utah allocated about $750,000 per year in unrestricted TANF funds primarily to promote the use of premarital education services,[430] and it has "dedicated noticeable amounts of TANF dollars to strengthening marriage."[431] As part of Utah's Healthy Marriage Initiative, the Utah Commission on Marriage focuses on education and preparation in building strong and healthy marriages by working to "maintain two-parent families and prevent family

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421 Hawkins et al., *supra* note 160, at 267 (noting the allocation of about $7.5 million each year from 2007 to 2011 for this purpose).

422 H.R. 2685, 2007 Leg., 80th Reg. Sess. (Tex. 2007).

423 REGION VI FAMILY STRENGTHENING SUMMIT (2011), http://www.idaresources.org/servlet/servlet.FileDownload?file=0157000000019RaAAI.

424 *See* H.R. Res. 1149, 82d Leg. Sess. (Tex. 2011).

425 *About Us*, FAITHFUL FATHERING, http://www.faithfulfathering.org/ABOUT_US.htm (last visited Oct. 18, 2012) (defining "faithful fathers" as those "that prioritize physical presence, are engaged emotionally and lead spiritually by example").

426 *See infra* Table A.

427 *See infra* Table B.

428 *See infra* Table C.

429 *See infra* Table D.

430 Hawkins et al., *supra* note 160, at 267.

431 *Id.* at 269.

breakdown."[432] Another initiative is the Uplift Utah Families Foundation, which promotes solid parenting for strong families.[433] Prevent Child Abuse Utah is an initiative to strengthen families against child abuse from birth.[434] Moreover, the private, not-for-profit Foundation for Family Life promotes healthy families,[435] and the Fathers & Families Coalition of Utah is an affiliate of a national coalition designed to encourage fatherhood development.[436] Since 2007, Utah had a 36% increase in TANF expenditures,[437] households had a 201% increase in annual SNAP costs,[438] and the state had a 55% increase in food costs for WIC.[439] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Utah is $585,142,665.[440]

Vermont

A fairly new program, the Vermont Fatherhood Initiative, works to educate responsible fathers.[441] Also, Vermont's Department of Children and Families initiated the *Sibling Bill of Rights* for children in foster care to remain in sibling groups.[442] Since 2007, Vermont's TANF expenditures decreased by 0.04%,[443] households had a 142% increase in annual SNAP costs,[444] and the state had a 0.5% increase in food costs for

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[432] *About*, STRONGER MARRIAGE BLOG, http://utahmarriage.usu.edu/?page_id=2 (last visited Oct. 18, 2012).

[433] *Uplift Utah Families Foundation*, UTAH PTA, https://www.utahpta.org/uplift-families-foundation (last visited Oct. 18, 2012).

[434] *Healthy Families Utah*, PREVENT CHILD ABUSE UTAH, http://www.preventchildabuseutah.org/healthyfamiliesutah.html (last visited Oct. 18, 2012) (describing Utah's abuse prevention program, which is a part of the national Healthy Families America Initiative).

[435] *About Us*, FOUND. FOR FAM. LIFE, http://foundationforfamilylife.com/about.html (last visited Oct. 18, 2012).

[436] *About Us*, FATHERS & FAMILIES COALITION UTAH, http://utahfathersandfamilies.org/about-us.html (last visited Oct. 18, 2012).

[437] *See infra* Table A.

[438] *See infra* Table B.

[439] *See infra* Table C.

[440] *See infra* Table D.

[441] Press Release, Rep. Mike Mrowicki, Nov. 1 Vt. Fatherhood Conference (Sept. 28, 2011), *available at* http://vtdigger.org/2011/09/29/nov-1-vt-fatherhood-conference/print/; *see also Fatherhood Initiative of Central Vermont*, GOOD BEGINNINGS CENT. VT., http://centralvt.goodbeginnings.net/ (last visited Oct. 18, 2012).

[442] *DCF Signs Sibling Bill of Rights for Children & Youth in State Custody*, VT. DEP'T FOR CHILDREN & FAMS. (Apr. 4, 2012), http://dcf.vermont.gov/news_4/4/12.

[443] *See infra* Table A.

[444] *See infra* Table B.

WIC.[445] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Vermont is $222,809,577.[446]

Virginia

The Virginia Department of Social Services conducts a Strengthening Families Initiative to support responsible fatherhood and healthy families, marriages, and relationships.[447] The Virginia Family Strengthening and Fatherhood Initiative is sponsored by the Virginia Department of Social Services to demonstrate the integrated "need for participation, of every division and office in working towards strengthening families and father engagement."[448] Within this program, the Richmond Family and Fatherhood Initiative has been the leader among Virginia cities in examining the social and financial impact of father absence and family fragmentation.[449] The Family Foundation of Virginia is a private, public-policy organization involved in legislation to protect and strengthen families.[450] Since 2007, Virginia had a 16% increase in TANF expenditures,[451] households had a 142% increase in annual SNAP costs,[452] and the state had a 22% increase in food costs for WIC.[453] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Virginia is $1,783,957,782.[454]

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[445] *See infra* Table C. These numbers indicate that Vermont has unchanging levels of TANF and WIC compared to dramatic increases in SNAP expenditures.

[446] *See infra* Table D.

[447] VA. DEP'T. OF SOC. SERVS., VDSS STRENGTHENING FAMILIES INITIATIVE: OVERVIEW DOCUMENT (2011), *available at* http://www.dss.virginia.gov/files/about/sfi/intro_page/about/overview.pdf.

[448] *Virginia Department of Social Services (VDSS) Family Strengthening and Fatherhood Initiative (FSFI): Goals and Objectives,* VA. DEP'T SOC. SERVS., http://www.dss.virginia.gov/form/grants/cvs-10-067.html (follow "Attachment G" hyperlink) (last visited Oct. 18, 2012).

[449] *See* RICHMOND FAMILY & FATHERHOOD INITIATIVE, COST & SOLUTIONS TO FAMILY FRAGMENTATION & FATHER ABSENCE IN RICHMOND, VA (on file with the Regent University Law Review). Five cities have been targeted for state initiatives integrated with faith-based support for implementation of programs: Richmond, Alexandria, Norfolk, Petersburg, and Roanoke. The Child Advocacy Practicum of the Center for Global Justice, Human Rights and the Rule of Law at Regent University School of Law worked with the Virginia Department of Social Services to develop a model similar to the one in Richmond for the cities of Norfolk and Alexandria. This model is designed to assist the state in integrating resources and objectives with faith-based organizations in each city ready to work toward strengthening families and decreasing family fragmentation from father absence in their particular city.

[450] *About the Family Foundation of Virginia,* FAM. FOUND. VA., http://familyfoundation.org/about/ (last visited Oct. 18, 2012).

[451] *See infra* Table A.

[452] *See infra* Table B.

[453] *See infra* Table C.

[454] *See infra* Table D.

Washington

Washington State's Family Policy Council is a government arm partnering with Community Public Health and Safety Networks across the state to involve communities in finding ways to build thriving families.[455] Similarly, the Family Policy Institute of Washington promotes public policy that strengthens families.[456] Since 2007, Washington had a 45% increase in TANF expenditures,[457] households had a 167% increase in annual SNAP costs,[458] and the state had a 23% increase in food costs for WIC.[459] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Washington is $2,327,683,510.[460]

West Virginia

The Family Policy Council of West Virginia promotes public policy to strengthen families.[461] The West Virginia Department of Health and Human Resources established a Healthy Families Initiative to foster good marriages and parenting[462] and is connected with West Virginia University.[463] Since 2007, West Virginia had a 91% increase in TANF expenditures,[464] households had an 81% increase in annual SNAP costs,[465] and the state had a 25% in food costs for WIC.[466] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for West Virginia is $845,688,010.[467]

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[455] THE FAMILY POLICY COUNCIL, THE FAMILY POLICY COUNCIL—COMMUNITY NETWORK PARTNERSHIP EXPLAINED (2010), *available at* http://www.fpc.wa.gov/publications/PartnershipExplained2010.pdf.

[456] FAMILY POLICY INSTITUTE OF WASHINGTON (on file with the Regent University Law Review). Marriage is on the ballot in Washington in 2012. *See* Kohm, *supra* note 236.

[457] *See infra* Table A.

[458] *See infra* Table B.

[459] *See infra* Table C.

[460] *See infra* Table D.

[461] FAMILY POLICY COUNCIL OF W. VA., TRUTH. GRACE. VISION. 1, *available at* http://www.campaignsitebuilder.com/user/jeremydysgmailcom/download/Case%20Statement.pdf.

[462] *West Virginia Healthy Families Initiative*, W. VA. DEP'T HEALTH & HUM. RESOURCES, http://www.wvdhhr.org/bcf/family_assistance/WVHFI.asp (last visited Oct. 18, 2012).

[463] W. VA. UNIV. EXTENSION SERV., STRENGTHENING FAMILIES 2009 (2009), *available at* http://programplanning.ext.wvu.edu/2009_program_area_summaries (follow "Strengthening Families" hyperlink).

[464] *See infra* Table A.

[465] *See infra* Table B.

[466] *See infra* Table C.

[467] *See infra* Table D.

Wisconsin

The Wisconsin State Legislature proposed legislation providing for better public school curriculum regarding sex education, abstinence, "personal responsibility, and the positive connection between marriage and parenting."[468] Wisconsin Fathers for Children and Families works to encourage two-parent families,[469] and the Milwaukee Fatherhood Initiative has held annual summits and provides resources for male city residents to encourage fewer father-absent homes.[470] The Wisconsin Family Council is a public policy organization that promotes strengthening families.[471] Since 2007, Wisconsin had a 26% increase in TANF expenditures,[472] households had a 208% increase in annual SNAP costs,[473] and the state had a 25% increase in food costs for WIC.[474] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Wisconsin is $1,669,252,320.[475]

Wyoming

The Wyoming Healthy Marriage Initiative and the Strong Families, Strong Wyoming organization work to strengthen marriage and families.[476] In the past, Wyoming has participated with HHS's national fatherhood initiative.[477] Since 2007, Wyoming had a 69% increase in TANF expenditures,[478] households had a 110% increase in annual SNAP

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[468] S. 237, 2011–2012 Leg. (Wis. 2011). The proposed bill failed to pass. Assemb. 337, 2011–2012 Leg. (Wis. 2011).

[469] *Who We Are*, WIS. FATHERS FOR CHILD. & FAMILIES, http://www.wisconsinfathers.org (last visited Oct. 18, 2012). Wisconsin Fathers for Children and Families is connected with the National Center for Fathering. *Links*, FATHERS.COM, http://www.fathers.com/content/index.php?option=com_content&task=view&id=324&Itemid=131 (last visited Oct. 18, 2012).

[470] LISA LARSON & ERIN MALCOLM, PLANNING COUNCIL FOR HEALTH & HUMAN SERVS., THE 2009 MILWAUKEE FATHERHOOD SUMMIT: FEEDBACK RESULTS FROM SUMMIT PARTICIPANTS, at i (2010), *available at* http://www.milwaukeefatherhood.com/files/reports/2009_Fatherhood_Summit_Final_Report_REVISED_6-21-10.pdf.

[471] *Wisconsin Family Council*, WIS. FAM. ACTION, http://www.wifamilyaction.org/wifamilycouncil (last visited Oct. 18, 2012) (focusing on "informing Wisconsin citizens, churches and policymakers about important pro-family legislative and cultural issues").

[472] *See infra* Table A.

[473] *See infra* Table B.

[474] *See infra* Table C.

[475] *See infra* Table D.

[476] *See generally* WHMI STRONG FAMS. STRONG WYO., COUPLES: BUILD ON YOUR STRENGTHS!, *available at* http://www.wyofams.org/index_htm_files/WHMI%20Couples%20Brochure.pdf.

[477] *Around the Regions: Region 8, Wyoming*, U.S. DEP'T HEALTH & HUM. SERVS., http://fatherhood.hhs.gov/regions/region08.shtml#WY (last visited Oct. 18, 2012).

[478] *See infra* Table A.

costs,[479] and the state had a 31% increase in food costs for WIC.[480] The conservative five-year cost of family fragmentation of TANF, SNAP, and WIC for Wyoming is $101,532,134.[481]

IV. GENERAL ANALYSIS

This survey is offered to states as a reference in considering and analyzing their expenditures and activities in relation to fragmented families. The information presented here does not necessarily allow for a cause-and-effect analysis, but states are free to make connections as they deem appropriate and are encouraged to use this information for internal analysis of the effectiveness of various programs. Although it is unclear whether family initiatives save taxpayer money, it can be safely assumed that the programs outlined here cost very little and are more likely to curb family fragmentation (than increase it), which will, in time, save state taxpayer money.

Some general insights, however, can be made. Stunning were the increases in SNAP expenditures over the past five years. Although SNAP is clearly a taxpayer cost of government support for fragmented families, University of Chicago economist Casey Mulligan links the recent rise in SNAP benefits to high unemployment in a recessed economy and monetary benefits provided under the 2009 Stimulus Act.[482] Individuals in fragmented families are using SNAP at an incredible pace and at great expense to taxpayers in every state.

In difficult economic times, states are obviously forced to make difficult budgetary decisions.[483] States that saw TANF decreases, namely Alaska, Hawaii, Idaho, Indiana, Minnesota, New Hampshire, New

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[479] *See infra* Table B.

[480] *See infra* Table C.

[481] *See infra* Table D.

[482] Casey B. Mulligan, *Food Stamps and Unemployment Insurance*, N.Y. TIMES ECONOMIX (May 9, 2012, 6:00 AM), http://economix.blogs.nytimes.com/2012/05/09/food-stamps-and-unemployment-insurance (citing to his work regarding the ease of qualifying for food stamps).

> [F]ood-stamp eligibility rules have changed markedly in the last several years, bringing the program closer to unemployment insurance. Food stamps effectively no longer have an asset test. States have also received waivers from work requirements during the recession (for a while, the requirements were waived nationwide by the 2009 stimulus law).
>
> As a result, food-stamp participation is now more common among the unemployed.

Id.; *see also* Casey B. Mulligan, *Testing for Need*, N.Y. TIMES ECONOMIX (Jan. 18, 2012, 6:00 AM), http://economix.blogs.nytimes.com/2012/01/18/testing-for-need/.

[483] *See* LIZ SCHOTT & LADONNA PAVETTI, CENTER ON BUDGET & POLICY PRIORITIES, MANY STATES CUTTING TANF BENEFITS HARSHLY DESPITE HIGH UNEMPLOYMENT AND UNPRECEDENTED NEED 5–6 (2011), *available at* http://www.cbpp.org/files/5-19-11tanf.pdf.

Jersey, North Dakota, Ohio, and Vermont,[484] may have accomplished those results by state budget benefit reductions,[485] but whether there are any links in those decreases to family initiatives would be useful for state policymakers to contemplate.

TANF funds have been used most widely for marriage education. Although research has not revealed definitively whether premarital education is effective,[486] such initiatives are certainly not harmful but are unquestionably helpful and creditable. Cost-effective policies to strengthen marriage and reduce divorce rates are another way states are seeking to decrease the cost of family fragmentation.[487] As this survey revealed, the five states that have pursued those policies were Florida, Maryland, Minnesota, Oklahoma, and Tennessee. Several states were spotlighted by TANF for their activities supporting married, two-parent families: Alabama, Connecticut, Florida, Georgia, Indiana, Louisiana, Mississippi, New Mexico, Oklahoma, Utah, and West Virginia.[488] Allowing states discretion in allocation of TANF funds has clearly been helpful to the various state initiatives. It has empowered states to target family-fragmentation concerns unique to their citizenry.

Similar to TANF-funded programs that support healthy family initiatives, programs that target WIC recipients for marriage education and resulting marriage benefits can be beneficial. Because the recipients of WIC funding are pregnant women, mothers, and children, some of the most vulnerable people in the welfare system, marriage initiatives and family-strengthening programs would help to decrease that vulnerability by providing support where it is needed most. Strengthening and stabilizing the connections between the two programs makes sense. Furthermore, streamlining TANF, SNAP, and WIC programs together to give families more support for future strength presents a sagacious objective.

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[484] *See infra* Table A.

[485] *See* SCHOTT & PAVETTI, *supra* note 483, at 2.

[486] *See* Elizabeth B. Fawcett et al., *Do Premarital Education Programs Really Work? A Meta-analytic Study*, 59 FAM. REL. 232, 233, 236 (2010) ("[T]he question of whether premarital education works is not as settled as program developers and practitioners might assume or like it to be."). Fawcett also noted the need for more longitudinal research. *Id.* at 233.

[487] *See* Alan J. Hawkins, *Will Legislation to Encourage Premarital Education Strengthen Marriage and Reduce Divorce?*, 9 J.L. & FAM. STUD. 79, 79–80, 94–95 (2007); Alan J. Hawkins & Tamara A. Fackrell, *Does Relationship and Marriage Education for Lower-Income Couples Work? A Meta-analytic Study of Emerging Research*, 9 J. COUPLE & RELATIONSHIP THERAPY 181, 181–82 (2010) (testing couple-education programs for effectiveness and finding "small-to-moderate effects").

[488] ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., TEMPORARY ASSISTANCE FOR NEEDY FAMILIES PROGRAM (TANF): EIGHTH ANNUAL REPORT TO CONGRESS 51–59.

Recognition and understanding of the problem of family fragmentation and its costly results in individual states is half of the battle. Legislative and policy initiatives, like those in Alabama, Georgia, Minnesota, Oklahoma, Utah, and Virginia indicate that those states want to be proactive in addressing needs presented by family fragmentation. Also, governors' initiatives like those in Alabama, Georgia, Kansas, and Utah raise awareness of the issues. Likewise, court initiatives like that in Georgia indicate judicial recognition of the issue of family fragmentation and manifest a desire on the part of the state's top justices to provide solutions that lead to family strengthening rather than habitually reordering broken families when those families may be seeking judicial intervention for alternatives to family fragmentation.

Private initiatives working to combat family fragmentation are supplemental pieces of the puzzle in that such initiatives prime the pump to begin the process of managing the cultural epidemic of domestic breakdown. These private initiatives inform and inspire the public and provide government accountability. Most importantly, they work with grass-root efforts in schools, faith-based organizations, and civic organizations to accurately assess and address the individual needs of the community, acting as the boots on the ground.

State resources do not necessarily rescue fragmented families, nor do those resources solve the problems presented to the states by family fragmentation. Economist Isabel Sawhill notes that "[t]he government has a limited role to play. It can support local programs and nonprofit organizations working to reduce early, unwed childbearing through teen-pregnancy prevention efforts, family planning, greater opportunities for disadvantaged youth or programs to encourage responsible relationships."[489] Others agree and see a need for integration of public and private efforts. "Government alone cannot change the culture. The private and faith-based communities do not have the resources to build the supports needed to strengthen marriage. But working together, government, community and faith-based organizations can reverse the trends that are destroying marriage."[490] Many of the initiatives outlined here have come about because of the collaboration between university

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[489] Sawhill, *supra* note 6; *see also* RON HASKINS & ISABEL SAWHILL, CREATING AN OPPORTUNITY SOCIETY 61–62, 125, 168, 186 (2009) (examining economic opportunity and proposing an agenda for creating opportunity for the young and disadvantaged).

[490] Chris Gersten, Americans for Divorce Reform, A Long-Term Strategy to End Marital Breakdown of Traditional Marriage 1 (unpublished manuscript) (on file with the Regent University Law Review). The plan outlines an eight-year strategy for government, community, and faith-based organizations to work together to reduce various forms of family fragmentation. *See id.* at 7.

researchers, government officials, and privately funded pro-family advocates.[491]

State resources may stand in the gap for women and children in need; however, those recipients and their children are restricted by the very benefits designed to assist them. Economist Derek Neal at the University of Chicago discussed this dilemma in 2001: "During the past four decades, the prevalence of single-parent families has increased dramatically in the United States. The decline of two-parent families is a potential cause for concern since two-parent families may make more efficient investments in their children."[492] Professor Neal developed a model showing the interaction between the expansion of welfare programs and the rise in single motherhood, pointing to

> the possibility that, prior to the expansion of aid to single mothers, never-married motherhood was not an attractive option, even for women who faced poor marriage prospects. . . . imply[ing] that, without government aid, women who face the worst marriage market prospects may not have the resources required to raise children on their own. Seen in this light, the expansion of welfare programs during the 1960s may be the key event that made never-married motherhood among economically disadvantaged women possible.[493]

Neal targets the key problem with too much reliance on government support for a fragmented family. "[W]elfare programs restrict the ability

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[491] An example is the Child Advocacy Practicum at Regent University School of Law, which was the impetus for this Article. The Child Advocacy Practicum is one of the classes offered at Regent through the Center for Global Justice, Human Rights, and the Rule of Law. The Child Advocacy Practicum offers students at Regent the ability to get firsthand experience working on projects that affect child welfare. LYNNE MARIE KOHM, REGENT UNIV. SCH. OF LAW, A SYLLABUS FOR CHILD ADVOCACY PRACTICUM 1 (2012) (on file with the Regent University Law Review).

[492] Derek Neal, *The Economics of Family Structure* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 8519, © 2001), *available at* http://www.nber.org/papers/w8519.pdf (discussing marriage rate theories, existing literature, and a developed economic theorem that describes the recent demographic phenomenon of never-married mothers).

[493] *Id.* at 24.

> However, once a system of aid was put in place, the drastic decline in the supply of marriageable, less educated, black men may have been the driving force behind the observed changes in family structure among black women. In short, while the existing literature puts forth government aid to single mothers and shortages of marriageable men as competing explanations for observed changes in observed family structures among black women, these two factors may have worked together over time to shape changes in black family structure.

Id. Professor Neal has continued his work in economics of black-white inequality, including African–American family structure. *See* Derek A. Neal, *Chicago Workshop on Black-White Inequality: A Summary*, CHI. FED LETTER, Apr. 2007, *available at* http://qa.chicagofed.org/digital_assets/publications/chicago_fed_letter/2007/cflapril2007_237a.pdf.

of participants to use their financial and human wealth to finance private consumption."[494] U.S. Labor Statistics mirror this principal: "In 2011, families maintained by women with no spouse present remained less likely to have an employed member (71.7 percent) than married-couple families (81.9 percent) or families maintained by men with no spouse present (80.2 percent)."[495] In fact, 54.1% of families maintained by women had no employment in 2011.[496] These labor statistics, combined with the increasing amounts of money states are spending, expose just how costly is the gap created by family fragmentation—and a large portion of that may be perpetuated by the welfare cycle. This research demonstrates that over the past five years, TANF, SNAP, and WIC family support alone has cost the states $110,747,439,379.[497]

Trends of family fragmentation have taken decades to manifest themselves. Likewise, the restoration of the family will take time to accomplish. Reversing the trend must be a part of a long-term societal commitment. Harvard Law Professor Mary Ann Glendon was an early forecaster of the state of family fragmentation witnessed today when she noted that "[t]he tale currently being told by the law about marriage and family life is probably more starkly individualistic than the ideas and practices that prevail."[498] Professor Bruce Hafen saw the correlation between the transformation of family law and the emergence of autonomous individualism, noting the repercussions of that individualism having "implications across the entire spectrum of legal subject matter and political theory" and arguing that autonomous individualism "is relevant to family law because the changes of the past generation have produced what Martha Minow calls '[a] body of family law that protects only the autonomous self.'"[499] This individualism has led to what we now understand to be family fragmentation. Cultural currents combined with expanded individual-focused family law have had devastating results in terms of family strength.

> In family law, as in family life, the individualistic cultural currents of the past quarter century have eroded the mortar of personal

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[494] Neal, *supra* note 492, at 9 (illustrating that the value of being on aid is greater than the value of being single without children).

[495] BUREAU OF LABOR STAT., U.S. DEP'T OF LABOR, EMPLOYMENT CHARACTERISTICS OF FAMILIES — 2011, at 2 (2012), *available at* http://www.bls.gov/news.release/archives/famee_04262012.pdf.

[496] *See id.* tbl.3; *see also id.* at 2 (noting that the unemployment rate for married mothers is 6% but 15% for mothers "with other marital statuses").

[497] *See infra* Table D.

[498] MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 312 (1989).

[499] Hafen, *supra* note 20, at 2–3 (quoting Martha Minow, *"Forming Underneath Everything That Grows:" Toward a History of Family Law*, 1985 WIS. L. REV. 819, 894 (1985)).

> commitment that traditionally held the building blocks of family life—people—together in intimate relationships. . . .
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> . . . .
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> To probe the assumptions underlying an entire generation of wrenching legal and social change is a daunting task for family law scholarship, if only because those assumptions now seem so widely, even if often uncritically, accepted.[500]

It might be easy to blame the law as the instigator of family fragmentation, but Professor Hafen agrees with Professor Glendon, wisely noting that the "law is clearly not the primary cause of the broad and complex attitudinal changes on this subject during the past quarter century, even if the law's acquiescence has influenced the pace and nature of change."[501] Glendon's observations in 1989 about society are only more serious now; and, "[i]f in fact our societ[y] [is] producing too many individuals who are [not] capable . . . of sustaining personal relationships, it is probably beyond the power of law to reverse the process."[502] While state and federal support is important, states do not need to perpetuate the process of family fragmentation in efforts to assist families in need.

This indicates that neither state nor federal governments can completely restore the family or civil society, as "no government program is likely to reduce child poverty as much as bringing back marriage as the preferable way of raising children."[503] Those states, however, which have made headway, are likely holding the line on increased damage. Most active among them in family strength initiatives are Alabama, Georgia, Minnesota, Oklahoma, and Utah. State governments that have effectively set up frameworks conducive to family strength and personal responsibility work to incentivize both marriage and active fatherhood.[504]

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[500] Hafen, *supra* note 20, at 2–3. Professor Hafen notes, however, that he is encouraged by an "emerging body of family law scholarship [that] is beginning to challenge the sources and implications of this trend." *Id.* at 2; *see, e.g.*, Katherine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 296 (1988); Martha Minow, *Weitzman: The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America*, 84 MICH. L. REV. 900, 915–16 (1986); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1855–60 (1985).

[501] Hafen, *supra* note 20, at 42.

[502] GLENDON, *supra* note 498.

[503] Sawhill, *supra* note 6. Economist Isabel Sawhill notes that there are three reasons to be concerned about this "dramatic shift" in family law: (1) "marriage is a commitment that cohabitation is not"; (2) "a wealth of research strongly suggests that marriage is good for children"; and (3) "marriage brings economic benefits." *Id.*

[504] Self-government is the key to true freedom for the individual. This principle of self-government provides a way to establish meaning for the liberty and individual rights that courts struggle to consistently define. We hold that when individuals themselves turn from selfish individualism to a true liberty and freedom in Christ, change and restoration

CONCLUSION

States cannot force healthy family structure, but they can endorse it. Although there is no quick fix, staying the course should yield outcomes that will not only strengthen families but will yield future generations of healthier children and, as a result, provide significant savings to taxpayers and states. States may choose to use the work presented here as a resource to support initiatives toward future family strength and restoration.

This research reveals the great cost borne by each state from the family brokenness of its own citizens. More investigation would be helpful. Follow-up research could include a longitudinal study to discern links between family initiatives in individual states and spending-directions in family-welfare expenses. Studying percentage decreases in various states to discern causal connections with those changes would be helpful.[505] Whether various factors other than family initiatives cause increases or decreases is important to understand as is how those other factors work with family initiatives to create a stronger society. Numbers as large as those presented here are difficult to grasp, and greater depth of study would be very helpful. This Article affords a beginning to providing further research on the results of family-strengthening initiatives. It is essential to remember that "even very small increases in stable marriage rates would result in very large returns to taxpayers,"[506] and those small increases make large economic differences over time.

A nation of welfare families fragmented and relying on state and federal financial assistance cannot be sustained. Emergent trends in family fragmentation may be curbed by initiatives that educate individuals and communities on the significance of marriage and fatherhood and may work to present significantly less expense to individual states. Recognizing these facts makes for a great beginning to a stronger state.

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are possible. Selfish individualism destroys family strength. *See generally* KOHM, *supra* note 6, at xiii–xviii.

[505] For example, some decreased costs could be due to budget cuts, population decreases, or family strengthening initiatives. It is unclear what factors caused the Alaska decreases. *See supra* note 98 and accompanying text. A study that would consider all factors, eliminating irrelevant factors and focusing on active causes, would provide excellent state-by-state research.

[506] SCAFIDI, *supra* note 4, at 20.

TABLE A: TEMPORARY ASSISTANCE FOR NEEDY FAMILIES ("TANF") TOTAL EXPENDITURES (ASSISTANCE AND NON-ASSISTANCE)[507]

State	[illegible]	[illegible]	[illegible]	2010	2011	Percent Change 2007-2011
Ala.	$90,460,123	$91,479,709	$87,396,473	$140,474,963	$109,737,857	21%
Alaska	$37,176,237	$23,379,222	$31,928,928	$21,344,523	$28,483,329	-23%
Ariz.	$202,261,794	$196,591,597	$245,598,194	$192,401,576	$234,417,720	16%
Ark.	$62,110,116	$58,141,125	$72,594,744	$136,535,898	$69,485,642	12%
Cal.	$3,067,233,614	$3,695,590,270	$3,346,865,619	$4,274,296,280	$3,457,463,001	13%
Colo.	$105,900,145	$113,117,032	$163,150,446	$205,175,965	$176,073,168	66%
Conn.	$235,787,331	$240,109,297	$240,109,297	$267,046,129	$245,487,055	4%
Del.	$24,663,538	$18,003,999	$33,811,249	$38,883,044	$31,612,277	28%
D.C.	$74,035,532	$85,383,319	$96,664,795	$112,661,281	$107,505,423	45%
Fla.	$400,321,679	$471,363,761	$467,842,357	$489,511,905	$427,834,778	7%
Ga.	$326,315,145	$441,602,340	$348,118,951	$389,889,938	$388,134,240	19%
Haw.	$82,485,639	$103,873,921	$121,101,361	$157,999,693	$82,230,727	-0.3%
Idaho	$24,310,311	$21,711,605	$20,604,496	$21,746,124	$12,862,685	-47%
Ill.	$545,389,784	$543,482,849	$545,384,730	$724,368,595	$604,847,837	11%
Ind.	$163,440,624	$175,590,731	$180,186,593	$178,162,404	$135,875,967	-17%
Iowa	$92,516,290	$89,355,179	$92,320,104	$125,162,660	$115,876,723	25%
Kan.	$62,123,777	$67,548,443	$64,854,859	$130,440,819	$90,439,375	46%
Ky.	$127,381,760	$120,983,785	$141,053,878	$194,813,798	$155,000,922	22%
La.	$145,118,959	$116,046,047	$135,647,308	$172,950,395	$212,368,302	46%
Me.	$64,182,205	$82,726,837	$75,999,004	$95,996,917	$81,396,694	27%
Md.	$205,004,611	$227,956,047	$259,996,523	$323,403,001	$220,162,019	7%
Mass.	$322,423,235	$321,559,779	$458,393,121	$420,601,995	$344,528,334	7%
Mich.	$592,720,134	$439,706,506	$669,852,600	$1,086,304,097	$665,119,842	12%

[507] OFFICE OF FAMILY ASSISTANCE, U.S. DEP'T OF HEALTH & HUM. SERVS., FISCAL YEAR 2011 TANF FINANCIAL DATA tbl.A6 (2012), *available at* http://www.acf.hhs.gov/sites/default/files/ofa/2011_tanf_data_with_states.pdf; OFFICE OF FAMILY ASSISTANCE, U.S. DEP'T OF HEALTH & HUM. SERVS., FISCAL YEAR 2010 TANF FINANCIAL DATA tbl.A5 (2011), *available at* http://www.acf.hhs.gov/sites/default/files/ofa/2010_tanf_data.pdf; *Table A-1 Combined Federal Funds Spent in FY 2009*, ADMIN. FOR CHILDREN & FAMS. (Aug. 2010), http://archive.acf.hhs.gov/programs/ofs/data/2009/table_a1_2009.html; *Table A Combined Federal Funds Spent in FY 2008*, ADMIN. FOR CHILDREN & FAMS. (Oct. 2009), http://archive.acf.hhs.gov/programs/ofs/data/2008/tableA_spending_2008.html; *Table A Combined Federal Funds Spent in FY 2007*, ADMIN. FOR CHILDREN & FAMS. (Mar. 2009), http://archive.acf.hhs.gov/programs/ofs/data/2007/tableA_spending_2007.html.

Minn.	$205,547,447	$176,582,894	$261,873,998	$268,920,842	$200,744,630	-2%
Miss.	$61,007,521	$69,379,735	$78,994,750	$83,941,666	$88,117,247	44%
Mo.	$184,158,549	$174,072,498	$174,530,031	$212,395,384	$190,385,828	3%
Mont.	$26,383,934	$25,709,017	$27,581,024	$33,764,247	$29,921,743	13%
Neb.	$22,562,539	$35,592,060	$28,975,680	$33,939,675	$52,858,929	134%
Nev.	$41,312,970	$48,679,947	$66,502,272	$52,008,110	$55,652,188	35%
N.H.	$40,486,471	$38,635,243	$44,093,332	$45,982,042	$40,429,955	-0.1%
N.J.	$345,892,443	$311,729,908	$309,503,590	$577,112,878	$303,902,545	-12%
N.M.	$61,732,379	$86,624,362	$113,682,413	$143,757,300	$101,440,053	64%
N.Y.	$2,100,310,257	$1,897,196,186	$2,019,103,408	$2,388,094,662	$2,245,285,831	7%
N.C.	$247,145,756	$243,406,301	$336,547,779	$248,063,866	$314,087,897	27%
N.D.	$26,663,554	$28,071,058	$27,250,914	$27,816,078	$25,861,453	-3%
Ohio	$912,258,022	$1,063,867,710	$879,648,628	$804,551,198	$718,061,644	-21%
Okla.	$91,995,010	$115,559,096	$158,264,840	$118,879,036	$112,513,400	22%
Or.	$159,703,149	$205,690,173	$178,845,763	$250,197,944	$175,138,560	10%
Pa.	$440,898,719	$501,863,848	$545,122,631	$534,080,209	$525,208,208	19%
R.I.	$70,219,217	$74,173,912	$75,201,738	$74,071,955	$75,331,611	7%
S.C.	$93,226,608	$111,974,400	$131,658,291	$129,827,974	$104,966,214	13%
S.D.	$20,055,143	$20,005,277	$17,213,697	$22,312,928	$22,544,340	12%
Tenn.	$128,286,687	$144,806,682	$202,036,915	$218,505,666	$215,673,488	68%
Tex.	$469,191,827	$570,434,746	$554,214,846	$658,557,631	$550,059,409	17%
Utah	$63,163,183	$60,819,298	$85,987,738	$97,372,154	$85,982,970	36%
Vt.	$33,393,789	$33,393,789	$33,393,789	$46,780,225	$33,380,075	-0.04%
Va.	$125,860,673	$141,938,579	$111,737,587	$156,544,998	$146,161,049	16%
Wash.	$212,521,579	$210,619,463	$392,732,225	$434,934,155	$309,214,830	45%
W. Va.	$72,104,299	$80,735,391	$112,923,047	$164,415,692	$137,508,964	91%
Wis.	$236,968,652	$239,389,316	$289,698,655	$318,029,979	$298,679,480	26%
Wyo.	$16,138,965	$17,723,276	$21,783,923	$19,699,008	$27,292,996	69%

TABLE B: SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM ("SNAP"): AVERAGE YEARLY COSTS PER HOUSEHOLD[508]

Ala.	$601,413,135	$663,901,057	$970,949,096	$1,226,018,708	$1,492,961,298	148%
Alaska	$86,084,132	$94,262,437	$129,624,461	$159,413,978	$176,385,311	105%
Ariz.	$646,750,299	$772,440,411	$1,223,845,635	$1,587,702,249	$1,648,821,864	155%
Ark.	$412,445,881	$431,547,807	$569,987,431	$686,400,617	$722,195,399	75%
Cal.	$2,569,814,590	$2,995,179,522	$4,382,009,712	$5,691,851,784	$6,481,947,277	152%
Colo.	$310,583,982	$325,104,191	$502,657,149	$687,709,379	$762,800,608	146%
Conn.	$253,062,794	$284,829,257	$417,158,566	$569,684,382	$647,390,087	156%
Del.	$74,729,045	$86,180,751	$129,098,106	$171,155,272	$205,304,944	175%
D.C.	$103,950,879	$112,324,800	$159,506,975	$195,893,308	$229,250,674	121%
Fla.	$1,400,153,858	$1,778,641,937	$2,968,374,682	$4,416,942,533	$5,148,715,738	268%
Ga.	$1,125,954,322	$1,276,750,098	$1,943,839,554	$2,565,169,527	$2,891,615,163	157%
Haw.	$156,542,027	$184,612,461	$273,683,509	$358,144,853	$412,604,147	164%
Idaho	$95,992,768	$116,567,714	$200,937,001	$299,552,014	$361,999,149	277%
Ill.	$1,565,198,255	$1,718,280,001	$2,322,771,336	$2,784,473,892	$2,995,469,012	91%
Ind.	$677,097,583	$772,883,186	$1,071,248,747	$1,291,225,153	$1,386,478,333	105%
Iowa	$265,450,404	$305,655,259	$419,857,396	$526,119,310	$566,732,507	113%
Kan.	$192,850,959	$211,265,341	$301,563,664	$402,630,483	$452,767,878	135%
Ky.	$674,261,809	$742,037,605	$1,002,094,470	$1,186,291,238	$1,260,888,769	87%
La.	$746,127,346	$1,025,182,241	$1,119,136,582	$1,286,198,597	$1,386,115,227	86%
Me.	$170,581,745	$196,264,502	$292,704,585	$356,097,335	$382,131,426	124%
Md.	$357,244,132	$432,043,737	$668,682,585	$877,975,713	$1,035,175,750	190%
Mass.	$471,901,175	$586,587,498	$925,603,583	$1,165,907,744	$1,291,609,491	174%
Mich.	$1,367,629,622	$1,506,032,208	$2,106,871,076	$2,808,763,231	$3,151,479,174	130%
Minn.	$296,387,269	$329,569,307	$472,689,944	$624,886,794	$698,408,893	136%
Miss.	$443,797,523	$496,847,694	$691,067,947	$846,542,922	$921,109,139	108%
Mo.	$745,311,957	$810,471,619	$1,135,612,551	$1,361,300,993	$1,437,886,768	93%
Mont.	$89,698,694	$94,225,210	$134,564,381	$176,546,027	$193,310,950	116%
Neb.	$126,459,764	$140,752,738	$179,068,040	$237,577,180	$256,477,504	103%
Nev.	$133,739,897	$169,714,444	$285,773,577	$414,596,369	$496,867,234	272%
N.H.	$62,477,686	$71,404,026	$115,948,720	$151,813,784	$162,679,478	160%

508 *Supplemental Nutrition Assistance Program Benefits*, FOOD & NUTRITION SERV. (July 26, 2012), http://www.fns.usda.gov/pd/17SNAPfyBen$.htm.

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
N.J.	$483,425,319	$532,944,902	$750,159,374	$1,030,292,837	$1,213,993,288	151%
N.M.	$248,844,870	$269,188,961	$410,844,850	$541,806,403	$631,681,353	154%
N.Y.	$2,324,294,916	$2,572,842,848	$3,955,033,246	$4,984,900,302	$5,350,660,541	130%
N.C.	$972,290,890	$1,104,399,962	$1,625,497,467	$2,072,127,398	$2,377,093,020	144%
N.D.	$51,891,080	$59,266,579	$79,564,871	$95,014,675	$95,918,344	85%
Ohio	$1,292,695,103	$1,494,661,229	$2,167,118,474	$2,733,689,660	$2,986,317,777	131%
Okla.	$458,907,034	$491,362,648	$666,446,549	$899,655,548	$947,338,484	106%
Or.	$477,442,080	$542,197,277	$831,153,110	$1,066,932,095	$1,189,269,261	149%
Pa.	$1,258,604,269	$1,386,964,117	$1,900,787,569	$2,332,575,204	$2,647,473,519	110%
R.I.	$89,354,659	$107,719,391	$170,463,595	$237,618,372	$274,736,117	207%
S.C.	$618,164,263	$706,792,219	$1,001,691,847	$1,256,298,352	$1,339,644,859	117%
S.D.	$70,614,077	$78,001,007	$111,278,093	$153,075,454	$162,135,500	130%
Tenn.	$1,003,609,007	$1,114,791,337	$1,603,675,536	$1,966,107,581	$2,048,637,590	104%
Tex.	$2,718,158,343	$3,068,232,722	$4,399,125,072	$5,447,397,414	$5,993,125,493	120%
Utah	$133,204,438	$150,960,595	$263,258,195	$366,903,456	$401,261,439	201%
Vt.	$55,659,902	$62,169,303	$99,238,170	$124,311,833	$134,856,526	142%
Va.	$551,446,240	$610,021,737	$922,879,649	$1,213,496,417	$1,335,038,906	142%
Wash.	$600,647,715	$680,799,184	$1,046,740,870	$1,386,585,984	$1,602,557,358	167%
W. Va.	$274,884,537	$304,122,744	$408,456,434	$486,939,521	$497,390,191	81%
Wis.	$363,438,137	$430,028,455	$679,971,117	$1,000,496,070	$1,117,802,969	208%
Wyo.	$25,284,892	$26,389,959	$37,074,837	$51,674,879	$53,162,213	110%

TABLE C: WOMEN, INFANTS, AND CHILDREN ("WIC") ANNUAL FOOD COSTS[509]

Ala.	$74,210,159	$82,129,896	$76,022,244	$79,839,341	$87,239,755	18%
Alaska	$14,830,199	$15,892,266	$16,569,253	$15,506,693	$16,269,305	10%
Ariz.	$79,686,234	$96,973,823	$105,224,266	$93,665,889	$100,870,256	27%
Ark.	$40,670,480	$49,082,990	$47,942,672	$48,932,442	$53,810,866	32%
Cal.	$608,765,814	$738,758,026	$757,390,634	$827,345,241	$920,629,963	51%
Colo.	$35,441,943	$44,628,898	$46,113,503	$46,781,507	$49,822,303	41%
Conn.	$30,878,226	$34,092,965	$35,500,802	$30,778,425	$32,950,302	7%
Del.	$8,039,196	$10,514,237	$10,815,265	$10,891,414	$12,235,263	52%
D.C.	$7,171,835	$8,889,738	$9,247,588	$8,273,117	$9,391,572	31%
Fla.	$214,966,918	$258,862,751	$272,171,534	$247,390,909	$262,985,183	22%
Ga.	$147,858,511	$176,503,058	$186,877,035	$193,582,313	$225,969,436	53%
Haw.	$21,977,213	$24,428,156	$23,613,339	$22,246,444	$23,799,696	8%
Idaho	$14,661,269	$19,024,435	$20,355,036	$19,527,932	$20,108,849	37%
Ill.	$139,961,473	$154,166,784	$169,791,276	$166,396,777	$177,201,732	27%
Ind.	$61,333,429	$73,815,080	$76,407,408	$75,139,432	$83,674,360	36%
Iowa	$29,382,669	$35,799,568	$34,498,197	$31,513,040	$34,914,528	19%
Kan.	$28,306,427	$33,012,799	$32,401,154	$32,880,037	$36,948,504	31%
Ky.	$66,238,789	$73,514,099	$68,900,666	$67,268,284	$68,861,184	4%
La.	$67,801,639	$87,810,485	$93,002,131	$89,640,638	$95,853,122	41%
Me.	$11,333,474	$12,574,349	$12,803,014	$12,871,811	$13,465,539	19%
Md.	$53,273,131	$66,819,066	$72,637,183	$70,092,498	$81,015,210	52%
Mass.	$57,740,848	$61,766,095	$62,562,086	$58,946,209	$61,858,249	7%
Mich.	$107,402,331	$121,704,763	$115,202,157	$120,286,804	$136,272,286	27%
Minn.	$59,239,544	$70,849,413	$68,682,739	$67,552,620	$73,482,264	24%
Miss.	$52,124,767	$62,783,464	$73,704,744	$63,882,500	$63,947,436	23%
Mo.	$52,465,647	$60,880,339	$54,913,301	$60,760,382	$70,914,720	35%
Mont.	$8,660,534	$9,460,491	$9,186,975	$9,033,187	$10,492,002	21%
Neb.	$18,177,984	$21,480,373	$20,971,660	$21,038,923	$23,511,032	29%
Nev.	$19,414,682	$25,759,369	$27,028,431	$29,725,974	$35,908,738	85%
N.H.	$7,926,142	$8,977,934	$8,693,440	$7,157,133	$7,569,965	-4%

[509] *WIC Program: Food Cost*, FOOD & NUTRITION SERV. (July 26, 2012), http://www.fns.usda.gov/pd/24wicfood$.htm.

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
N.J.	$71,623,257	$87,624,385	$93,879,419	$98,155,852	$107,497,168	50%
N.M.	$30,509,851	$32,802,772	$32,158,207	$26,278,926	$29,827,126	-2%
N.Y.	$272,094,470	$292,296,689	$311,543,551	$316,295,403	$352,074,635	29%
N.C.	$113,667,969	$136,418,654	$141,758,728	$130,769,295	$143,038,362	26%
N.D.	$7,443,565	$8,361,673	$7,590,274	$7,513,762	$8,103,064	9%
Ohio	$122,014,284	$139,031,682	$133,659,387	$119,743,626	$130,821,171	7%
Okla.	$52,463,978	$60,615,316	$61,778,383	$59,347,355	$62,463,349	19%
Or.	$43,506,016	$50,139,963	$50,267,983	$49,217,076	$53,873,401	24%
Pa.	$106,122,891	$121,732,749	$133,525,020	$134,635,245	$161,926,585	53%
R.I.	$12,649,188	$13,469,665	$13,321,840	$13,731,698	$14,682,419	16%
S.C.	$56,749,082	$71,500,649	$70,735,574	$68,642,624	$75,361,907	33%
S.D.	$8,859,022	$10,249,696	$9,796,081	$11,638,275	$12,829,503	45%
Tenn.	$86,918,047	$87,957,478	$78,277,721	$78,424,170	$83,200,080	-4%
Tex.	$334,539,441	$397,961,910	$374,594,749	$332,237,106	$367,891,514	10%
Utah	$21,143,562	$25,980,888	$26,628,372	$30,425,445	$32,784,183	55%
Vt.	$9,031,133	$9,645,819	$9,554,486	$8,979,947	$9,080,542	0.5%
Va.	$56,448,273	$62,538,023	$62,652,202	$62,244,345	$68,618,393	22%
Wash.	$80,056,758	$95,504,212	$100,061,356	$91,184,263	$98,690,238	23%
W. Va.	$21,646,472	$26,598,409	$27,768,532	$25,244,806	$27,046,481	25%
Wis.	$50,630,798	$58,103,155	$60,434,561	$58,924,500	$63,184,345	25%
Wyo.	$4,101,430	$5,068,725	$4,815,241	$4,697,951	$5,382,350	31%

TABLE D: THE COST OF FAMILY FRAGMENTATION[510]

Ala.	$1,862,132,119		Mont.	$278,496,678
Alaska	$274,886,637		Neb.	$386,563,774
Ariz.	$2,354,438,823		Nev.	$603,150,892
Ark.	$1,097,417,263		N.H.	$258,125,286
Cal.	$13,889,399,807		N.J.	$2,002,722,681
Colo.	$1,133,294,089		N.M.	$875,294,005
Conn.	$1,130,062,178		N.Y.	$9,948,102,542
Del.	$274,502,219		N.C.	$3,235,401,330
D.C.	$418,487,815		N.D.	$176,339,791
Fla.	$6,094,667,526		Ohio	$4,976,310,252
Ga.	$4,003,132,943		Okla.	$1,381,356,038
Haw.	$649,633,231		Or.	$1,687,572,911
Idaho	$402,577,760		Pa.	$4,035,892,088
Ill.	$4,804,827,434		R.I.	$417,408,285
Ind.	$2,029,611,213		S.C.	$1,850,403,452
Iowa	$876,553,765		S.D.	$231,602,765
Kan.	$678,390,943		Tenn.	$2,872,307,831
Ky.	$1,886,020,365		Tex.	$8,316,723,945
La.	$2,148,942,689		Utah	$585,142,665
Me.	$589,978,032		Vt.	$222,809,577
Md.	$1,569,619,542		Va.	$1,783,957,782
Mass.	$2,096,000,653		Wash.	$2,327,683,510
Mich.	$4,753,524,945		W. Va.	$845,688,010
Minn.	$1,228,507,696		Wis.	$1,669,252,320
Miss.	$1,298,827,950		Wyo.	$101,532,134
Mo.	$2,132,161,200		Total	$110,747,439,379

[510] These numbers were obtained by adding—by individual state—the annual numbers for 2007–2011 for TANF, SNAP, and WIC and then multiplying that sum by the co-efficient of 31.7%. We used this co-efficient because it is the one referenced in the 2008 Report as a very conservative estimate of the cost of family fragmentation. SCAFIDI, *supra* note 4, at 14.

THE LAWS OF PHYSICS & THE PHYSICS OF LAWS

D. Arthur Kelsey[*]

I. AN UNDERLYING ORDER

From ancient conjurers to modern scientists, those claiming to understand the nature of matter, energy, and the like often refer to their conclusions as "laws." Why would they do that? The Law of Gravity, for example, could just as easily be called the gravity principle or Newton's axiom. Even so, scientists instinctively use the argot of lawyers and judges. I think they do so because law represents order, and order law.

Physicist Stephen Hawking reminds us that "ever since the dawn of civilization, people have not been content to see events as unconnected and inexplicable. They have craved an understanding of the underlying *order* in the world."[1] It is for this reason we lawyers can say that "the Sparks of all [the] Sciences in the world are raked up in the ashes of the Law."[2]

For similar reasons, I wonder whether raking through the ashes of science (as well as some of its white hot coals) might reveal symmetries that reinforce our understanding of law. The parallels between science and law reveal the interwoven nature of the created order. Although neither, standing alone, claims to have produced a unified explanation of everything, viewed together they provide allegorical parallels between what we think we know about nature (science) and what we think we know about man (law).

The early common law jurists thought this way. Even before the admixture of Reformation and Enlightenment influences, the common law tradition we inherited assumed the laws of science naturally led to an understanding of the laws of men.[3] In Judge Henry Bracton's thirteenth-century treatise, the first true attempt to synthesize English

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[*] The views advanced in this Essay represent commentary "concerning the law, the legal system, [and] the administration of justice" as authorized by Virginia Canon of Judicial Conduct 4(B) (permitting judges to "speak, write, lecture, teach" and otherwise participate in extrajudicial efforts to improve the legal system). These views, therefore, should not be mistaken for the official views of the Virginia Court of Appeals or my opinion as an appellate judge in the context of any specific case. I also appreciate the assistance of my law clerk, Shawn D. Lillemo, Esq., in the research for and editing of this essay.

[1] STEPHEN HAWKING, A BRIEF HISTORY OF TIME 13–14 (10th anniversary ed. 1998) (emphasis added).

[2] HEN. FINCH, LAW, OR A DISCOURSE THEREOF 6 (photo. reprint 1992) (1678).

[3] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *38–39.

common law, he defined jurisprudence as simply "the science of the just and unjust."[4]

Explaining the point further, Sir William Blackstone argued in his famous *Commentaries* that the elemental laws of physics provide the starting point in our effort to understand the laws of men:

> Law, in its most general and comprehensive sense, signifies a rule of action, and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the *laws* of motion, of gravitation, of optics, or mechanics, as well as the *laws* of nature and of nations. And it is that rule of action which is prescribed by some superior, and which the inferior is bound to obey.
>
> Thus, when the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When he put that matter into motion, he established certain laws of motion, to which all movable bodies must conform.[5]

Finding the same sense of order underlying the laws of men, Blackstone recognized free will as one of the intrinsic design features of the "noblest of all sublunary beings."[6]

> This, then, is the general signification of law; a rule of action dictated by some superior being, and, in those creatures that have neither the power to think, nor to will, such laws must be invariably obeyed . . . . But laws, in their more confined sense, and in which it is our present business to consider them, denote the rules, not of action in general, but of *human* action or conduct; that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and freewill, is commanded to make use of those faculties in the general regulation of his behaviour.[7]

Justice James Wilson—a signer of the Declaration of Independence, one of the principal framers of the Constitution, and an inaugural member of the Supreme Court of the United States—agreed: "Order, proportion, and fitness pervade the universe. Around us, we see; within us, we feel; above us, we admire a rule, from which a deviation cannot, or should not, or will not be made."[8] "The great and incomprehensible Author, and Preserver, and Ruler of all things—he himself works not

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[4] 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 25 (Samuel E. Thorne trans., Harvard Univ. Press 1968) (c. 1250).

[5] 1 BLACKSTONE, *supra* note 3, at *38 (emphasis added).

[6] *Id.* at *39.

[7] *Id.*

[8] James Wilson, Of the General Principles of Law and Obligation, *in* 1 THE WORKS OF JAMES WILSON 97, 97 (Robert Green McCloskey ed., Harvard Univ. Press 1967) (1804).

without an eternal decree," Wilson concluded.[9] "Such—and so universal is law."[10]

This jurisprudential view was a common theme among the great jurists of the past. They believed the laws of physics and the laws of men, taken together, represent a universal order, a kind of architectural design crafted with purpose and care. The two disciplines differed only in their coercive efficacy: Pebbles and stars are bound to obey the laws of physics; yet men are free to disobey the laws of men. Except for the normative nature of the laws of men, the two systems of law share many elegant parallels. Although this thesis was advocated with confidence in the eighteenth century, it still holds up pretty well today.

II. NEWTONIAN PHYSICS

A. The First & Second Laws of Motion—Inertial Forces & Stare Decisis

Working from conclusions first reached by Galileo, Isaac Newton developed the Laws of Motion in his 1687 *Mathematical Principles of Natural Philosophy*, a work considered by Hawking as "surely the most influential book ever written in physics."[11]

Newton's First Law holds: "Every body perseveres in its state of being at rest or of moving uniformly . . . except insofar as it is compelled to change its state by forces impressed."[12] Under his Second Law, "A change in motion is proportional to the motive force impressed . . . whether the force is impressed all at once or successively by degrees."[13]

It follows that, absent such a force, an object at rest will remain at rest. And if it is in motion, it will remain in motion. This idea Newton called the *vis inertiae*, the inherent nature of an object not to change its state of motion or rest.[14] A "body exerts this force only during a change of its state, caused by another force impressed upon it."[15] Inertia is directly proportional to an object's mass: The greater the mass, the more its inertia; the smaller the mass, the less its inertia. Challenging the contrary orthodoxy first taught by Aristotle,[16] Newton's First and Second

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[9] *Id.*

[10] *Id.*

[11] HAWKING, *supra* note 1, at 196.

[12] ISAAC NEWTON, THE PRINCIPIA: MATHEMATICAL PRINCIPLES OF NATURAL PHILOSOPHY 416 (I. Bernard Cohen & Anne Whitman trans., Univ. of Cal. Press 1999) (1687) [hereinafter PRINCIPIA].

[13] *Id.*

[14] I. Bernard Cohen, *A Guide to Newton's Principia*, PRINCIPIA, *supra* note 12, at 3, 96.

[15] PRINCIPIA, *supra* note 12, at 404.

[16] ARISTOTLE, THE PHYSICS, *reprinted in* 4 ARISTOTLE IN TWENTY-THREE VOLUMES bk. IV, at 303 (G. P. Goold ed., Philip H. Wicksteed & Francis M. Cornford trans., 1980)

Laws laid the foundation for modern physics and helped explain the physical nature of our expanding universe. Rather than everything inevitably coming to rest, inertia maintains the status quo and resists changes to it.

The Anglo–American tradition of law follows the ancient law of stare decisis. Once a legal premise has been set in motion by a high court, protected by the force and stature of precedent, its momentum propels it effortlessly into future generations. Only a later court of equal or greater dignity with the initiating court can significantly alter the trajectory of the precedent into future generations. A resisting court's ability to do so is directly proportional to the mass of the moving precedent. Its mass is measured by the strength of judicial consensus on the truth of the precedent and the longevity of its journey over time. Against this mass is the vigor of those seeking to bring it to an end.

When precedents carry great intellectual mass (like Blackstone's interpretation of common law in his *Commentaries*[17] or John Marshall's assertion of judicial review in *Marbury v. Madison*[18]) few, if any, counteracting forces can interpose their resistant will in opposition. Unmet by resistance, precedents simply move from age to age along their original trajectories. On the other hand, precedents of featherweight mass usually come to an inglorious end, often lost among the emotive moods of the day, without any appreciable possibility of moving forward into future generations.[19]

More often than not, however, the resistant forces we typically observe are sufficient only to change the relative vector of a disputable precedent, resigning it to a less ambitious course than originally charted by those who set it in motion. Yet in all cases, the governing premise remains the same: The law of judicial inertia, stare decisis, presupposes judicial precedents continue their intended course. Those seeking to change the course of a precedent or even to possibly end its journey altogether can succeed only by amassing sufficiently weighty reasons for doing so. In a common law legal system, precedents do not—and should not—come to rest on their own accord.

In this context, the mass is in the enduring legal principle embedded in the precedent—not simply the judicial opinion expounding

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("[A]ll the elemental substances have a natural tendency to move towards their own special places, or to rest in them when there . . . .").

[17] 1 BLACKSTONE, *supra* note 3, at *64.

[18] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

[19] Of course, even the slightest of influences can have enormous unforeseen consequences. In what has come to be known as the "butterfly effect," the minutest legal precedent could conceivably create a legal tornado on the other side of the world. *See* EDWARD N. LORENZ, THE ESSENCE OF CHAOS app. 1, at 181–82 (1993).

upon it. As Professor Bryson explains, common law jurists "thought that the cases were not themselves the common law of England, but are only evidence of the common law."[20] The common law, Lord Mansfield once remarked, "would be a strange science if it rested solely upon cases . . . . Precedent indeed may serve to fix principles, which for certainty's sake are not suffered to be shaken, whatever might be the weight of the principle, independent of precedent."[21] A point largely lost in modern conversations about stare decisis, Lord Mansfield's view represented the original understanding of the concept: "[P]recedent, though it be evidence of law, is not law in itself; much less the whole of the law."[22]

From an allegorical perspective, stare decisis is like the trajectory of a rocket. The greatest force must be applied at the earliest stage, lifting the rocket off the launch pad and pushing it beyond the Earth's gravitational pull. After lift-off, the rocket follows its flight path powered only by its momentum. Absent the application of a resistant force (such as a thruster burn, an asteroid, or a solar flare), the rocket will indefinitely continue on its intended trajectory. In the same way, consider the physical flow of a river. Snow and rain flow down the mountains to the sea. The water carves gorges through rock, moves around boulders in the rapids, gets forced through man-made dams, and ultimately fans out into deltas and bays. Resistant forces may change the course of the river, but they rarely stop it altogether. Whether allegorized as a rocket trajectory or a winding river, stare decisis abides by Newton's principle of inertia. The basic formula of stare decisis describes the inertial history of common law reasoning and quantifies the resisting force necessary to alter or end the originally intended trajectory of a legal principle.

B. Newton's Third Law: Opposing Forces & the Adversary System

Described as the fundamental principle of symmetry, Newton's Third Law of Motion provides that all forces come in opposing pairs. For each action (better thought of as a force) we should expect to see an equal and opposite reaction.[23] "If anyone presses a stone with a finger," Newton observed, "the finger is also pressed by the stone."[24]

Newton's Third Law means that all forces in the universe can be best described as interactions between two different objects. Each force

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[20] 1 RATIO DECIDENDI: GUIDING PRINCIPLES OF JUDICIAL DECISIONS 287 (W. Hamilton Bryson & Serge Dauchy eds., 2006).

[21] Jones v. Randall, (1774) 98 Eng. Rep. 706 (K.B.) 707; Lofft 384, 385.

[22] *Id.*

[23] PRINCIPIA, *supra* note 12, at 417.

[24] *Id.*

has two end points—two objects of force. Each is equal in magnitude but exactly opposite in direction. The end points mirror each other. Force itself, as an intelligible scientific concept, does not exist outside of this point-counterpoint model. Thus, to physicists and schoolchildren alike, force is simply a tug of war. Each side pulls on the rope while the rope pulls on each side.

The architects of the common law system intuitively understood this principle. Unlike the inquisitorial system employed by continental courts applying civil law, the common law courts of England and America created an adversarial system of justice. It presupposes truth can best be found in the competing contest between opposing forces. For each matter in dispute, the assertion of X is expected to be accompanied by a counter assertion of not-X.

A less violent adaptation of the trial-by-combat adjudication of the Middle Ages,[25] modern litigation is a forensic contest between two opponents. Each seeks to pull the tug-of-war rope of persuasion toward his side. Presiding over the contest is a neutral decision maker, a judge or jury. In every case, the initial assumption is the same: Both sides apply persuasive force in opposite directions to unbalance the other. Depending on the governing burden of proof (which determines which side is initially disfavored by the rules of the game), either side of the tug-of-war rope pulls until one wins or the game is called off.

The apparent brutishness of the contest may sometimes distract us, but the adversarial method of litigation resonates with good sense, in part at least, because of its symmetrical relationship with Newton's Third Law of Motion. There is an intrinsic sense of order in both.

III. QUANTUM MECHANICS

A. Justice & the Wave-Particle Paradox

Much of the trouble in modern physics stems from an ancient question: Is light an indivisible particle or a wave? Albert Einstein once wrote to a friend: "All these fifty years of conscious brooding have brought me no nearer to the answer to the question 'What are light quanta?' Nowadays every Tom, Dick, and Harry thinks he knows it, but he is mistaken."[26] Physicist Richard Feynman described the state of confusion over the "wave-particle duality" of light with an oft-repeated quote: "[L]ight was waves on Mondays, Wednesdays, and Fridays; it was

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[25] *See* 2 BLACKSTONE, *supra* note 3, at *346–48.

[26] Martin J. Klein, *Einstein and the Development of Quantum Physics*, *in* EINSTEIN: A CENTENARY VOLUME 133, 138 (A. P. French ed., 1979).

particles on Tuesdays, Thursdays, and Saturdays, and on Sundays, we think about it!"[27]

In Einstein's famous $E=mc^2$ equation, he proved the energy-to-mass ratio was a function of the speed of light.[28] The history of nuclear fission, from the Manhattan Project to the modern worldwide use of atomic power plants, owes its existence to this simple equation. It thus should come as some surprise to learn that modern scientists still do not know what light actually is.

The debate over the nature of light began in the fifth century B.C. Attributed by some to the teachings of Pythagoras,[29] "Greek atomists believed that seeing and hearing (and smelling) involved the traveling of atoms (at finite speed) from the perceived object to the perceiving organ and that the form of the atoms conveyed information."[30] Light traveled in straight lines and bounced off mirrors like a ball off a wall. Aristotle disagreed with the particle theory, claiming light was more like a wave.[31] The wave theory seemed incomplete, however, to Newton, who noted light's ability to cast shadows suggested a stream of particles.[32]

Most classical physicists of the nineteenth century who worked with electromagnetism seemed content to describe light as a wave.[33] Thomas Young, an English scientist, popularized the wave theory with a simple, yet profound, experiment. He shined a beam of light onto a projection screen through a barrier with two closely spaced slits.[34] If light were made of particles, he reasoned, two closely spaced bright images would

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[27] RICHARD P. FEYNMAN, QED: THE STRANGE THEORY OF LIGHT AND MATTER 23 n.3 (expanded ed. 2006) [hereinafter QED].

[28] The formulation $E=mc^2$ is really a reformulation of Einstein's original equation $m=L/c^2$. *See* A. Einstein, *Does the Inertia of a Body Depend upon its Energy-Content?*, *in* THE PRINCIPLE OF RELATIVITY 69, 70–71 (H.A. Lorentz et al. eds., W. Perrett & G. B. Jeffery trans., Methuen & Co. 1923).

[29] *See* E. NUGENT, OPTICS: LIGHT AND SIGHT THEORETICALLY AND PRACTICALLY TREATED, WITH THEIR APPLICATION TO FINE ART AND INDUSTRIAL PURSUITS 3 (London, Strahan & Co. new ed. 1870).

[30] Olivier Darrigol, *The Analogy Between Light and Sound in the History of Optics from the Ancient Greeks to Isaac Newton. Part 1*, 52 CENTAURUS 117, 123 (2010).

[31] ARISTOTLE, ON THE SOUL, *reprinted in* 8 ARISTOTLE IN TWENTY-THREE VOLUMES bk. II, at 107 (G. P. Goold ed., W. S. Hett trans., 1975) ("[I]t is the essence of colour to produce movement in the actually transparent; and the actuality of the transparent is light. The evidence for this is clear . . . .").

[32] ISAAC NEWTON, OPTICS (1704), *reprinted in* 34 GREAT BOOKS OF THE WESTERN WORLD 377, 529 (Robert Maynard Hutchins ed., 1952) ("Are not the rays of light very *small bodies* emitted from shining substances?" (emphasis added)).

[33] *See, e.g.*, J. Clerk Maxwell, *A Dynamical Theory of the Electromagnetic Field*, 155 PHIL. TRANSACTIONS ROYAL SOC'Y LONDON 459, 499 (1865) ("[L]ight is an electromagnetic disturbance propagated through the field according to electromagnetic laws.").

[34] AMIR D. ACZEL, ENTANGLEMENT: THE GREATEST MYSTERY IN PHYSICS 18 (2002).

appear on the projection screen. But what he saw was not what he expected. Instead, *many* parallel lines in a classic wave interference pattern appeared on the screen. The only plausible explanation for these refracted images, Young concluded, was that light consisted of streams of wave energy, not particles.[35]

Einstein, as he did with so many other topics, reconsidered the debate from an entirely different perspective. He pointed out the photoelectric effect (certain metals releasing electrons when light shines on them) occurred in specific quantities. As Einstein viewed it, light must consist of streams of energized particles[36]—indivisible packets of energy later called photons.[37] Nevertheless, none of Einstein's explanation refuted the earlier findings that light also acted like a wave insofar as it exhibited a wavelength and was capable of reflecting, refracting, and polarizing—typical functions of a wave.

Today's physicists offer little to resolve the conflicting theories of the nature of light. Using terms like "wave energy duality," they appear to accept the inexplicable paradox—unknown in classical physics—that light is sometimes a wave, sometimes a particle, and perhaps both at the same time.[38] As described in the legendary Feynman lectures, "We choose to examine a phenomenon which is impossible, *absolutely* impossible, to explain in any classical way, and which has in it the heart of quantum mechanics. In reality, it contains the *only* mystery."[39] It seems the only true certitude we have on this topic is that we can be certain of very little.

A similar definitional paradox is deeply embedded in our understanding of justice. In every case there are two ways to perform the calculations of justice. On some occasions we choose the particle theory of *law*. On others, we choose the wave theory of *equity*. Sometimes we marble them together, allowing both to contribute to the decision. Even when we do so, however, we still get the unnerving sense we are dealing with conceptually dissimilar concepts.

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[35] *See id.* at 18–19.

[36] Klein, *supra* note 26, at 134.

[37] Gilbert N. Lewis coined the term "photon" in 1926. *See* Gilbert N. Lewis, Letter to the Editor, *The Conservation of Photons*, 118 NATURE 874, 874 (1926) ("I therefore take the liberty of proposing for this hypothetical new atom, which is not light but plays an essential part in every process of radiation, the name *photon*.").

[38] Light and electrons "behave somewhat like waves, and somewhat like particles." QED, *supra* note 27, at 85. "In order to save ourselves from inventing new words such as 'wavicles,' we have chosen to call these objects 'particles' . . . ." *Id.*

[39] 3 FEYNMAN ET AL., THE FEYNMAN LECTURES ON PHYSICS § 1-1 (definitive ed. 2006).

The law-equity duality has a long history. Early common law jurists looked to discrete, concrete rules of law to find the justice of every case. The very nature of a neutral, outcome-indeterminate principle ensured justice because it applied the same reasoning process to every litigant (from plowboy to prince) and in every case (from small to great). In this way, common law jurists usually looked at justice deductively.[40] Reasoning from general to specific, they consulted governing statutes of the legislature, binding precedent from prior courts, as well as accepted mores of custom and practice—all in a synthesizing effort to formulate a principled rule of decision for a particular case. In the language of physics, the initial conditions determined the result.

Shortly after the birth of what we now call the common law, a competing vision of justice appeared. In medieval England, a King was the sovereign Liege Lord of the kingdom, divinely appointed protector of all dependent subjects, and thus the very fount of justice.[41] Whatever the common law may or may not be, the King believed his personal conscience—that is, his subjective sense of justice—superseded the uniform rules of common law.[42] This regal spirit of justice became known as equity.[43]

In the early 1200s, litigants began petitioning the King to intervene in disputes where the litigants thought the common law might violate the royal sense of justice.[44] After growing weary of exercising his conscience in an ever growing docket of unhappy litigants, the King delegated the task to his Chancellor, a close advisor and member of the King's Council.[45]

Until the appointment of Sir Thomas More in 1529, all earlier Chancellors were prelates, educated to be ecclesiastical scholars and appointed to be the King's personal confessors.[46] The Chancellors usually looked at justice inductively and made decisions on a case-by-case basis informed only by general maxims of equity,[47] which they discovered from

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[40] *See* Roscoe Pound, *The End of Law as Developed in Juristic Thought*, 30 HARV. L. REV. 201, 201 (1917).

[41] *See* 1 DAN B. DOBBS, LAW OF REMEDIES § 2.2, at 68 (2d ed. 1993) [hereinafter DOBBS 1993].

[42] *See id.*

[43] *Id.* § 2.1(3), at 63.

[44] *Id.* § 2.2, at 67–68.

[45] *Id.* § 2.2, at 69.

[46] *Id.* § 2.2, at 66–67.

[47] *Id.* § 2.3(1), at 74.

theologians like St. Thomas Aquinas, as well as from ancient philosophical constructs developed by Aristotle.[48]

From the Chancellor's perspective, he "did not issue generally applicable 'legal' rulings. Quite the contrary. It was the very universality of the common law precedents and their unbending quality that he might find, from time to time, unjust when applied to a specific set of circumstances."[49] As Aquinas starkly put it, "In these and like cases it is bad to follow the law, and it is good to set aside the letter of the law and to follow the dictates of justice and the common good."[50]

Needless to say, the development of an equity court did not please many common law adherents. The famous commentator John Selden voiced the popular protest against using equity as a substitute for law:

> Equity is a Roguish thing: for Law we have a measure, know what to trust to; Equity is according to the Conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the Standard for the measure, we call a Foot, a Chancellor's Foot; what an uncertain Measure would this be? One Chancellor has a long Foot, another a short Foot, a Third an indifferent Foot: 'Tis the same thing in the Chancellor's Conscience.[51]

Sir Edward Coke, a Chief Justice of the King's Bench, shared Selden's discontent. He used the law court's power of habeas corpus to release litigants from the Chancery Court's contempt orders forbidding them from enforcing a common law judgment that the Chancellor condemned as inequitable.[52] Thus equity began to blur justice over a range of permissible results in cases where the common law drew distinct, but inequitable, bright lines.

On the eve of the American Revolution, Sir Robert Chambers (Blackstone's successor as the Oxford Vinerian Chair of English Law) framed the law-equity dispute not as an accident of judicial politics but as a deep jurisprudential paradox. "It has appeared to some a question difficult of decision," Chambers explained, "what is the use of a court of

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[48] D. Arthur Kelsey, *Law and Equity in Virginia*, VBA NEWS J., Dec. 2002, at 6, 6 (citing Eric G. Zahnd, *The Application of Universal Laws to Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law*, 59 LAW & CONTEMP. PROBS. 263, 265–73 (1996); Roger A. Shiner, *Aristotle's Theory of Equity*, 27 LOY. L.A. L. REV. 1245 (1994); 1 DOBBS 1993, *supra* note 41, § 2.3(1), at 74).

[49] *Id.*

[50] 3 ST. THOMAS AQUINAS, SUMMA THEOLOGICA, pt. II-II, q. 120, art. 2, at 1689 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1274).

[51] THE TABLE-TALK OF JOHN SELDEN 49 (S.W. Singer ed., London, John Russell Smith 2d ed. 1856); *see also* Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc., 527 U.S. 308, 332–33 (1999) (quoting 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 19, at 21 (photo. reprint 1972) (1836)).

[52] *See* CATHERINE DRINKER BOWEN, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE 478–88 (1957).

equity if our laws are right, and what is the use of laws if they are wrong."[53] Chambers answered the question by challenging its assumptions: "This question supposes in human institutions a degree of excellence which they never have attained. No human law was ever perfect, it has always equity for its object, but it sometimes misses of its end."[54] "Yet law is not unnecessary," he continued, "[t]he subject has, in the law, a rule of action always safe, and commonly right; and where it happens to be wrong a remedy is provided."[55]

At its founding, America inherited this law-equity duality.[56] Although most American courts have merged the administration of justice (eventually abolishing the distinction between the judge of law and the chancellor in equity), the substantive distinction remains between the two competing visions of justice. As Professor Pomeroy explained, "While the external distinctions of form between suits in equity and actions at law have been abrogated, the essential distinctions which inhere in the very nature of equitable and legal primary or remedial rights still exist as clearly defined as before the system was adopted . . . ."[57]

Thus, even to this day, some of our most sacred rights, such as the right to a trial by jury in civil cases, specifically depend on which side of the law-equity boundary a given case falls.[58] The substantive distinction between law and equity remains important in determining available

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[53] 1 ROBERT CHAMBERS, A COURSE OF LECTURES ON THE ENGLISH LAW DELIVERED AT THE UNIVERSITY OF OXFORD 1767–1773, at 221 (Thomas M. Curley ed., 1986).

[54] *Id.*

[55] *Id.*

[56] *See* 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1517, at 732–33 (photo. reprint 1972) (1836).

[57] 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 354, at 795–96 (5th ed. 1941).

[58] U.S. CONST. amend VII; Curtis v. Loether, 415 U.S. 189, 193 (1974) (holding that the jury trial right of the Seventh Amendment applies to legal cases "in contradistinction to equity" (quoting Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830))). A "jury trial was given in actions at common law and not in suits in equity, and a jury trial may still be granted or not, according to whether the case is classified as one in equity or at law." DAN B. DOBBS, LAW OF REMEDIES § 2.1, at 28 (1973) [hereinafter DOBBS 1973].

remedies,[59] formulating the scope of injunctive relief,[60] and dispensing exceptions to worthy litigants from the strictures of the law.[61]

Equity formulations often take on the role of exceptions. A rule of law, like the statute of limitations, usually states a categorical principle: A claimant cannot file a complaint more than a certain number of years after his cause of action arises. Equity sets this generally applicable rule aside if the complainant shows he was somehow tricked into waiting too late—a specific mercy-laden caveat called equitable estoppel.[62]

Dozens of examples of this law-equity duality can be given. My only point is that it exists today and has existed for a very long time. The heart of the judicial system is justice. Yet, like modern physicists attempting to describe the properties of light, we too must equivocate on the actual properties of justice. Is it governed by principles of law, maxims of equity, or both?

Our answer is unsettling but honest: Sometimes it is law, sometimes equity, sometimes both, but never neither. To adapt the Feynman pejorative:[63] Justice is equity on Mondays, Wednesdays, and Fridays; it is law on Tuesdays, Thursdays, and Saturdays; and on Sundays, we think about it.

Along these same lines, consider the even more disquieting paradigm contest taking place in the deepest cavern of modern physics. Few scientists have engaged at this level, and those who have engaged returned with stories bordering on the unintelligible.[64] On one side of the cavern are the accepted principles of general relativity, Einstein's elegant explanation of the geometric properties of space-time. General relativity explains the essential gravitational structure of the universe at large. On the other side of the cavern is quantum mechanics, which

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[59] "[Q]uite apart from the fact of merger, there may be good reasons to deny equity remedies in 'law' type claims—not because they are claims at law, but because they do not warrant the exercise of the special power." DOBBS 1973, *supra* note 58, § 2.6, at 67.

[60] *See* KENT SINCLAIR, GUIDE TO VIRGINIA LAW/EQUITY REFORM AND OTHER LANDMARK CHANGES § 1.07, at 45 (2006).

[61] "Equitable estoppel" is a device whereby a party is "absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed." 3 POMEROY, *supra* note 57, § 804, at 189.

[62] *See* Schroeder v. Young, 161 U.S. 334, 344 (1896) ("Under such circumstances the courts have held with great unanimity that the purchaser is estopped to insist upon the statutory period . . . .").

[63] *See* QED, *supra* note 27, at 23 (describing the "wave-particle duality" confusion as to why photon-multipliers maintained strength instead of softening as predicted by the wave theory).

[64] *See generally* 1 JOSEPH POLCHINSKI, STRING THEORY (2005); KATRIN BECKER ET AL., STRING THEORY AND M-THEORY: A MODERN INTRODUCTION (2007).

explains the permissible range of properties of mass and energy at the level of subatomic matter.

To date, many physicists have tried, although none have succeeded, to reconcile these paradigms. The math, the theory, and the experimental data frustrate all attempts to construct a unified "theory of everything" that would explain equally well the very large and very small—leaving not a few theorists content with the paradoxical hypothesis that gravity is at once a curvature in the fabric of space-time and a wavelike graviton particle.[65]

In a similar way, jurists and lawyers are continually flanked by two competing strong towers of justice: the generally applicable law with its virtue of objective uniformity, and the specifically applicable equity with its virtues of particularity and tailored mercy. Neither paradigm, by itself, fully describes what we mean by justice. Perhaps we will never come up with a rhetoric that convincingly forces these competing virtues into a single formulation. Perhaps it is vain to think we could.

B. Heisenberg's Uncertainty Principle & the Jurisprudence of Doubt

In the mid-1920s, a young German physicist named Werner Heisenberg wanted to precisely describe tiny subatomic particles.[66] The conventional wisdom taught that such particles should have a physical position and measurable momentum at any given moment in time. Rejecting this view, Heisenberg postulated a system where position and momentum were interdependent, not unlike Einstein's space-time theory.[67] Heisenberg believed "an observer cannot infer a single unique event that would have led to the measured outcome."[68] "There would always be, as Heisenberg put it, an 'inexactness' (*Ungenauigkeit*) in the conclusions."[69]

Later physicists realized Heisenberg's insight led to a simple, but startling, conclusion: Inherent in every measurement is a band of inescapable uncertainty.[70] Heisenberg's thesis implied *the very act of measuring somehow changes the thing measured.* These concepts rocked the scientific community because of the implication that absolute certitude, when it comes to subatomic quantifications, is impossible. The

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[65] It is "proposed to identify the massless spin-two particle in the string's spectrum with the graviton, the quantum of gravitation." BECKER ET AL., *supra* note 64, at xi.

[66] DAVID LINDLEY, UNCERTAINTY: EINSTEIN, HEISENBERG, BOHR, AND THE STRUGGLE FOR THE SOUL OF SCIENCE 84–86 (2007).

[67] *Id.* at 131.

[68] *Id.* at 146.

[69] *Id.* at 147.

[70] *See* HAWKING, *supra* note 1, at 58.

discovery effectively dethroned the scientist from his role as an objective and neutral observer and made him part of the thing being observed.

The epistemology of science continues, even today, to convulse over the implications of Heisenberg's uncertainty principle. Even so, Heisenberg's computations and experimental data have held up to rigorous scrutiny. The uncertainty principle, Hawking claims, "has been an outstandingly successful theory and underlies nearly all of modern science and technology."[71] Thus, science has moved from the illusion that things can be measured precisely to a realization that the best knowledge we can hope to obtain lies in "probability cloud[s]."[72]

Long before the theory of quantum mechanics, the common law tradition intuited a similar uncertainty principle. Dealing in mere probabilities, a concept previously foreign to physics, has always been a traditional feature of the law.

The institutional humility derived from inevitable uncertainty explains why the adversarial system does not begin with strict neutrality and then configure the trial as an even-handed experiment to ascertain truly objective realities. To be sure, just the opposite is true. Every trial begins with a wholly unproven assumption, a heuristic bias in the classical sense of the term. We do not merely hypothesize its truth—we outright presume it. Every trial, to put it plainly, begins with a thumb on the scales of justice.

In a criminal case, for example, the accused is presumed to be innocent before a single fact is offered to support such a presumption. In a civil case, with few exceptions, the civil defendant is presumed to be not liable. The presumption could be that he did not act negligently, that he did not breach the contract, or that he did not act with malice.

Why would the law inject such bias into the adversarial system? Why would it not be far more sensible to begin a trial with utter objectivity, presuming neither side to be blameless and allowing the evidence, like the needle of a compass, to point to the objective truth? The reason is that lawyers and jurists alike have known for centuries that *irrefutable* truth is almost always, if not invariably, garbled by the exercise of discovering it. The very act of advocating tends to exaggerate the strengths of an assertion and to minimize its weaknesses. Some witnesses, whether subconsciously or deliberately, seem to be hardwired to rationalize their retelling of past events in a manner favorable to their perceived self-interests. We use cross-examination to trim down overstatements and to fill in understatements. We consult a library of evidentiary rules to filter out unreliable information.

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[71] *Id.*

[72] 1 FEYNMAN ET AL., *supra* note 39, § 6-5.

Despite our best efforts, however, most cases end up presenting competing views of hyperbolized truth. Judges and juries grope for the median view, the probabilistic truth, which they estimate to be somewhere between the poles of embellishment. Guiding this search, burdens of proof establish default settings in the decision-making process, which temporarily predispose the case to the most risk-averse outcome. They recognize the margin of error inherent in the adversarial system and steer the decision away from the pretense of pure objectivity.

The uncertainty principle also distributes myriad lesser evidentiary burdens between the parties on a topic-by-topic basis. Professor Wigmore said the "most important consideration in the creation of presumptions is probability."[73] The probability biases range from mere permissible inferences to legally conclusive presumptions.[74] Wigmore devoted at least fifty-five sections of his original treatise to various evidentiary burdens and presumptions allocated by the common law to certain basic facts.[75]

The idea of presuming truth in the absence of proof, however, did not originate with the common law. As James Franklin, a professor of mathematics, notes in *The Science of Conjecture*, the Babylonian Talmud contained "a good deal of reasoning from presumption (*hazakah*)" as did Roman law at the time of Justinian and many other ancient legal codes.[76]

Despite the occasional jurist expressing angst over the concept,[77] most of us are comfortable with a jurisprudence of doubt. We do not—because we believe we cannot—demand or expect pure evidentiary objectivity. We accept as a given a certain "margin of misstatement"[78] inherent in the very nature of our language, in the fog of memory, or in the rationalizations of disputants. Different levels of the burden of proof (reasonable suspicion, probable cause, preponderance of the evidence, clear and convincing proof, beyond a reasonable doubt) merely calibrate the tolerable limits of uncertainty for specific decision-making topics.

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[73] 2 KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 343, at 500 (6th ed. 2006) [hereinafter MCCORMICK].

[74] *Id.* § 342, at 496.

[75] 4 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2485–2540 (1905). Among the "hundreds of recognized presumptions" are the presumptions of regularity, that letters were delivered, that a person missing for seven years is deceased, and that offspring are the legitimate children of the husband. MCCORMICK, *supra* note 73, § 343, at 501–06.

[76] JAMES FRANKLIN, THE SCIENCE OF CONJECTURE: EVIDENCE AND PROBABILITY BEFORE PASCAL 6, 9–10 (2001).

[77] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992) ("Liberty finds no refuge in a jurisprudence of doubt.").

[78] Benjamin Cardozo, *Law and Literature*, 52 HARV. L. REV. 471, 474 (1939).

In short, common law jurists have long accepted the premise that our understanding of juristic truth—the *sui generis* kind of truth produced in courtrooms—is invariably affected by the truth-telling process of the adversary system. "The bottom line, at any rate, seems to be that facts are not the simple, hard things they were supposed to be."[79] While we can measure some things with precision, others we can know only vaguely. It is for this very reason we engineer myriad presumptions into the litigation process to act as temporary proxies for the truth.

These truth presets, if we can call them that, ameliorate the capriciousness of Heisenberg's observation that the act of measuring something necessarily changes it. They also remind us, as Chambers said of the legal scholars who came before him, "I suppose it will be found that often as their knowledge increases their confidence grows less."[80]

CONCLUSION

The laws of physics represent a search for order amid the tumult of matter and energy, from the most imperceptible subatomic speck to our grandest imagination of the ever-expanding universe. Most modern physicists (even those expressing their faith in, to use their description of it, "chaos theory")[81] search for the underlying order, rightly discounting as unhelpful the hypothesis that all things are merely a random physical and metaphysical game of chance. As Einstein famously said, "God does not play dice" with the universe.[82]

So, too, in the laws of men, we look for order amid the tumult of human conflict. Our laws, like our physics, rest upon presuppositions reinforcing that sense of order. We presuppose traditional laws should have a measurable stare decisis force similar to the law of inertia. We rely on an adversarial system that pairs opposing litigable points of view similar to the pairing of all natural forces in Newtonian physics. We accept the apparent *ad hoc* duality in our definition of justice—generalized law and particularized equity—in the same way physicists accept particle-wave duality in their understanding of light. We accept

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79 LINDLEY, *supra* note 66, at 4.

80 1 CHAMBERS, *supra* note 53, at 195.

81 Sensitive dependence on initial conditions results in amplified divergence in outcomes, but surprisingly, often in observable fractal patterns exhibiting such phenomena as Lorenz attractors. *See generally* JULIEN CLINTON SPROTT, ELEGANT CHAOS: ALGEBRAICALLY SIMPLE CHAOTIC FLOWS 11, 61 (2010). Because chaos still deals with deterministic systems, some consider the label "chaos" to be a bit of a misnomer. *See* STEPHEN H. KELLERT, IN THE WAKE OF CHAOS: UNPREDICTABLE ORDER IN DYNAMICAL SYSTEMS, at ix (1993) ("Chaos theory is not as interesting as it sounds. How could it be?").

82 HAWKING, *supra* note 1, at 58.

our inability to reconstruct absolute truth through the judicial process, just as Heisenberg acknowledged his inability to overcome the principle of uncertainty in quantum mechanics.

Why should such things attract our interest? I turn to Oliver Wendell Holmes for the answer:

> The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.[83]

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[83] O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 478 (1897).

HATE SPEECH: A COMPARISON BETWEEN THE EUROPEAN COURT OF HUMAN RIGHTS AND THE UNITED STATES SUPREME COURT JURISPRUDENCE

*Roger Kiska**

INTRODUCTION[1]

Freedom of expression in Europe has not come easily. Historically, bloody wars have raged over the continent waged by totalitarian regimes aimed at controlling fundamental freedoms, with freedom of expression always being near the top of the list of suppressed rights. But the impact of free speech, particularly with regard to the fall of Communism, has been monumental.

Despite the key role freedom of expression has played in safeguarding the liberties now enjoyed in Europe, intergovernmental bodies and national legislatures are all too ready to limit that right based on ideology. Even the European Court of Human Rights ("ECHR"), which has for decades strongly held that freedom of expression includes the right to shock, offend, and disturb,[2] very recently blurred what had been very clear jurisprudence protecting expression by upholding domestic "hate speech" legislation in Sweden that prohibited criticism of homosexual behavior.[3] "Hate speech" legislation in Europe has become such a problem that even mainstream Christian values expressed publically and privately have led to fines, imprisonment, and injury to employment.[4]

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1 Parts of this Article are largely adopted from materials Benjamin Bull, Paul Coleman, and the author wrote for Alliance Defending Freedom. The author has also presented these materials in talks on "hate speech."

2 *See, e.g.*, Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 23 (1976).

3 Vejdeland v. Sweden, App. No. 1813/07 ¶¶ 8–9, 59–60 (Eur. Ct. H.R. Feb. 9, 2012), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109046.

4 *See, e.g.*, Eweida v. United Kingdom, App. No. 48420/10 ¶¶ A(1)(a), (2) (Eur. Ct. H.R. lodged Sept. 29, 2010) (communicated case), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112944 (noting both applicants were employees who lost wages for wearing cross necklaces in violation of staff uniform policies); Ladele v. United Kingdom, App. No. 51671/10 ¶¶ A(1)(a), (2)(a) (Eur. Ct. H.R. lodged Aug. 27, 2010) (communicated case), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111187 (explaining how

This Article proceeds in a four-fold manner. First, the Article gives an overview of the European landscape, exhibiting just how clouded the definition of "hate speech" has become amongst intergovernmental bodies charged with protecting freedom of expression. Second, the Article provides a brief overview of the history of "hate speech" legislation and how that history should be used as a hermeneutic to view the free speech debate today. Third, the Article provides a detailed analysis of the existing jurisprudence of the ECHR, pinpointing precisely where it has gone off course in defining the contours of speech protection. Finally, the Article examines United States Supreme Court jurisprudence on freedom of expression, providing a comparative analysis of the standard used by the United States Supreme Court and the ECHR.

I. OVERVIEW OF "HATE SPEECH" AT THE EUROPEAN LEVEL[5]

Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides the right to freedom of expression in the following terms:

> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[6]

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the first applicant, a public registrar, was threatened with losing her job when she refused to register the civil partnerships of homosexual couples, and how the second applicant, a therapist, was fired when he refused to counsel homosexual couples on sexual issues); JON GOWER DAVIES, A NEW INQUISITION: RELIGIOUS PERSECUTION IN BRITAIN TODAY 13–14 (2010) (referring to a situation in the U.K. of a husband and wife who managed a hotel and who were all but run out of business due to allegations from a guest that they had equated Muhammad to Hitler, even though the district judge rejected the case).

[5] For a more in-depth look on this topic see Roger Kiska & Paul Coleman, *Freedom of Speech and "Hate Speech": Unravelling the Jurisprudence of the European Court of Human Rights*, 5 INT'L J. FOR RELIGIOUS FREEDOM, no. 1, 2012, at 129; PAUL COLEMAN, CENSORED: HOW EUROPEAN "HATE SPEECH" LAWS ARE THREATENING FREEDOM OF SPEECH (forthcoming 2012).

[6] Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221.

The ECHR has repeatedly held that "freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfillment."[7] The ECHR has also held on numerous occasions that freedom of expression must be protected. The court has explicitly stated that freedom of expression protects not only the "'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also [protects] those that offend, shock or disturb . . . . Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society.'"[8] While freedom of expression is subject to exceptions in Paragraph 2 of Article 10, these exceptions "must, however, be construed strictly, and the need for any restrictions must be established convincingly."[9] It is paramount that any European government or intergovernmental authority not act to indoctrinate and not be allowed to make distinctions between persons holding one opinion or another. Any such distinctions would be contrary to the principles of democracy, which have been so bravely defended throughout the recent history of Europe.[10]

The issue of constraints on speech and opinion has risen to prominence in Europe in recent years. The prevalence of high-profile "hate speech" cases, running the gambit from criticism of Islam[11] to

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[7] *E.g.*, Dichand v. Austria, App. No. 29271/95 ¶ 37 (Eur. Ct. H.R. Feb. 26, 2002), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60171; Marônek v. Slovakia, 2001-III Eur. Ct. H.R. 337, 349; Thoma v. Luxembourg, 2001-III Eur. Ct. H.R. 67, 84; *see also* Şener v. Turkey, App. No. 26680/95 ¶ 39(i) (Eur. Ct. H.R. July 18, 2000), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58753; Lingens v. Austria, 103 Eur. Ct. H.R. 11, 26 (1986).

[8] Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 23 (1976); *accord Dichand*, App. No. 29271/95 ¶ 37; *Marônek*, 2001-III Eur. Ct. H.R. at 349; *Thoma*, 2001-III Eur. Ct. H.R. at 84; Jerusalem v. Austria, 2001-II Eur. Ct. H.R. 69, 81; Arslan v. Turkey, App. No. 23462/94 ¶ 44(i) (Eur. Ct. H.R. July 8, 1999), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58271; De Haes v. Belgium, 1997-I Eur. Ct. H.R. 198, 236; Goodwin v. United Kingdom, 1996-II Eur. Ct. H.R. 483, 500; Jersild v. Denmark, 298 Eur. Ct. H.R. (ser. A) at 23 (1994); Thorgeir Thorgeirson v. Iceland, 239 Eur. Ct. H.R. (ser. A) at 27 (1992); Oberschlick v. Austria, 204 Eur. Ct. H.R. (ser. A) at 25 (1991); *Lingens*, 103 Eur. Ct. H.R. at 26; Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser. A) at 40 (1979).

[9] *Şener*, App. No. 26680/95 ¶ 39(i); *accord Thoma*, 2001-III Eur. Ct. H.R. at 84; Observer & Guardian v. United Kingdom, 216 Eur. Ct. H.R. (ser. A) at 30 (1991).

[10] *Cf.* Council of Eur., Rep. of the Comm. of Experts on Human Rights, Problems Arising from the Co-Existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights, 45, H(70)7 (Aug. 1, 1970) [hereinafter Report on Human Rights] (noting that restricting one's freedom of thought or opinion is contrary to the quality of a democratic society).

[11] Norwood v. United Kingdom, 2004-XI Eur. Ct. H.R. 343, 347–50 (decision) (holding the case inadmissible because the applicant's actions constituted a violation of the Convention that bars protection of those same actions).

criticism of homosexual behavior,[12] has led to robust discussion at the intergovernmental level regarding what is and what is not acceptable speech.

It is first worth considering, therefore, what "hate speech" actually is. The central problem is that nobody really knows what it is or how to define it. Humpty Dumpty's conversation with Alice in Lewis Carroll's *Through the Looking Glass* seems very relevant to the discussion.

> "When *I* use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."[13]

"Hate speech" seems to be whatever people choose it to mean. It lacks any objective criteria whatsoever. A recent factsheet of the ECHR admits that "[t]here is *no universally accepted definition* of . . . 'hate speech.'"[14] Similarly, a previous factsheet observed that "[t]he identification of expressions . . . [of] 'hate speech' is sometimes difficult because this kind of speech does not necessarily manifest itself through the expression of hatred or of emotions. It can also be concealed in statements which at a first glance may seem to be rational or normal."[15]

The purpose of the factsheet is to simplify for the general public the meaning of the legal concept behind "hate speech." Instead, the factsheet defines "hate speech" as: (1) without definition, (2) difficult to identify, and (3) speech that can sometimes appear *rational* and *normal*.[16] As will be discussed below, the ECHR, which uses legal certainty as a keystone in its interpretation of the legitimacy of interferences with Convention rights, upholds vague "hate speech" laws criminalizing certain forms of expression.

Despite the lack of definition, many intergovernmental bodies and States themselves have attempted to identify the *particular* speech that *they* consider to be criminal. The Fundamental Rights Agency of the European Union ("FRA"), in one of the more dubious attempts to define

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[12] Vejdeland v. Sweden, App. No. 1813/07 ¶¶ 8–9, 59–60 (Eur. Ct. H.R. Feb. 9, 2012), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109046.

[13] LEWIS CARROLL, THROUGH THE LOOKING-GLASS, AND WHAT ALICE FOUND THERE 124 (Alfred A. Knopf, Inc. 1984) (1872).

[14] EUROPEAN COURT OF HUMAN RIGHTS, HATE SPEECH para. 4 (2012), *available at* http://www.echr.coe.int/NR/rdonlyres/D5D909DE-CDAB-4392-A8A0-867A77699169/0/FICHES_Discours_de_haine_EN.pdf.

[15] COUNCIL OF EUR., HATE SPEECH 2 (2009), *available at* https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2021692&SecMode=1&DocId=1434498&Usage=2.

[16] *Id.*

"hate speech," stated, "'Hate speech' refers to the incitement and encouragement of hatred, discrimination or hostility towards an individual that is motivated by prejudice against that person because of a particular characteristic . . . ."[17]

The FRA, however, with some legal juggling, completely redefines "hate speech" in another document, stating, "The term 'hate speech', *as used in this section*, includes a broader spectrum of verbal acts [including] *disrespectful public discourse*."[18] It also admits that the data collected by the national monitoring bodies "may not, strictly speaking, all fall under a legal definition of hate speech."[19]

So, if it is accepted that there is no definition of "hate speech," it is surely not helpful for the same organization to use different definitions in different documents and label some incidents as "hate speech" while at the same time admitting they may not come under a legal definition of "hate speech."

The most significant instance in recent years with regard to the confusion of terms as it relates to legal and illegal speech has come from Strasbourg, France. In the recent case of *Vejdeland v. Sweden*, the ECHR held that while the particular speech in question "did not directly recommend individuals to commit hateful acts," the comments were nevertheless "serious and prejudicial allegations."[20] The ECHR further stated that "[a]ttacks on persons" can be committed by "insulting, holding up to ridicule or slandering specific groups of the population," and that speech used in an "irresponsible manner" may not be worthy of protection.[21]

As stated at the outset of this Article, the ECHR has for decades held that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for the development of every man. It has time and time again held that freedom of expression "is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend,

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[17] EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, HATE SPEECH AND HATE CRIMES AGAINST LGBT PERSONS 1 (2009), *available at* http://fra.europa.eu/fraWebsite/attachments/Factsheet-homophobia-hate-speech-crime_EN.pdf.

[18] EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, HOMOPHOBIA AND DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN THE EU MEMBER STATES: PART II—THE SOCIAL SITUATION 46 (2009) (emphasis added), *available at* http://fra.europa.eu/fraWebsite/attachments/FRA_hdgso_report_part2_en.pdf.

[19] *Id.*

[20] App. No. 1813/07 ¶ 54 (Eur. Ct. H.R. Feb. 9, 2012), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109046.

[21] *Id.* ¶ 55.

shock or disturb."[22] *Vejdeland* represents a shocking departure from very well-settled case law on freedom of expression.

Under this confusion of jurisprudence, how can anyone be confident in a system that places certain expressions in the "protected category" on the basis that there is a fundamental right to use speech that "offends and shocks" and that also places other expressions in the "criminal category" on the basis that such speech is "serious and prejudicial"?

What is the difference between protected "offensive and shocking" speech on the one hand and criminal "serious and prejudicial" speech on the other hand? The answer is that nobody knows and that Humpty Dumpty was right: "*The question is . . . which is to be master—that's all.*"[23] In other words, it is increasingly clear that whichever "group" shouts the loudest gets to decide what is and is not criminal speech. This is bad for fundamental freedoms and bad for the principles of legal certainty and the rule of law. In legal terms, this means: fail, fail, and fail.

Furthermore, the question arises as to whether *Vejdeland* was fact-specific or if it marked a new trend in ECHR jurisprudence. The case involved individuals who had been linked to neo-Nazism.[24] The applicants unlawfully entered a school and placed approximately 100 pamphlets condemning homosexuals and homosexual behavior in students' lockers.[25] Under such a notorious set of facts, the chamber judges of the ECHR could have been more amenable to uphold the fines because of how unsympathetic the applicants were. In other words, the chamber very well could have decided the case not because it was "hate speech" but because those were the only charges on the proverbial "table."

The result of such "hate speech" provisions is a reduction in the fundamental right to freedom of speech and freedom of expression. Instead of being free to disagree with one another, have robust debate, and freely exchange ideas, "hate speech" laws have shut down debate and created a heckler's veto. In the end, a chilling effect is created that leads to self-censorship and an overly sensitive society.

A recent FRA publication laments that "[t]here is currently no adequate EU binding instrument aimed at effectively *countering expression of negative opinions* against LGBT people, incitement to

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[22] *E.g.*, Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 23 (1976) (internal quotation marks omitted).

[23] CARROLL, *supra* note 13, at 124 (emphasis added).

[24] *See Vejdeland*, App. No. 1813/07 ¶ 8; SWEDISH SEC. SERV., OFFENCES RELATED TO NATIONAL INTERNAL SECURITY 28–29 (2001), *available at* http://www.sakerhetspolisen.se/download/18.7671d7bb110e3dcb1fd80009985/pmv2001en.pdf.

[25] *Vejdeland*, App. No. 1813/07 ¶¶ 8, 56.

hatred or discrimination, as well as abuse and violence."[26] Is this really what we want? A binding instrument aimed at countering the expression of negative opinions?

The current trend towards vague "hate speech" laws has led to a new type of inquisition. Those who express views that are unpopular or not part of the politically correct orthodoxy of European society can lose their jobs, be fined, or even spend time in jail.[27] The aims of "hate speech" laws are legitimate only in as much as they seek to protect minority groups. However, the laws almost universally fail to meet the requisite levels of legal certainty, foreseeability, and clarity as required by the European Convention on Human Rights.[28] Furthermore, the toll that such censorship takes on freedom of speech is neither necessary in a democratic society nor proportionate to the aims sought.[29] As the following examples will show, the end result of vague "hate speech" laws is often the marginalization of the mainstream and the further alienation of fringe groups. Rather than promoting tolerance, "hate speech" laws can be the impetus for even greater intolerance.

In the United Kingdom, numerous street preachers have been arrested by the police for "hate speech."[30] Their crime? Merely preaching

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[26] EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, HOMOPHOBIA, TRANSPHOBIA AND DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY 36–37 (2010) (emphasis added), *available at* http://fra.europa.eu/fraWebsite/attachments/FRA-2011-Homophobia-Update-Report_EN.pdf.

[27] *See* sources cited *supra* note 4.

[28] *See* Brumărescu v. Romania, 1999-VII Eur. Ct. H.R. 201, 222 (stating that "legal certainty" is one of "the fundamental aspects of the rule of law"); Goodwin v. United Kingdom, 1996-II Eur. Ct. H.R. 483, 496–97 (explaining that clarity and foreseeability are necessary to protect individuals from arbitrary State interference); Müller v. Switzerland, 133 Eur. Ct. H.R. (ser. A) at 20 (1988) (discussing the ECHR's jurisprudence on the necessity that valid legal consequences be foreseeable).

[29] *See* Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 23 (1976) (outlining the legal framework for what is "necessary" in a democratic society and what it means for a law to be "proportionate" to the aims sought).

[30] *See* Andrew Alderson, *Preacher Threatened with Arrest for Reading out Extracts from the Bible in Public*, TELEGRAPH, Aug. 15, 2009, http://www.telegraph.co.uk/news/religion/6034144/Preacher-threatened-with-arrest-for-reading-out-extracts-from-the-Bible-in-public.html (discussing the threat of arrest); *Christian Preacher on Hooligan Charge After Saying He Believes That Homosexuality Is a Sin*, DAILY MAIL, May 1, 2010, http://www.dailymail.co.uk/news/article-1270364/Christian-preacher-hooligan-charge-saying-believes-homosexuality-sin.html; *Actual Footage of British Police Arresting Christian Street Preacher, Dale Mcalpine*, YOUTUBE (May 14, 2010), http://www.youtube.com/watch?v=12LtOKQ8U7c; *Birmingham Street Preacher Wins Wrongful Arrest Case*, CHRISTIAN INST. (Dec. 10, 2010), http://www.christian.org.uk/news/birmingham-street-preacher-wins-wrongful-arrest-case/; *Michael Overd Cleared of Verbally Abusing Gay Men in Taunton*, BBC NEWS (Feb. 10, 2012), http://www.bbc.co.uk/news/uk-england-somerset-16984133.

publicly from the Bible. Were they preaching on a controversial topic? Yes, they were. But does that mean only inoffensive preaching should be permitted?

Some of the cases have been extraordinary. For example, at Easter time a few years ago, policemen from the "Race and Hate Crime Unit," following a complaint by a member of the public, investigated a church minister for handing out flyers advertising an Easter service.[31] The leaflet simply featured a picture of a flower and said, "New Life, Fresh Hope" and gave information regarding the service.[32]

In another example from last year, the police investigated a cafe owner for displaying Bible verses on a television in his cafe.[33] And even more recently, authorities banned a church in Norwich, in England, from distributing literature that argued the theological correctness of its religion when compared to Islam.[34] The church members had been peaceably handing out the same leaflet in the same area for four years without prior incident until the authorities held that such literature promoted "hatred."[35] Such examples continue to come to light at an alarming rate. Subjective offense by the listener, no matter how sensitive they are, has become the standard for censorship with a palpable chilling effect being the result.

Last year in Ireland, a humanist accused a bishop of incitement to hatred for giving a homily that referred to Ireland's increasingly "godless culture."[36] The humanist complained to the police that the sermon was hostile to those who do not share the church's aims. In response, the police launched an investigation and passed on the file to the prosecutor.[37] Such a claim would have been unthinkable, and perhaps even humorous, in years past. The rapidity of the ideological shift in European culture with regard to freedom of speech and freedom of thought has been unprecedented.

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[31] THE CHRISTIAN INST., MARGINALISING CHRISTIANS: INSTANCES OF CHRISTIANS BEING SIDELINED IN MODERN BRITAIN 37–38 (2009), *available at* http://www.christian.org.uk/wp-content/downloads/marginchristians.pdf.

[32] *Id.* at 37.

[33] Ross Slater & Jonathan Petre, *Police Tell Cafe Owner: Stop Showing Bible DVDs, or We Will Have to Arrest You*, DAILY MAIL, Sept. 24, 2011, http://www.dailymail.co.uk/news/article-2041504/Police-tell-cafe-owner-Stop-showing-Bible-DVDs-arrest-you.html.

[34] *Norwich Reformed Church Banned for Islam 'Hate' Leaflet*, BBC NEWS (Apr. 16, 2012), http://www.bbc.co.uk/news/uk-england-norfolk-17733162.

[35] *Id.*

[36] Jerome Reilly, *Bishop Accused of Incitement to Hatred in Homily*, INDEPENDENT.IE (Jan. 29, 2012), http://www.independent.ie/national-news/bishop-accused-of-incitement-to-hatred-in-homily-3003057.html.

[37] *Id.*

In Spain, in the summer of 2010, a pro-family television network was fined 100,000 euros for running a series of advertisements in support of the traditional family and showing "*only actual footage*" of a "gay pride" parade.[38] Is it controversial to publicly support the traditional family? Apparently it is. But does that mean that such support should be censored? Furthermore, why is the expression in the "gay pride" parade protected but its reproduction criminalized? It seems judges and administrators have become the arbiters of what is and what is not acceptable public opinion and discourse.

Perhaps one of the most disturbing cases in recent times comes once again from the United Kingdom. Police arrested Ben and Sharon Vogelenzang (both Christians) after a conversation with a guest who was staying at their hotel.[39] Ben, Sharon, and the female Muslim guest had a lively debate about religion—each side arguing that their own religion was correct.[40] It should be noted that the ECHR has held that the freedom to try to convince one's neighbor of the correctness of one's beliefs is inherent in Article 9 of the European Convention on Human Rights.[41]

Several days after their debate, the guest complained to the police, and the police arrested the Vogelenzangs and charged them with "a religiously-aggravated public order offence."[42] After a lengthy investigation, the court eventually threw out the case and acquitted Ben and Sharon; in the meantime, the ordeal destroyed their business, which has never recovered.[43] One conversation. One false complaint. And it devastated lives as a result.[44]

Moving from Europe for just a moment, there are places around the world where freedom of expression is severely limited. One country in

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[38] Matthew Cullinan Hoffman, *Spanish Television Network Fined €100,000 for Criticizing Homosexuality*, LIFESITENEWS (July 26, 2010), http://www.lifesitenews.com/news/archive/ldn/2010/jul/10072601; Press Release, European Centre for Law & Justice, ECLJ Deeply Concerned After Spanish Government Censors Freedom of Expression/Religion of Catholic Media Group (July 6, 2010), http://eclj.org/Releases/Read.aspx?GUID=496702da-27da-40cc-b78b-44836d02a2c6&s=eur.

[39] DAVIES, *supra* note 4, at 13–14.

[40] *Id.* at 13.

[41] *See* Kokkinakis v. Greece, 260 Eur. Ct. H.R. 3, 17 (1993) ("[The] freedom to 'manifest [one's] religion' . . . includes in principle the right to try to convince one's neighbour, for example through 'teaching' . . . ." (second alteration in original) (citing Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 6, at art. 9)).

[42] DAVIES, *supra* note 4, at 13–14.

[43] *Id.* at 14.

[44] *See id.* at 13–19 (giving a detailed analysis of the case and the effect it had on the hotel managers' lives).

particular that has been highly criticized for its "blasphemy laws" is Pakistan.[45] The widespread abuse of these laws has led to the trial, imprisonment, and murder of many citizens—all charged with the crime of using offensive speech.[46]

But it is little wonder the laws are so abused when we look and see just how vague some of the terminology is. For example, one section of the Pakistan Criminal Code states, "Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person, shall be punished . . . ."[47]

This language is so broad that it could mean anything. But the aforementioned law does not just appear in the Criminal Code of Pakistan. The exact language for the elements that make up this crime in the Pakistan Criminal Code are also in the criminal code of a European Union country.[48] We need to be very careful. Loosely worded criminal legislation and vague terminology can be used and abused with devastating consequences. The consequences of the laws in Pakistan are common knowledge, but as outlined, limitations on freedom of speech are increasingly taking place in Europe as well.

II. HISTORY OF "HATE SPEECH"

In 1948, the UN delegates recognized that the problem was not simply that totalitarian governments were engineering society poorly or in the wrong direction. They recognized that the solution was not merely correcting how state-oriented ideologies implemented their programs or simply nudging them in a better direction. No, the problem was that the State had seized the reins of society entirely and constrained the liberty of individuals. The solution was to erect a barrier between the natural, inherent rights of mankind and the power of the State.

The Universal Declaration of Human Rights ("UDHR")[49] and its progeny, the European Convention on Human Rights, are guarantors of *human* rights against the State. The Declaration does not give rights to the State but rather burdens it with supporting rights. It does not give the State a license to experiment with social values and fundamental rights by being the arbiter of what is acceptable speech and, therefore,

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[45] *E.g.*, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ANNUAL REPORT 68 (2009).

[46] *Id.*

[47] PAK. PENAL CODE § 298 (2006).

[48] *See* CYPRUS CRIMINAL CODE § 141 (1959).

[49] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

also acceptable opinion. In fact, it explicitly closes this door in its final article, which explains that nothing in the whole Declaration can be properly interpreted as bestowing upon a State the right to undermine "any of the rights and freedoms set forth herein."[50]

It is through democratic, relational, and rhetorical efforts that social values are to be fostered and furthered, not through the exclusionary and discriminatory mandates of the government. For let us not forget that discrimination forms the core of the State's attack on freedom of expression: this is not a "content-neutral" development of the law but one that discriminates against certain views.

The history of "hate speech," stemming from the preparatory meetings to the UDHR, paints a rather surprising picture of how undemocratic restrictions on freedom of expression can be.

The UDHR, which went through seven drafting stages, invited the most vigorous discussions over Article 19 (freedom of expression)[51] and Article 7 (protection against discrimination).[52] Serious questions arose as to how "tolerant" a tolerant society should be with regard to freedom of expression in light of the history of fascist propaganda that brought Europe into World War II under the Nazi's regime in Germany.[53] With the West being staunch supporters of heavy protections for freedom of expression, it was the Communist countries that aggressively proposed amended language to implement "hate speech" language into the UDHR.[54]

In language strikingly similar to that used by the proponents of "hate speech" in today's political spectrum in support of rigid "hate speech" laws, Soviet Delegate Alexandr Bogomolov argued that laws prohibiting the "advocacy of hatred" were "of the greatest importance":

> The affirmation of the equality of individuals before the law should be accompanied by the establishment of equal human rights in political, social, cultural and economic life. In terms of practical reality, this meant that one could not allow advocacy of hatred or racial, national or religious contempt . . . . Without such a prohibition, any Declaration

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[50] *Id.* at 77.

[51] The ratified version of Article 19 states, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." *Id.* at 75.

[52] Article 7 states, "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." *Id.* at 73.

[53] JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 66 (1999).

[54] *Id.* at 67–69.

> of Human Rights would be useless. It could not be said that to forbid the advocacy of racial, national or religious hatred constituted a violation of the freedom of the press or of free speech. Between Hitlerian racial propaganda and any other propaganda designed to stir up racial, national or religious hatred and incitement to war, there was but a short step. Freedom of the press and free speech could not serve as a pretext for propagating views which poisoned public opinion.
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> Propaganda in favour of racial or national exclusiveness or superiority merely served as an ideological mask for imperialistic aggression. That was how the German imperialists had attempted to justify by racial considerations their plan for destruction and pillage in Europe and Asia.[55]

While the Soviet Union and other Communist nations were largely unsuccessful in placing restrictions on speech within the UDHR,[56] their efforts continued throughout other international treaties drafted in the years that followed.[57]

The International Covenant on Civil and Political Rights ("ICCPR") continued the debate on "hate speech" where the UDHR ended.[58] The minutes of the meetings and the voting record tell the same story as the drafting of the UDHR; broadly speaking it was the Communist nations that sought to prohibit "advocacy of national, racial or religious hatred," while the liberal democratic nations argued in favor of free speech.[59] However, unlike the UDHR, when it came to the final version of the ICCPR, the Communist nations garnered enough support to pass amendments prohibiting "hate speech" and added a specific prohibition on speech to the ICCPR with Article 20(2), which states, "Any advocacy

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[55] Comm'n on Human Rights, Working Group on the Declaration of Human Rights, 2d sess., 6–7, Dec. 10, 1947, U.N. Doc. E/CN.4.AC.2/SR/9 (1947).

[56] Stephanie Farrior,. *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT'L L. 1, 15–17 (1996) (describing a UDHR amendment proposed by the Soviet representative to the U.N. Commission on Human Rights that failed by a vote of ten to four).

[57] *Cf.* John McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. REV. 1739, 1767 (2009) (showing efforts taken by Communist States to insert "hate speech" prohibitions into international treaties after World War II).

[58] *See* Farrior, *supra* note 56, at 20–21; *see also Travaux préparatoires of Article 20 of the International Covenant on Civil and Political Rights*, UNITED NATIONS HUM. RTS., http://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/Travaux Preparatoires.aspx/ (listing the ICCPR's records of meetings and drafting documents).

[59] *See* MARC J. BOSSUYT, GUIDE TO THE "*TRAVAUX PRÉPARATOIRES*" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 406–07 (1987); *see also* MORSINK, *supra* note 53, at 67–69 (explaining individual Communist and liberal nations' involvement in the drafting process).

of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[60]

Similarly, Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD") requires signatories to the treaty to undertake "immediate and positive measures designed to eradicate all incitement to, or acts of . . . discrimination."[61]

Despite the requirement to give "due regard to the principles embodied in the Universal Declaration of Human Rights," including freedom of expression, State Parties must nevertheless, *inter alia*, "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination" and "declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law."[62] Adopted by the United Nations General Assembly in 1965,[63] Article 4 is undoubtedly the most far-reaching of all the international laws relating to "hate speech."

During the adoption of ICERD in the United Nations General Assembly, it was the Colombian representative who most articulately challenged the impending threats to freedom of speech. He stated:

> [T]o penalize ideas, whatever their nature, is to pave the way for tyranny, for the abuse of power; and even in the most favourable circumstances it will merely lead to a sorry situation where interpretation is left to judges and law officers. As far as we are concerned, as far as our democracy is concerned, ideas are fought with ideas and reasons; theories are refuted with arguments and not by resort to the scaffold, prison, exile, confiscation or fines.
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> . . . .
>
> Moreover, we believe that penal law can never presume to impose penalties for subjective offences. This barbarous practice is merely the expression of fanaticism such as is found among uncivilized people and is hence proscribed by universal law. Here, therefore, is one voice that will not remain silent while the representatives of the most advanced nations in the world vote without seriously pondering on the dangers involved in authorizing penalties under criminal law for ideological offences.[64]

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[60] International Covenant on Civil and Political Rights art. 20(2), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

[61] International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter ICERD].

[62] *Id.* at art. 4(a)–(b).

[63] *Id.* at 212 n.1.

[64] U.N. GAOR, 20th Sess., 1406th plen. mtg. at 8, U.N. Doc. A/PV.1406 (Dec. 21, 2001).

Despite the stark warnings, many of the nations of the world adopted censorship on "hateful" speech by means of the criminal law.[65] While the communist regimes that invested huge amounts of power in the hands of the State have now been shamed and consigned to history, the notion that the State ought to have the power to control speech that it considers to be "dangerous" nevertheless remains. As one commentator noted, "The voting record reveals the startling fact that the internationalization of hate-speech prohibitions in human rights law owes its existence to a number of states where both criticisms of the prevalent totalitarian ideology as well as advocacy for democracy were strictly prohibited."[66]

As State Parties passed Article 2(2) of ICCPR and Article 4 of ICERD, these new articles required State Parties to take positive measures to introduce "hate speech" laws.[67] The international measures passed at the United Nations have now filtered down into domestic legislation, and, in spite of the numerous eloquent defenses of free speech given during the ratifying process of the international documents, "hate speech" laws have gradually spread throughout the liberal democratic nations[68] that once opposed them.[69] Ironically, many of these nations are now some of the most enthusiastic users of the "hate speech" laws they originally rejected.

III. EUROPEAN COURT OF HUMAN RIGHTS ANALYSIS

A. Fundamental Nature of Freedom of Expression

As the ECHR has repeatedly held, "[F]reedom of expression . . . constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment."[70] The ECHR has also held on numerous occasions that

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[65] *See, e.g.*, Criminal Code, R.S.C. 1985, c. C-46, §§ 318, 430 (Can.); National Cohesion and Integration Act, (2008) Cap. 12 § 13 (Kenya); Public Order Act, 1986, c. 64, § 18 (U.K.).

[66] Jacob Mchangama, *The Sordid Origin of Hate-Speech Laws*, POL'Y REV., Dec. 2011–Jan. 2012, at 45, 51.

[67] *See* ICCPR, *supra* note 60, at art. 2(2); ICERD, *supra* note 61, at art. 4.

[68] *E.g.*, Public Order Act, 1986, c. 64, § 18 (U.K.); Prohibition of Incitement to Hatred Act, 1989 (Act No. 19/1989) (Ir.); *see also* Criminal Code, R.S.C. 1985, c. C-46, §§ 318, 430 (Can.).

[69] BOSSUYT, *supra* note 59, at 407.

[70] Lingens v. Austria, 103 Eur. Ct. H.R. 11, 26 (1986); *accord* Dichand v. Austria, App. No. 29271/95 ¶ 37 (Eur. Ct. H.R. Feb. 26, 2002), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60171; Marônek v. Slovakia, 2001-III Eur. Ct. H.R. 337, 349; Thoma v. Luxembourg, 2001-III Eur. Ct. H.R. 67, 84; Şener v. Turkey, App. No. 26680/95 ¶ 39(i) (Eur. Ct. H.R. July 18, 2000), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58753.

"[f]reedom of expression constitutes one of the essential foundations of such a society," the hallmarks of which are "pluralism, tolerance, and broadmindedness."[71]

Furthermore, the ECHR has been clear that a High Contracting Party cannot act to indoctrinate and cannot be allowed to operate distinctions between persons holding one opinion or another.[72] Any such distinctions would be contrary to the principles of democracy that have been so bravely defended throughout the recent history of Europe.[73] This freedom of expression protects not only the "'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb . . . . Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society.'"[74]

Protection for freedom of expression pertains to all views and opinions and to all forms of media or publication.[75] The protections afforded *to* freedom of expression in Europe have generally been interpreted very liberally in a number of cases.[76] One example is *Arslan v. Turkey*, in which the ECHR extended Article 10 protection to a book recounting the history of the Kurdish people in Turkey from an admittedly biased perspective and encouraging people to oppose the Turkish government.[77] In *Goodwin v. United Kingdom*, the court also

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[71] Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 23 (1976); *accord Thoma*, 2001-III Eur. Ct. H.R. at 84; Jerusalem v. Austria, 2001-II Eur. Ct. H.R. 69, 81; Oberschlick v. Austria, 204 Eur. Ct. H.R. (ser. A) at 25 (1991); *Lingens*, 103 Eur. Ct. H.R. at 26.

[72] MONICA MACOVEI, FREEDOM OF EXPRESSION: A GUIDE TO THE IMPLEMENTATION OF ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 8 (2004).

[73] *Cf.* Report on Human Rights, *supra* note 10.

[74] *Handyside*, 24 Eur. Ct. H.R. (ser. A) at 23; *accord Dichand*, App. No. 29271/95 ¶ 37; *Marônek*, 2001-III Eur. Ct. H.R. at 349; *Thoma*, 2001-III Eur. Ct. H.R. at 84; *Jerusalem*, 2001-II Eur. Ct. H.R. at 81; Arslan v. Turkey, App. No. 23462/94 ¶ 44(i) (Eur. Ct. H.R. July 8, 1999), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58271; De Haes v. Belgium, 1997-I Eur. Ct. H.R. 198, 236; Goodwin v. United Kingdom, 1996-II Eur. Ct. H.R. 483, 500; Jersild v. Denmark, 298 Eur. Ct. H.R. (ser. A) at 23 (1994); Thorgeir Thorgeirson v. Iceland, 239 Eur. Ct. H.R. (ser. A) at 27 (1992); *Oberschlick*, 204 Eur. Ct. H.R. (ser. A) at 25; *Lingens*, 103 Eur. Ct. H.R. at 26; Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser. A) at 40 (1979).

[75] *Goodwin*, 1996-II Eur. Ct. H.R. at 500 (discussing the "[p]rotection of journalistic sources" as a part of freedom of expression); *accord* MACOVEI, *supra* note 72, at 11 (addressing freedom of the press, particularly radio and television broadcasting).

[76] *See, e.g.*, *Lingens*, 103 Eur. Ct. H.R. at 26; *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 40; MACOVEI, *supra* note 72, at 49 ("[T]he Court has developed a large jurisprudence, demonstrating the high protection afforded to freedom of expression, in particular to the press.").

[77] App. No. 23462/94 ¶¶ 45, 50.

extended Article 10 protection to journalists' sources.[78] The court also gave Article 10 protection in *Sunday Times v. United Kingdom* to a newspaper when the British government imposed an injunction restraining the newspaper from publishing damaging information about the British government.[79]

Ideas have also generally enjoyed strong protection. The ECHR has held that the dissemination of ideas, even those strongly suspected of being false, enjoy the protections of Article 10.[80] The responsibility of discerning truth from falsehood has in this sense been placed on the proper figure, the listener. Overall, the ECHR has thus recognized that the cure to bad speech is more speech and intelligent dialogue.

B. Prescription, Legitimate Aim, and Necessity

In analyzing interference with freedom of expression, the ECHR utilizes a three-prong test to determine whether the interference in question was violative of the European Convention on Human Rights.[81] The ECHR first asks whether the State interference with speech was "prescribed by law"; second, it inquires whether the interference pursued a "legitimate aim[]"; and, finally, the ECHR analyzes whether the interference with the fundamental right to expression was "necessary in a democratic society."[82]

1. Prescription

With regard to the question of whether a law restricting freedom of expression is "prescribed by law," High Contracting Parties are given a larger margin of appreciation under this first test, with the ECHR deeming such leeway to be legitimate inasmuch as national authorities must be able to judge the circumstances warranting restrictions on guaranteed rights.[83] By no means is the margin of appreciation unlimited; the ECHR utilizes a high level of scrutiny when analyzing interference with fundamental rights such as freedom of expression.[84]

The ECHR has been clear that the term "law" must be viewed broadly as meaning any measure with the force of law in effect at a given time.[85] Furthermore, the ECHR has stated that it "has always

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[78] 1996-II Eur. Ct. H.R. at 502–03.

[79] 30 Eur. Ct. H.R. (ser. A) at 41–42.

[80] Salov v. Ukraine, 2005-VIII Eur. Ct. H.R. 143, 180.

[81] Müller v. Switzerland, 133 Eur. Ct. H.R. (ser. A) at 19 (1988).

[82] *Id.* (internal quotation marks omitted).

[83] Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 22 (1976).

[84] *Id.* at 23.

[85] *See* Huvig v. France, 176 Eur. Ct. H.R. 36, 53 (1990) (referring specifically to Article 8(2)).

understood the term 'law' in its 'substantive' sense, not its 'formal' one; it has included both enactments of lower rank than statutes and unwritten law."[86] In *Sunday Times v. United Kingdom*, for example, the ECHR stated that "the word 'law' in the expression 'prescribed by law' covers not only statute but also unwritten law."[87] Unwritten law is common law.[88] In common law countries, such as the United Kingdom, the ECHR has stated that

> [i]t would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not "prescribed by law" on the sole ground that it is not enunciated in legislation: this would . . . strike at the very roots of that State's legal system.[89]

In order to be prescribed by law, the law in question must be accessible and foreseeable in its effects.[90] It thus cannot suffer from vagueness. The "quality" of the law must clearly and precisely define the conditions and forms of any limitations on basic Convention safeguards and must be free from any arbitrary application.[91] The requirement of prescription has been a progressively larger stumbling block in European jurisprudence as States increasingly adopt loosely worded legislation that makes the hearer, in his subjective understanding, the arbiter of whether the speech in question was criminal or not. The example provided above regarding Cyprus's blasphemy law mirroring that of Pakistan[92] is a clear example of "hate speech" legislation that fails to meet the criteria required to pass Convention scrutiny. The provisions are so broad that they provide no guidance or foreseeability whatsoever to the general public on how to govern their actions. At the same time, the wording of the legislation gives unfettered discretion to local authorities to determine what is and what is not acceptable expression.

The ECHR, in *Metropolitan Church of Bessarabia v. Moldova*, held that domestic law, to meet the clarity requirement, must afford a

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[86] *Id.* at 53–54 (citation omitted).

[87] 30 Eur. Ct. H.R. (ser. A) at 30 (1979).

[88] Chappell v. United Kingdom, 152 Eur. Ct. H.R. 3, 22 (1989) (stating that "'law' includes unwritten or common law").

[89] *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 30.

[90] *See id.* at 31.

[91] Olsson v. Sweden, 130 Eur. Ct. H.R. (ser. A) at 30 (1988); *see also* S.W. v. United Kingdom, 335 Eur. Ct. H.R. 28, 42 (1995) (discussing how the development of criminal law by the courts should be reasonably foreseeable); *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 31.

[92] *Compare* CYPRUS CRIMINAL CODE § 141 (1959), *with* PAK. PENAL CODE § 298 (2006).

measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention:

> In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise.[93]

Precisely stated, for the general public, a law limiting freedom of expression must be accessible and foreseeable in its effects. One of the roles of the judges of the ECHR, therefore, is to assess the "quality" of a law, ensuring that the law has the requisite precision in defining the conditions and forms of any limitations on basic safeguards.[94] The precision and foreseeability requirement is necessary in order to avoid both arbitrariness and an unfettered discretion by the authorities to act as they wish.[95] The legislation in question, therefore, must be easy to access, as well as clear and precise in order that the public may govern its actions accordingly. It is only, thus, when these four elements of precision, access, clarity, and foreseeability are met that the law will be deemed to meet the criteria of prescription by law.[96]

2. Legitimate Aim

The second prong of the analysis of interference is whether the interference in question pursues a legitimate aim. Restrictions on rights guaranteed by the European Convention on Human Rights must be narrowly tailored and must be adopted in the interests of public and social life, as well as the rights of other people within society.[97]

The ECHR recognizes that "it is in the first place for the national authorities to assess whether there is a 'pressing social need' for the restriction and, in making their assessment, they enjoy a certain margin of appreciation."[98] Therefore,

> [t]he Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10 the decisions they have taken pursuant to their power of

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93 Metropolitan Church of Bessarabia v. Moldova, 2001-XII Eur. Ct. H.R. 81, 111.

94 *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 31.

95 *Olsson*, 130 Eur. Ct. H.R. (ser. A) at 30; *see also* Hentrich v. France, 296 Eur. Ct. H.R. 3, 19 (1994).

96 *See* Ezelin v. France, 202 Eur. Ct. H.R. (ser. A) at 21–22 (1991).

97 *See* Thoma v. Luxemborg, 2001-III Eur. Ct. H.R. 67, 84 ("Although freedom of expression may be subject to exceptions they must be narrowly interpreted and the necessity for any restrictions must be convincingly established." (internal quotation marks omitted)); Thorgeir Thorgeirson v. Iceland, 239 Eur. Ct. H.R. (ser. A) at 27 (1992).

98 *Thoma*, 2001-III Eur. Ct. H.R. at 85.

> appreciation. In so doing, the Court must look at the "interference" complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient."[99]

Article 10, paragraph 2, provides an exhaustive list of the circumstances in which a person's right to freedom of expression may legitimately be restricted.[100] They are:

> [1] in the interests of national security, territorial integrity or public safety, [2] for the prevention of disorder or crime, [3] for the protection of health or morals, [4] for the protection of the reputation or rights of others, [5] for preventing the disclosure of information received in confidence, [and] [6] for maintaining the authority and impartiality of the judiciary.[101]

With regard to national security and territorial integrity in a post-9/11 Europe, the courts have been more willing to accept, as a legitimate aim, the limitation of speech for individuals or groups the courts hold to be seditious.[102] However, the margin of appreciation associated with national security concerns is by no means unlimited. In *Zana v. Turkey*, the former mayor of Diyarbakir, in southeast Turkey, made statements in favour of the Kurdish Worker's Party that coincided with the massacre of civilians, including women and children.[103] While noting his opposition to massacres, he defended the killings as accidents.[104] The court convicted the former mayor of Diyarbakir under Turkish law for supporting the activities of an armed organization.[105] Before the ECHR,

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[99] *Id.* (citing Fressoz & Roire v. France, 1999-I Eur. Ct. H.R. 1, 19–20).

[100] Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 6, at art. 10(2).

[101] *Id.*

[102] *See, e.g.*, Press Release, Registrar of European Court of Human Rights, Chamber Judgment: Leroy v. France (Oct. 2, 2008), *available at* http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2501837-2699727 (holding a cartoon condoning terrorism was not protected under Article 10); *see also* Daphne Barak-Erez & David Scharia, *Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law*, 2 HARV. NAT'L SEC. J. 1, 10–12 (2011) (discussing the impact of 9/11 on the ECHR's analysis of whether the cartoon in *Leroy v. France* was protected under Article 10); Shawn Marie Boyne, *Free Speech, Terrorism, and European Security: Defining and Defending the Political Community*, 30 PACE L. REV. 417, 424–25 (2010) ("In contrast, the European Convention on Human Rights ('ECHR'), which sets the broad framework for human rights protections in Europe, tempers the protection afforded to free speech with the governmental necessity of imposing restrictions 'in the interests of national security, territorial integrity or public safety, [or] for the prevention of disorder or crime.'" (alteration in original) (quoting Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 6, at art. 10)).

[103] 1997-VII Eur. Ct. H.R. 2533, 2540, 2547.

[104] *Id.* at 2540.

[105] *Id.* at 2541–42.

the Turkish authorities argued that the conviction of the applicant, which included a jail sentence, was in the interest of national security.[106] The ECHR held that the interference pursued a legitimate aim because the applicant was a well-known political figure in the region during a time when serious disturbances raged in the area and because his influence could objectively lead to further violence.[107]

In contrast, in *Ergin v. Turkey (No. 6)*, in which a newspaper editor was criminally fined for writing an article purported to incite individuals to evade military service, the ECHR held that the interference was disproportionate to pursuing the aim of national security and did not correspond to a pressing social need.[108] Similarly, in *Piermont v. France*, the ECHR rejected France's assertion that they possessed a legitimate aim to protect France's territorial integrity by preventing a member of the European Parliament who had condemned France's presence in French Polynesia from entering New Caledonia.[109]

With regard to the prevention of disorder or crime, the ECHR has readily accepted this exception as a legitimate aim, particularly in cases that would undermine homeland security, such as with the integrity of the police force. For example, the ECHR has held that verbally abusing police officers in public could be held as a crime because such actions hinder the job of the police by undermining their authority.[110]

Cases in which High Contracting Parties have used the protection of health and morals as an aim for interfering with freedom of expression have been relatively few. Many of the cases, however, focused on issues relevant to the Christian moral worldview, such as cases that dealt with obscenity and blasphemy laws. In *Handyside v. United Kingdom*, the ECHR upheld the seizure of books containing obscene materials that were intended for school children because the seizure pursued the legitimate aim of protecting young children from immoral material that could have objectively harmed their development.[111] In *Wingrove v. United Kingdom*, the ECHR again upheld protection of public morals as a legitimate aim where the British Board of Film Classification refused to distribute a film depicting Saint Teresa of Avila having an erotic fantasy involving the crucified figure of Christ.[112]

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[106] *Id.* at 2546.

[107] *Id.* at 2549.

[108] 2006-VI Eur. Ct. H.R. 325, 329–30.

[109] 314 Eur. Ct. H.R. (ser. A) at 9–10, 25–27 (1995).

[110] Janowski v. Poland, 1999-I Eur. Ct. H.R. 187, 200–02.

[111] 24 Eur. Ct. H.R. (ser. A) at 24–25, 28 (1976).

[112] Wingrove v. United Kingdom, 1996-V Eur. Ct. H.R. 1937, 1942–43, 1959–60.

In another case with religious liberties implications, the ECHR upheld the protection of the reputation or rights of others as a legitimate aim.[113] In *Otto-Preminger-Insitut v. Austria*, the ECHR upheld the seizure of a film by Austrian authorities in a highly Catholic part of Austria because the film was highly offensive to Catholics.[114]

The aim of preventing the disclosure of information received in confidence has provided very little by way of ECHR case law. This protection is provided for both sensitive government documents and corporate documents that could endanger the well-being of these entities. However, in contrast, the ECHR has held that the convictions of French journalists who published private company documents that they procured through illegal photocopying means violated Article 10 of the Convention.[115]

Finally, the ECHR has upheld on a number of occasions interferences with Article 10 rights under the legitimate aim of maintenance of the authority and impartiality of the judiciary. A wider margin of appreciation has been provided to this aim because of the central importance of the rule of law and integrity of the judiciary to a democratic society. In *Sunday Times v. United Kingdom*, for example, the ECHR agreed that the government had a legitimate aim for an injunction against the applicant newspaper that ordered the newspaper not to publish an article on a thalidomide producer that would have prejudiced a class action lawsuit involving a number of children born with severe disabilities.[116] The court ultimately held, however, that the United Kingdom violated Article 10 because of the next prong of the test: the necessity of the interference for a democratic society.[117]

3. Necessary for a Democratic Society

The final criterion that must be met for government interference into Convention protections to be legitimate is that the interference in question must be necessary in a democratic society. The ECHR has stated that the typical features of a democratic society are pluralism, tolerance, and broadmindedness.[118] For such an interference to be necessary in a democratic society, it must meet a "pressing social need" while at the same time remaining "proportionate to the legitimate aim

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[113] Otto-Preminger-Institut v. Austria, 295 Eur. Ct. H.R. 3, 20–21 (1994).

[114] *Id.*

[115] Fressoz & Roire v. France, 1999-I Eur. Ct. H.R. 1, 7–9, 24.

[116] 30 Eur. Ct. H.R. (ser. A) at 35, 41–42 (1979) (finding that the interference was justifiable as pursuing a legitimate aim, but ultimately holding that there was a violation of Art. 10 because the interference was not necessary for a democratic society).

[117] *Id.* at 41–42.

[118] *See* cases cited *supra* note 8.

pursued."[119] The ECHR defines proportionality as being the achievement of a fair balance between various conflicting interests.[120] Any interference with freedom of expression must be based on just reasons that are both "relevant and sufficient."[121] This need must of course be concrete.[122]

The State has a duty to remain impartial and neutral, since what is at stake is the preservation of pluralism and the proper functioning of democracy, even when the State or judiciary may find some of those views irksome.[123] Clearly, when the State is allowed to dictate what is and what is not offensive and to punish speech it deems offensive, a *de facto* case of viewpoint discrimination is established and a project of social engineering is embarked upon.

"Any interference must correspond to a 'pressing social need'; thus, the notion 'necessary' does not have the flexibility of such expressions as 'useful' or 'desirable.'"[124] The list of restrictions of freedom of expression, as contained in Article 10 of the Convention, is exhaustive; they are to be construed strictly, within a limited margin of appreciation allowed for the State, and only convincing and compelling reasons can justify restrictions on that freedom.[125]

The ECHR summarized its definition of how to determine whether a pressing social need has been met in *Zana v. Turkey*, noting that it must

> look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient." In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in

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[119] *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 38.

[120] *See* Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 24 (1981) (balancing justifications for retaining a law and detrimental effects of retaining it); Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 23 (1976) (discussing proportionality between restrictions on freedom of expression and a legitimate pursued aim).

[121] Zana v. Turkey, 1997-VII Eur. Ct. H.R. 2533, 2548; *see also Dudgeon*, 45 Eur. Ct. H.R. (ser. A) at 22 (addressing the requirement of relevancy and sufficiency in Article 8).

[122] *See* JEAN-FRANCOIS RENUCCI, ARTICLE 9 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION 47 (2005).

[123] United Communist Party of Turkey v. Turkey, 1998-I Eur. Ct. H.R. 1, 27.

[124] Svyato-Mykhaylivska Parafiya v. Ukraine, App. No. 77703/01 ¶ 116 (Eur. Ct. H.R. June 14, 2007), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81067.

[125] Wingrove v. United Kingdom, 1996-V Eur. Ct. H.R. 1937, 1956 ("No restriction on freedom of expression . . . can be compatible with Article 10 unless it satisfies, *inter alia*, the test of necessity as required by the second paragraph of that Article.").

> Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.[126]

C. Vejdeland v. Sweden*: "Hate Speech" Restrictions Upheld by the European Court of Human Rights*

In 2004, the applicants, Tor Fredrik Vejdeland, Mattias Harlin, Björn Täng, and Niklas Lundström, "together with three other persons, went to an upper secondary school . . . and distributed approximately a hundred leaflets . . . in or on the pupils' lockers."[127] The principal then stopped the applicants and told them to leave the premises.[128] The leaflets in question criticized homosexual behavior—referring to it as "deviant sexual proclivity" that had "a morally destructive effect on the substance of society"—and warned the pupils of "homosexual propaganda" allegedly being promulgated by teachers in the school.[129]

The court's account is as follows:

> For distributing the leaflets, the applicants were charged with agitation against a national or ethnic group . . . . The applicants disputed that the text in the leaflets expressed contempt for homosexuals and claimed that, in any event, they had not intended to express contempt for homosexuals as a group. They stated that the purpose of their activity had been to start a debate about the lack of objectivity in the education dispensed in Swedish schools.[130]

Nevertheless, on July 6, 2006, the Supreme Court of Sweden convicted the applicants under Chapter 16, Article 8, of the Swedish Penal Code for "agitation against a national or ethnic group."[131]

In the judgment, the ECHR took "into consideration that the leaflets were left in the lockers of young people who were at an impressionable and sensitive age and who had no possibility to decline to accept them."[132] The ECHR further noted that "the distribution of the leaflets took place at a school which none of the applicants attended and to which they did not have free access."[133] The court also considered the penalty imposed on the applicants and noted that none of the applicants served prison time, although the maximum sentence for their offense

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[126] *Zana*, 1997-VII Eur. Ct. H.R. at 2548 (citations omitted).

[127] Vejdeland v. Sweden, App. No. 1813/07 ¶¶ 1, 8 (Eur. Ct. H.R. Feb. 9, 2012), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109046.

[128] *Id.* ¶ 8.

[129] *Id.* (internal quotation marks omitted).

[130] *Id.* ¶¶ 9–10 (internal paragraph numbering omitted).

[131] *Id.* ¶¶ 15, 18.

[132] *Id.* ¶ 56.

[133] *Id.*

carried a prison sentence of two years.[134] It therefore held that the penalties were not excessive.[135]

In deciding, however, that the *content* of the expression was unworthy of protection, as the ECHR did in paragraphs fifty-four to fifty-five of the judgment,[136] the ECHR is on a far more dangerous footing. As the dissenting opinion of Judge András Sajó, joined by Judges Vladimiro Zagrebelsky and Nona Tsotsoria, warned in *Féret v. Belgium*:

> Content regulation and content-based restrictions on speech are based on the assumption that certain expressions go "against the spirit" of the Convention. But "spirits" do not offer clear standards and are open to abuse. Humans, including judges, are inclined to label positions with which they disagree as palpably unacceptable and therefore beyond the realm of protected expression. However, it is precisely where we face ideas that we abhor or despise that we have to be most careful in our judgment, as our personal convictions can influence our ideas about what is actually dangerous.[137]

However, in holding that there had been no violation of Article 10, in large part because of the content of the applicants' expression, the ECHR has done a disservice to freedom of expression as enshrined in the Convention. The ECHR has long held "that freedom of expression is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb."[138] However, in this decision, the ECHR held that the language was "serious," "prejudicial," and "insulting."[139] It also maintained that speech used in an "irresponsible manner" may not be worthy of protection.[140]

As a result of the ECHR's reasoning, it is surely impossible for citizens to effectively regulate their conduct so that they know when their "offensive" and "shocking" speech is protected but not their "serious and prejudicial" speech. The ECHR could quite easily have dismissed the applicant's case on the basis of the circumstances of the case without having to make its remarkably vague holdings on the content of the applicants' so-called "hate speech."

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[134] *Id.* ¶ 58.

[135] *Id.*

[136] *Id.* ¶¶ 54–55 (noting that "serious and prejudicial allegations," while "not necessarily entail[ing] a call for an act of violence," can be "exercised in an irresponsible manner").

[137] *Id.* ¶ 2 (Spielmann, J., concurring) (translating Féret v. Belgium, App. No. 15615/07 (Eur. Ct. H.R. July 16, 2009) (Sajo, J., dissenting)).

[138] *Id.* ¶ 53 (internal quotation marks omitted).

[139] *Id.* ¶¶ 54–55.

[140] *Id.* ¶ 55.

In *Şener v. Turkey*, the government charged the owner and editor of a weekly review under the Turkish Prevention of Terrorism Act (1991) "with having disseminated propaganda against the indivisibility of the State by publishing" an article containing sharp criticism of the Turkish Government's policies and actions of their secured forces with regard to the population of Kurdish origin.[141] The ECHR found that

> although certain phrases seem aggressive in tone . . . the article taken as a whole does not glorify violence. Nor does it incite people to hatred, revenge, recrimination or armed resistance. On the contrary, the article is an intellectual analysis of the Kurdish problem which calls for an end to the armed conflict.[142]

The ECHR held that the government had "failed to give sufficient weight to the public's right to be informed of a different perspective on the situation . . . irrespective of how unpalatable that perspective may be for them."[143] The ECHR concluded that the editor's "conviction was disproportionate to the aims pursued and, accordingly, not necessary in a democratic society."[144] As such, the ECHR held "there [had] therefore been a violation of Article 10 of the Convention."[145]

D. Expression in the Context of Religious Freedom

The ECHR has elevated "freedom of thought, conscience and religion," guaranteed by Article 9 of the Convention, to being one of the cornerstones of a democratic society.[146] The ECHR has held that religious freedom is "one of the most vital elements that go to make up the identity of believers and their conception of life."[147] Article 9 has taken the position of a substantive right under the European Convention on Human Rights.[148]

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[141] App. No. 26680/95 ¶¶ 6–8, 44 (Eur. Ct. H.R. July 18, 2000), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58753.

[142] *Id.* ¶ 45.

[143] *Id.*

[144] *Id.* ¶ 47 (internal quotation marks omitted).

[145] *Id.*

[146] Kokkinakis v. Greece, 260 Eur. Ct. H.R. 3, 17 (1993).

[147] Otto-Preminger-Institut v. Austria, 295 Eur. Ct. H.R. 3, 17 (1994).

[148] *See* Manoussakis v. Greece, 1996-IV Eur. Ct. H.R. 1346, 1365 (holding that under the European Convention on Human Rights, states have no discretion in determining whether beliefs or expressions of beliefs are legitimate); *Otto-Preminger-Institut*, 295 Eur. Ct. H.R. at 17–18 (citing *Kokkinakis* to reinforce that Article 9's religious dimension is a vital element in the make-up of believers' identities); *Kokkinakis*, 260 Eur. Ct. H.R. at 17 (commenting that Article 9's religious dimension is a vital element in the make-up of believers' identities); Hoffmann v. Austria, 255 Eur. Ct. H.R. 45, 50, 53–54, 60 (1993) (holding that no issue arose under Article 9 where the applicant became a Jehovah's Witness, brought action for custody of her children, and the Supreme Court of Austria

The freedom to choose one's faith and live it out is an inviolable freedom protected under the European Convention.[149] Discriminatory treatment of a religion for historic, ethnic, or content-based reasons, which has the effect of diminishing this freedom, violates the European Convention on Human Rights.

As the majority opinion in *Hasan v. Bulgaria* correctly reasons:

> The Court recalls that religious communities traditionally and universally exist in the form of organised structures. They abide by rules which are often seen by followers as being of a divine origin. Religious ceremonies have their meaning and sacred value for the believers if they have been conducted by ministers empowered for that purpose in compliance with these rules. The personality of the religious ministers is undoubtedly of importance to every member of the community. Participation in the life of the community is thus a manifestation of one's religion, protected by Article 9 of the Convention.[150]

In addition, the ECHR has held that, similar to freedom of expression, guaranteeing freedom of thought, conscience, and religion assumes State neutrality.[151] Respect for a plurality of beliefs and convictions is a basic obligation of the State. Individuals must be able to freely choose, and States must allow individuals to freely adopt, their religious convictions and religious memberships. Article 9 enshrines the dictum that the right to freedom of religion excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.[152]

In the specific case of freedom of religion, the ECHR's task in order to determine the margin of appreciation in each case is to "take into account what is at stake, namely the need to maintain true religious

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ruled against her, overturning lower courts, on the grounds of the children's religious education and well-being).

[149] Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 6, at art. 9–11.

[150] 2000-XI Eur. Ct. H.R. 117, 137.

[151] *See Manoussakis*, 1996-IV Eur. Ct. H.R. at 1365 (explaining that discretion of the State must be excluded in determining legitimate religious beliefs or expressions of those beliefs under Article 9 of the Convention); *see also* Jehovah's Witnesses Moscow v. Russia, App. No. 302/02 ¶ 141 (Eur. Ct. H.R. June 10, 2010), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99221 (reiterating that the ECHR has held States must exercise discretion when determining whether religious beliefs or practices are legitimate); Church of Scientology Moscow v. Russia, App. No. 18147/02 ¶ 87 (Eur. Ct. H.R. Apr. 5, 2007), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80038 (commenting that the ECHR's job is to review State decisions concerning the exercise of State discretion in light of conformity with the Convention).

[152] *Manoussakis*, 1996-IV Eur. Ct. H.R. at 1365.

pluralism, which is inherent in the concept of a democratic society."[153] "The restrictions imposed on the freedom to manifest" all of the rights inherent in freedom of religion, including the freedom to express one's religious opinions, "call for very strict scrutiny by the [ECHR]."[154] In the exercise of its supervisory function, the ECHR must consider the basis of the interference complained of with regard to the case as a whole.[155]

Freedom of religion, within the context of the black letter of Article 9, is multi-faceted.[156] Among other things, it means the right to pray anytime and anywhere. It also means that one can share one's opinion and faith freely, including references to the Bible or God. It means that no one can tell a person of faith what to believe. It means freedom to follow one's own Christian conscience, even in one's professional life, without fear of being persecuted or fired from one's position. It means speaking openly about one's Christian beliefs in whatever stage of life—for example, in an office or on a university campus. Freedom of religion includes the right to live one's faith whether at work, in the store, in a church, or in the classroom.

While this is what the black letter of the law says, the reality is that Christian expression has been limited on multiple occasions at both the European and domestic levels. Within the context of religious expression, the issue of evangelism has been much debated. *Kokkinakis v. Greece*[157] was the seminal ECHR case dealing with the limitations of sharing one's faith.[158] The government charged the applicant, a Jehovah's Witness, with proselytism and sentenced the applicant to imprisonment and to pay a fine.[159] The ECHR's holding was very clear about the fundamental right to religious expression in the context of evangelism:

> While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to "manifest [one's] religion". Bearing witness in words and deeds is bound up with the existence of religious convictions.
>
> According to Article 9, freedom to manifest one's religion is not only exercisable in community with others, "in public" and within the

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[153] Metropolitan Church of Bessarabia v. Moldova, 2001-XII Eur. Ct. H.R. 81, 114; *see also Kokkinakis*, 260 Eur. Ct. H.R. at 17 (holding that the freedoms protected in Article 9 are foundational to a democratic society).

[154] *Manoussakis*, 1996-IV Eur. Ct. H.R. at 1364.

[155] *Kokkinakis*, 260 Eur. Ct. H.R. at 21.

[156] *See* Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 6, at art. 9.

[157] 260 Eur. Ct. H.R. 3.

[158] Peter G. Danchin, *Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law*, 49 HARV. INT'L L.J. 249, 272 (2008).

[159] *Kokkinakis*, 260 Eur. Ct. H.R. at 8–9.

> circle of those whose faith one shares, but can also be asserted "alone" and "in private"; furthermore, it includes in principle the right to try to convince one's neighbour, for example through "teaching", failing which, moreover, "freedom to change [one's] religion or belief", enshrined in Article 9, would be likely to remain a dead letter.[160]

Recent arrests of street preachers in Great Britain have increased at an alarming rate.[161] Yet, in 2007, a review of the leading authority in the United Kingdom on the law relating to street evangelism revealed several principles that have garnered international consensus on the right of speakers to express or even promote their ideas in the public square, so long as they did not incite violence.[162] In the case of *Redmond-Bate v. Director of Public Prosecutions*, Ms. Redmond-Bate was street-preaching with two other women.[163] Some members of the crowd exhibited hostility towards them.[164] A constable asked the women to stop preaching, but when they refused to do so the police arrested them for breach of the peace.[165] The police charged Ms. Redmond-Bate "with obstructing a police officer in the execution of his duty," and the court convicted her.[166]

On appeal, the Divisional Court overturned the decision.[167] The leading judgment was given by Lord Justice Sedley who held that the

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[160] *Id.* at 17 (alterations in original) (citations omitted).

[161] *See, e.g.*, Heidi Blake, *Christian Preacher Arrested for Saying Homosexuality Is a Sin*, TELEGRAPH, May 2, 2010, http://www.telegraph.co.uk/news/religion/7668448/Christian-preacher-arrested-for-saying-homosexuality-is-a-sin.html (reporting on the arrest of street preacher Dale McAlpine); *Birmingham Street Preacher Wins Wrongful Arrest Case*, CHRISTIAN INST. (Dec. 10, 2010), http://www.christian.org.uk/news/birmingham-street-preacher-wins-wrongful-arrest-case/ (reporting on the arrest and subsequent trial of street preacher Anthony Rollins); Hilary White, *Another UK Street Preacher Arrested, Charged, for Views on Homosexuality*, LIFESITENEWS.COM (May 3, 2010), http://www.lifesitenews.com/home/print_article/news/1756/ (reporting that Dale McAlpine's arrest was the second arrest of that kind made in just over a month); *see also* Bureau of Democracy, Human Rights, & Labor, *International Religious Freedom Report 2010*, U.S. DEP'T OF STATE (Nov. 17, 2010), http://www.state.gov/j/drl/rls/irf/2010/index.htm (detailing the status of religious freedom in the United Kingdom); *Video: US Govt Notes UK Christians Get Rough Ride*, CHRISTIAN INST. (Nov. 18, 2010), http://www.christian.org.uk/news/video-us-govt-notes-uk-christians-get-rough-ride/ (reporting on U.S. Secretary of State Hilary Clinton's address concerning the Department of State's annual report on religious freedom in the United Kingdom).

[162] *See generally The Law Relating to Street Evangelism*, CHRISTIAN INST. (Apr. 2007), http://www.christian.org.uk/wp-content/downloads/the-law-relating-to-street-evangelism.pdf (summarizing English laws on religious freedom as they pertain to street preaching and offering advice on how to comply with such laws).

[163] (1999) 163 J.P. 789 (Q.B.) 790 (Gr. Brit.).

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.* at 798–99.

issue was whether the constable had acted reasonably in reaching the view that there was an imminent threat and in determining where that threat was coming from.[168]

> If the appellant and her companions were . . . being so provocative that someone in the crowd, without behaving wholly unreasonably, might be moved to violence he was entitled to ask them to stop and to arrest them if they would not. If the threat of disorder or violence was coming from passers-by who were taking the opportunity to react so as to cause trouble . . . , then it was they and not the preachers who should be asked to desist and arrested if they would not.[169]

Lord Justice Sedley pointed out, "Nobody had to stop and listen. If they did so, they were free to express the[ir] view . . . ."[170] He also confirmed that protected speech "includes not only the inoffensive, but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having."[171] He continued:

> To proceed . . . from the fact that . . . preaching about morality, God and the Bible (the topic not only of sermons preached on every Sunday of the year but of at least one regular daily slot on national radio) to a reasonable apprehension that violence is going to erupt is, with great respect, both illiberal and illogical. The situation perceived and recounted by [the constable] did not justify him in apprehending a breach of the peace, much less a breach of the peace for which the three women would be responsible.[172]

The mere fact that the Church's perspective may be "unpalatable" to some does not legitimize its censorship by the State under the Convention. On the contrary, what stands out from *Şener* is the ECHR's admonition that "there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest."[173] In this respect, the ECHR parallels the United States Supreme Court in the special protection it affords to speech dealing with "matters of public concern."[174] As demonstrated in *Snyder v. Phelps,* Christian expression on sensitive moral and religious issues

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[168] *Id.* at 790–91.

[169] *Id.* at 797 (citations omitted).

[170] *Id.* at 798.

[171] *Id.*

[172] *Id.* at 798.

[173] Şener v. Turkey, App. No. 26680/95 ¶ 40 (Eur. Ct. H.R. July 18, 2000), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58753.

[174] *See* Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011).

could fairly be characterized as constituting speech on matters of public concern.[175]

In 2004, Alliance Defending Freedom assisted Pastor Åke Green in the appeal of his one-month jail sentence[176] after a court found him guilty under a Swedish "hate-crimes" law forbidding criticism of participants in homosexual behavior.[177] Green had preached a sermon to his small congregation in which he directly quoted Scripture from the Bible on the subject of sexual immorality, including homosexual behavior.[178] A recording of the pastor's sermon was provided to the state prosecutor who instituted a criminal prosecution against Green.[179] The trial court convicted Green and sentenced him to prison simply for expressing his religious beliefs to his church congregation.[180] The Swedish appeals court overturned the conviction, concluding, "Åke Green, at the time he made his statements, acted out of his Christian conviction to improve the situation of his fellow man, and did so according to what he considered to be his duty as a pastor."[181] The court recognized that Green's speech resulted from "a theme found in the Bible."[182]

The Observatory on Intolerance and Discrimination Against Christians in Europe has presented recommendations before the OSCE regarding the need to defend freedom of speech, particularly that of

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[175] Quoting from case precedent, the Supreme Court explained:

> "[S]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'" The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." That is because "speech concerning public affairs is more than self-expression; it is the essence of self-government." Accordingly, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."

Snyder, 131 S. Ct. at 1215 (citations omitted) (quoting, respectively, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985); N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964); Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964); Connick v. Myers, 461 U.S. 138, 145 (1983)).

[176] *ADF Protecting Religious Liberty Internationally, Assisting Defense of Pastor in Sweden*, ALLIANCE DEFENDING FREEDOM (Nov. 9, 2005), http://www.alliancedefending freedom.org/News/PRDetail/1179.

[177] Keith B. Richburg & Alan Cooperman, *Swede's Sermon on Gays: Bigotry or Free Speech?: Pastor Challenges Hate-Law Restrictions*, WASH. POST, Jan. 29, 2005, at A1.

[178] *Id.*

[179] *Id.*; *see also* Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2005-11-29 p. 805 B1050-05 (Swed.).

[180] Richburg & Cooperman, *supra* note 177; *see also* Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2005-11-29 p. 805 B1050-05 (Swed.).

[181] Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2005-11-29 p. 805 B1050-05 (Swed.).

[182] *Id.*

Christians to "teach Christian/Biblical Anthropology, faith and morality."[183] The OSCE concluded, as recently as 2009, that intolerance and discrimination against Christians needed to be addressed; nonetheless, these abuses, particularly in the area of speech regarding homosexuality, and Islam, persist.[184] Ambassador Janez Lenarcic, Director of the OSCE Office for Democratic Institutions and Human Rights ("ODIHR"), acknowledged the need for action, stating,

> What came out clearly from this meeting is that intolerance and discrimination against Christians is manifested in various forms across the OSCE area . . . .
>
> While denial of rights may be an important issue where Christians form a minority, exclusion and marginalization may also be experienced by Christians where they comprise a majority in society.[185]

This troubling trend has been manifested primarily in the curtailment of freedom of Christian expression. Freedom of thought, conscience, and religion is under a very real threat to being limited to mere freedom of worship in private or within the confines of church. Expression of moral views, Christian symbols, or appeals to an objective truth (either morally or with regard to the theological superiority of one's religion) have become the subject of job discrimination[186] and criminal charges.[187]

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[183] Barbara Vittucci, Observatory on Intolerance & Discrimination Against Christians, Key Recommendations for OSCE Summit in Kazakhstan, 2010 (Oct. 7, 2010), *available at* http://www.osce.org/home/71878 (translation available on the website for OSCE); *see also* Working Session 2, OSCE Review Conference, Observatory on Intolerance & Discrimination Against Christians, Fundamental Freedoms, Including Freedom of Thought, Conscience, Religion or Belief (Oct. 1, 2010), *available at* http://www.osce.org/home/71587 (reporting, in part, that Christian parents in Germany served jail time for not allowing their children to watch a play that displayed themes in opposition to their moral beliefs).

[184] *See* Press Release, Org. for Sec. & Co-operation Eur., Intolerance and Discrimination Against Christians Needs to be Addressed, Concludes OCSE Meeting (Mar. 4, 2009) (on file with the Regent University Law Review) (summarizing the issues raised at an OSCE meeting concerning escalating discrimination against Christians in Europe); *see also* Taner Akcam, Op-Ed., *Turkey's Human Rights Hypocrisy*, N.Y. TIMES, July 20, 2012, at A23 (reporting that while Turkey's Prime Minister works hard to protect Muslim freedoms, the freedoms come at the price of discrimination against Christians, Arabs, and Kurds); *Christians Take 'Beliefs' Fight to European Court of Human Rights*, BBC NEWS (Sept. 4, 2012), http://www.bbc.co.uk/news/uk-19472438 (reporting that four Christians living in the United Kingdom are taking their respective employment cases up to the ECHR based on violations of Article 9).

[185] Press Release, *supra* note 184 (internal quotation marks omitted).

[186] *See, e.g.*, Ladele v. United Kingdom, App. No. 51671/10 ¶¶ A(1)(a), 2(b) (Eur. Ct. H.R. Aug. 27, 2010) (communicated case), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111187 (recounting that Ladele was threatened with dismissal if she failed to perform civil partnership ceremonies and that McFarlane was dismissed due to his refusal

IV. COMPARATIVE JURISPRUDENCE: THE UNITED STATES

Internationally, the courts in Canada and the United States are most analogous to those in Europe with regard to strictness of procedural requirements, transparency, and respect for the rule of law. The American model of protection for expression stands in stark contrast to that of Europe, however, in that it provides profound protection for expression, including religious expression.

The First Amendment has long afforded the American people with strong freedoms in the area of speech and expression.[188] At the heart of the First Amendment is the inescapable relationship between the free flow of information and a self-governing people, and American courts have not hesitated to remove obstacles that obstruct this flow. Embodied in American democracy is the firm conviction that wisdom and justice are most likely to prevail in public decision-making if all ideas, discoveries, and points of view are plainly set forth before the people for their consideration.

Chief Justice Roberts of the United States Supreme Court recently affirmed,

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow . . . . [W]e cannot react to [the] pain [inflicted] by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.[189]

At the same time, American courts have recognized that not all expression enlightens the body politic and that some words are capable of perpetrating serious harm. Thus, as experience revealed that the value of a species of expression was thoroughly meager, but its potential for harm great, American courts began to define narrow categories of words that states could restrict or punish.[190] The United States Supreme

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to counsel same-sex couples); Eweida v. United Kingdom, App. No. 48420/10 ¶ A(1)(a) (Eur. Ct. H.R. Sept. 29, 2010) (communicated case), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112944 (recounting that Eweida was sent home without pay for failure to comply with uniform restrictions concerning a cross necklace and that Chaplin was placed in a non-nursing position for failure to cover a crucifix).

[187] *See, e.g.*, Kokkinakis v. Greece, 260 Eur. Ct. H.R. 3, 8 (1993) (describing the multiple separate charges filed against Kokkinakis for trying to convert people to his religion).

[188] "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

[189] Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011).

[190] *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (commenting that "'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" are not considered protected speech under the Constitution).

Court, thus, excluded libel, obscenity, and incitement from the First Amendment's protections.[191] But, in time, even these free speech exceptions became smaller in scope.[192] Under the current state of the law, there remain only three types of speech that are constitutionally proscribed: obscenity, defamation, and speech that creates "clear and present danger."[193]

In analyzing a government restriction on speech under the United States Constitution, a three-step legal framework has typically been employed. First, a determination is made of whether the speech is protected by the First Amendment; second, the "nature of the forum" or place where the speech occurs is identified—which in turn dictates the standard for judging the speech restriction; and, finally, an assessment is made of whether the justification for the speech restriction satisfies "the requisite standard."[194]

A. Protected Forms of Expression

It is well settled that religious utterances and discussion, such as those detailed above with regard to criticism of homosexual behavior, constitute protected speech under the United States Constitution. "Indeed, in Anglo–American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince."[195] Religious speech, therefore, is entitled to the same protection granted to secular, private expression under the First Amendment.[196]

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[191] *See, e.g.*, Miller v. California, 413 U.S. 15, 36–37 (1973) (reaffirming that the First Amendment does not protect obscene material); Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (per curiam) (commenting that incitement language is not protected in times of war and should logically extend to times of peace); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 301–02 (1964) (Goldberg, J., concurring) (commenting that personal libel is not protected under the First Amendment).

[192] *See* Cohen v. California, 403 U.S. 15, 19–20 (1971) (holding that curse words on a jacket are protected by the First Amendment); *N.Y. Times Co.*, 376 U.S. at 278–79, 282–83 (holding an Ohio statute unconstitutional because it failed to distinguish incitement, which is not protected by the First Amendment, from mere advocacy); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501–02, 506 (1952) (holding that a state cannot ban a movie only on the grounds that it is sacrilegious).

[193] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) (defamation); Roth v. United States, 354 U.S. 476, 485 (1957) (obscenity); Schenck v. United States, 249 U.S. 47, 52 (1919) (speech that creates "clear and present danger").

[194] Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 797 (1985).

[195] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995).

[196] *Id.*; Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993); Bd. of Educ. v. Mergens, 496 U.S. 226, 235 (1990); Widmar v. Vincent, 454 U.S. 263, 277 (1981); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981).

Furthermore, so-called "offensive" speech is protected. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[197] The Supreme Court has pointed out that preserving "the opportunity for free political discussion is a basic tenet of . . . constitutional democracy."[198] The Court stated that, in public debate, United States citizens "must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."[199] This is inevitably so because popular speech and agreeable words have little need for constitutional protection.[200]

Under U.S. analysis, the true test of the right to free speech is the protection afforded to unpopular, objectionable, disturbing, or even despised speech.[201] "The fact that society may find speech offensive is not a sufficient reason for suppressing it."[202] The United States Supreme Court explained in *Cox v. State of Louisiana* that

> a "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment . . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."[203]

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[197] Texas v. Johnson, 491 U.S. 397, 414 (1989).

[198] Cox v. Louisiana, 379 U.S. 536, 552 (1965).

[199] Boos v. Barry, 485 U.S. 312, 322 (1988) (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988)) (internal quotation marks omitted).

[200] *See* City of Houston v. Hill, 482 U.S. 451, 472 (1987).

[201] *See, e.g.*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 763 (1994) ("'The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed'" (alteration in original) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992))); United States v. Eichman, 496 U.S. 310, 318–19 (1990) ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (quoting *Johnson*, 491 U.S. at 414)).

[202] Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991).

[203] *Cox*, 379 U.S. at 551–52 (alterations in original) (quoting Terminiello v. Chicago, 337 U.S. 1, 4–5 (1949)).

This is true even if the offensive speech is premised on an attack of race, ethnicity, religion, or sexual preference, otherwise depicted as "hate speech."[204]

B. Unprotected Forms of Expression

Historically speaking, there have been few exceptions to the constitutional protection set aside for pure expression. In 1942, the Supreme Court described these departures in detail: "These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[205]

The *Chaplinsky* categorical approach has endured its share of critics over the years, most notably, a later version of the Supreme Court in *R.A.V. v. City of St. Paul*:

> We have sometimes said that these categories of expression are not within the area of constitutionally protected speech, or that the protection of the First Amendment does not extend to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity as not being speech at all. What they mean is that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government.[206]

The very notion of First Amendment "exceptions" is viewed with skepticism because a hallmark of free speech is to allow for the free trade in ideas, even ideas that most people find distasteful or unsettling. The First Amendment denies the government the power to prohibit

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[204] *See* Virginia v. Black, 538 U.S. 343, 365–67 (2003) (holding, on grounds of viewpoint and content discrimination, that the act of burning a cross is not always "intended to intimidate" and that burning a cross as part of a political rally "would almost certainly be protected expression" (quoting *R.A.V.*, 505 U.S. at 402 n.4 (White, J., concurring))); *R.A.V.*, 505 U.S. at 391 (White, J., concurring) (discussing an ordinance applied only to "fighting words . . . on the basis of race, color, creed religion, or gender" (internal quotation marks omitted)); *Johnson*, 491 U.S. at 408–09 ("[A] principle 'function of free speech under our system of government is to invite dispute.'" (quoting *Terminiello*, 337 U.S. at 4)); Cohen v. California, 403 U.S. 15, 21 (1971) (discussing distasteful modes of expression).

[205] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[206] *R.A.V.*, 505 U.S. at 383–84 (emphasis omitted) (citations omitted) (internal quotation marks omitted).

disfavored or even offensive expression.[207] And it matters not that "a vast majority of its citizens believes [the message] to be false and fraught with evil consequence."[208]

Under the current state of law, there remain only three types of speech that can be constitutionally proscribed: (1) obscenity, (2) defamation, and (3) speech that creates "clear and present danger."[209] So-called "hate speech" is most likely to be analyzed under the "clear and present danger" test first penned in 1919 in the case of *Schenck v. United States*.[210] Justice Oliver Wendell Holmes, speaking for the Court, concluded that the government has the right to outlaw expression "used in such circumstances and [that is] of such a nature as to create a clear and present danger."[211] It is in this case that Justice Holmes offered the famous analogy: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic."[212]

1. *Brandenburg* Test

The "clear and present danger" test was later modified and restated in *Brandenburg v. Ohio*.[213] In this decision, the Supreme Court held that the guarantees associated with free speech allow for expression that advocates the use of force and even the threat of illegal action "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[214] Under this revamped standard, a threat of harm or lawlessness is granted protection unless there is a showing of: (1) intention, (2) imminence, and (3) likelihood of the threat coming to fruition.[215] Following *Brandenburg*,

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[207] *Johnson*, 491 U.S. at 414.

[208] *Black*, 538 U.S. at 358.

[209] *See* cases cited *supra* note 193; *see also* Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 188 (2007) ("[S]peech that is obscene or defamatory can be constitutionally proscribed because social interest in order and morality outweighs the negligible contribution of those categories of speech to the marketplace of ideas."); *Chaplinsky*, 315 U.S. at 573 ("The [limited scope of a statute] does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee . . . including profanity, obscenity and threats."); Cantwell v. Connecticut, 310 U.S. 296, 308 (1940) ("When clear and present danger . . . or other immediate threat to public safety . . . appears, . . . the power of the State to prevent or punish is obvious.").

[210] 249 U.S. 47, 52 (1919).

[211] *Id.*

[212] *Id.*

[213] 395 U.S. 444, 447 (1969).

[214] *Id.*

[215] *Id.*

these three elements became necessary for restricting any form of communication as "clear and present danger."[216]

2. "Fighting Words"

The "fighting words" doctrine, first established in *Chaplinsky*, remains alive and well. However, the concept has been adjusted to mirror the revised "clear and present danger" standard set out in *Brandenburg*. The "fighting words" exception is limited in scope because the very concept is generally considered to be inconsistent with free speech principles.[217] "The fact that speech arouses some people to anger is simply not enough to amount to fighting words in the constitutional sense."[218]

Rather, to come under this exception, comments must be directed to the hearer,[219] must be reasonably regarded by the hearer as a direct personal insult,[220] and must be inherently likely to provoke an "immediate" violent reaction.[221] Thus, the "fighting words" doctrine incorporates the *Brandenburg* elements of intention, imminence, and likelihood.

Finally, and perhaps most importantly, for comments to classify as "fighting words," they can play no role in the expression of ideas.[222]

3. "True Threats"

In what can only be described as an exception to an exception, words that classify as "true threats" are proscribable, even if they fail to meet the elements of the *Brandenburg* standard. A "true threat" is a statement communicating a serious intention to "commit an act of unlawful violence."[223] A threat of this nature is deprived of protection even if the speaker does not intend to carry out the threat, so long as the statement establishes intimidating speech.[224] Because a true threat is not a means for trading ideas, this type of communication sits outside of

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[216] *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 902, 928–29 (1982) (holding, under the *Brandenburg* standard, "emotionally charged rhetoric" is constitutionally protected when it does not "incite lawless action").

[217] Texas v. Johnson, 491 U.S. 397, 408–09 (1989).

[218] Cannon v. City of Denver, 998 F.2d 867, 873 (10th Cir. 1993).

[219] Cantwell v. Connecticut, 310 U.S. 296, 309 (1940).

[220] Cohen v. California, 403 U.S. 15, 20 (1971).

[221] *Cantwell*, 310 U.S. at 308.

[222] *See* Feiner v. New York, 340 U.S. 315, 319–21 (1951).

[223] Virginia v. Black, 538 U.S. 343, 359 (2003).

[224] *Id.* at 359–60.

constitutional parameters, irrespective of any showing of intention, imminence, or likelihood that the threat will be realized.[225]

C. Forum Analysis and Restrictions

The extent that protected speech can be validly regulated by the state depends in large part on the nature of the forum.[226] In First Amendment jurisprudence, the United States Supreme Court recognizes three types of forums: traditional public forums, designated public forums, and nonpublic forums.[227]

1. Traditional Public Forum

A traditional public forum is a parcel of property used for "the free exchange of ideas."[228] Traditional public forums are "open for expressive activity regardless of the government's intent."[229] This type of forum is "defined by the objective characteristics of the property, such as whether, 'by long tradition or by government fiat,' the property has been 'devoted to assembly and debate.'"[230] In essence, a traditional public forum is any public property that allows for open public access and is compatible with expressive activity, with streets, sidewalks, and parks being prime examples:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use

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[225] *See id. But cf.* R.A.V. v. City of St. Paul, 505 U.S. 377, 393 (1992) ("[T]he reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particular intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey.").

Utilizing this same logic linked to a "true threat," the suspect provision found in the Freedom of Access to Clinic Entrances Act of 1994 § 3, 18 U.S.C. § 248 (2006), outlawing "threat of force," has been upheld as a valid restriction on speech. *See, e.g.*, Riely v. Reno, 860 F. Supp. 693, 702–03 & n.7 (D. Ariz. 1994) (discussing the freedom of anti-abortion expression conducted by way of spray painting "DEATH CAMP" on an abortion facility); Cook v. Reno, 859 F. Supp. 1008, 1010 (W.D. La. 1994) (discussing anti-abortion demonstrations outside an abortion clinic); American Life League, Inc. v. Reno, 855 F. Supp. 137, 141–42 (E.D. Va. 1994) (discussing prayer and sidewalk counseling outside reproductive healthcare facilities and the meaning of the term "injure").

[226] Frisby v. Schultz, 487 U.S. 474, 479 (1988).

[227] Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

[228] *Id.* at 800.

[229] Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678 (1998).

[230] *Id.* at 677 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

> of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[231]

Striking down floating buffer zones around abortion clinics in *Schenck v. Pro-Choice Network*, the United States Supreme Court noted, "Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is *at its most protected* on public sidewalks, a prototypical example of a traditional public forum."[232]

In *Heffron v. International Society for Krishna Consciousness, Inc.*, the Supreme Court provided a definitive statement on the objective characteristics that flow from a traditional public forum.[233] Contrasting the venue of a state fair with a public street, the Court stressed the following physical characteristics of a public forum: (1) public accessibility, (2) public thoroughfare, and (3) open air.[234] These factors have since become an integral part of public forum analysis.[235] When present, these attributes demonstrate high potential for communication and low possibility for interference with other activities.[236]

Aside from physical characteristics, a crucial factor in tagging a piece of property as a traditional public forum is whether expression is compatible with the purpose of the property.[237] To determine compatibility, the focus is on the purpose of the property and how speech could interfere with that purpose. For example, in *Greer v. Spock*, the Supreme Court observed that a military base could not effectually serve its primary function of protecting the country and training military personnel while simultaneously serving as a forum for public expression.[238]

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[231] Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

[232] 519 U.S. 357, 377 (1997) (emphasis added).

[233] 452 U.S. 640, 650–51 (1981).

[234] *Id.* at 651.

[235] *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 479–80 (1988) (discussing the nature of the forum in question); United States v. Grace, 461 U.S. 171, 177 (1983) (noting that public accessibility is only one factor considered and is not, by itself, dispositive).

[236] *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 697 (1992) (Kennedy, J., concurring) ("In my view the policies underlying the [forum analysis] doctrine cannot be given effect unless we recognize that open, public spaces and thoroughfares that are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of the property."); *Hague*, 307 U.S. at 515 ("Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.").

[237] *See Krishna Consciousness*, 505 U.S. at 697–98 (Kennedy, J., concurring) (emphasizing compatibility with speech as the determinative factor for assessing a traditional public forum by discussing "times of fast-changing technology").

[238] 424 U.S. 828, 838 (1976).

2. Designated Public Forum

The well-recognized "second category of public property is the designated public forum, whether of a limited or unlimited character—property that the State has opened for expressive activity by part or all of the public."[239] It is birthed "by government designation of a place or channel of communication for use by the public at large for . . . speech, for use by certain speakers, or for the discussion of certain subjects."[240] A designated public forum can only be established "by purposeful governmental action."[241]

3. Nonpublic Forum

Finally, if the property is not a traditional public forum and has not been opened by the government for expression, then the area is classified as a nonpublic forum.[242] Nonpublic forum consists of "[p]ublic property [that] is not by tradition or designation [open] for public communication."[243]

4. Restrictions

Speech finds its greatest protection when communicated in a traditional public forum. Restrictions on speech may be upheld as valid time, place, and manner regulations where they serve governmental interests that are significant and legitimate, are content-neutral, and are narrowly tailored to serve such interests, leaving open ample alternative channels of communication.[244] In "quintessential public forums" such as streets or parks, the state may enforce a content-based speech restriction only if it shows such regulation to be "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[245] Content-neutral laws are subject to a different and lesser form of scrutiny that requires the restriction to be "narrowly tailored to serve a significant government interest, and leave open ample channels of communication."[246] A speech restriction is content neutral if

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[239] *Krishna Consciousness*, 505 U.S. at 678.

[240] Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

[241] Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998).

[242] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 53 (1983).

[243] *Id.* at 46; *see also* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

[244] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); *see also* Hill v. Colorado, 530 U.S. 703, 725–26 (2000).

[245] *Perry Educ. Ass'n*, 460 U.S. at 45.

[246] *Id.*

it is "justified without reference to the content of the regulated speech."[247]

In contrast, the government enjoys significant latitude in regulating speech in a nonpublic forum. In this type of forum, the government is free to impose a content-based restriction on speech.[248] Nonetheless, the government does not possess "unfettered power to exclude any [speaker] it wish[es]."[249] Any restriction on speech must be "reasonable."[250] In the designated public forum, either of these standards can apply, depending on whether the restricted speech falls inside or outside the designation of the forum.[251]

Finally, on public school grounds, forum analysis applies to the expression of outsiders just like any other governmentally-owned property, but, as it concerns students or teachers, no forum analysis is necessary, as it is presumed that these individuals have a right to speak on school property.[252] While schools may forbid student speech that is "vulgar," "lewd," "indecent," or plainly "offensive"[253] and may censor "school-sponsored" speech that is "reasonably related to legitimate pedagogical concerns"[254] or "reasonably viewed as promoting illegal drug use,"[255] it is well settled that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[256]

5. Viewpoint Discrimination

Viewpoint discrimination is flatly prohibited under the First Amendment in any type of forum. In *Lamb's Chapel v. Center Moriches*

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[247] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976); *see also* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

[248] *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677–78 (1998).

[249] *Id.* at 682.

[250] *Id.* ("[E]xclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property." (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985))); *see also Cornelius*, 473 U.S. at 809 ("The reasonableness of the Government's restriction . . . must be assessed in the light of the purpose of the forum and all surrounding circumstances."); Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 575 (1987) (discussing the reasonableness of a resolution against First Amendment speech).

[251] *See Ark. Educ. Television Comm'n*, 523 U.S. at 679–80 (discussing access to a forum and the government's choice of what standard to apply).

[252] Tinker v. Des Moines Ind. Comm. Sch. Dist., 393 U.S. 503, 506 (1969).

[253] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683, 685 (1986).

[254] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

[255] Morse v. Frederick, 551 U.S. 393, 403, 408–09 (2007).

[256] *Tinker*, 393 U.S. at 506.

Union Free School District, the Supreme Court found that a school district had engaged in impermissible viewpoint-based discrimination by denying a church access to district property for a child-rearing presentation where other community groups were able to access it for similar purposes, stating:

> [T]here [is no] indication in the record before us that the application to exhibit the particular film series involved here was, or would have been, denied for any reason other than the fact that the presentation would have been from a religious perspective. In our view, denial on that basis was plainly invalid under our holding in *Cornelius* . . . that
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> > "[a]lthough a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose especial benefit the forum was created . . . , the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."
>
> The film series involved here no doubt dealt with a subject otherwise permissible . . . and its exhibition was denied solely because the series dealt with the subject from a religious standpoint.[257]

Likewise, in *Rosenberger v. Rector & Visitors of University of Virginia*, the Court stated, "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[258]

Content refers to topic; viewpoint refers to opinion. Therefore, while a content-based restriction calls for heightened scrutiny, a viewpoint-based restriction is altogether impermissible.[259] An exclusion premised on religion often targets viewpoint, not content, and is improper for this reason. The Supreme Court in *Good News Club v. Milford Central School* stated, "[S]peech discussing otherwise permissible subjects cannot be excluded . . . on the ground that the subject is discussed from a religious viewpoint."[260]

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[257] 508 U.S. 384, 393–94 (1993) (third alteration in original) (internal citation omitted) (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 473, 806 (1985)).

[258] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

[259] R.A.V. v. City of St. Paul, 505 U.S. 377, 387–88 (1992).

[260] 533 U.S. 98, 112 (2001); *see also* Orin v. Barclay, 272 F.3d 1207, 1214–16 (9th Cir. 2001) (striking down a college policy that prohibited an abortion protestor from using religious terms in speech); DeBoer v. Vill. of Oak Park, 267 F.3d 558, 567–69 (7th Cir. 2001) (invalidating a village hall policy that made space available to civic programs and activities but excluded National Day of Prayer organizers who wished to use the hall to pray for the civic government).

V. *VEJDELAND V. SWEDEN* ANALYZED UNDER U.S. SUPREME COURT JURISPRUDENCE

The statute at issue in *Vejdeland* would be unconstitutional viewpoint discrimination under *R.A.V.* Because the statute criminalized only certain kinds of insulting speech, that is, insults based on "protected" characteristics and not insulting speech generally, it "handicap[ped] the expression of particular ideas."[261] While the government has the authority to "single[] out an especially offensive mode of expression" for punishment, it cannot single out a particularly obnoxious viewpoint.[262]

Unlike the ECHR, the U.S. Government would not need a viewpoint-discriminatory "hate speech" law to stop the appellants from leafleting. Under the Supreme Court's public forum doctrine, student lockers are a nonpublic forum within which the government may impose reasonable restrictions on speech.[263] For example, the school, as a matter of policy, may exclude outsiders from the premises or may deny them access to the lockers.

The appellants could have been prosecuted under a number of content-neutral grounds, requiring no examination of the content of their leaflet. They were distributing leaflets within a school and had refused to comply when required to leave by the principal.[264] They had no right to be on school property in the beginning and were certainly trespassing when asked to leave.[265] They could similarly have been prosecuted under the Swedish equivalent to these laws. Sweden has legislation that covers trespass,[266] and it seems clear that a prosecution would have been successful. Of course, the ECHR did not have the luxury of selecting between alternate charges and had to consider the compatibility of their conviction under "hate speech" laws with Article 10 of the Convention. Nevertheless, the court went further than was necessary when it

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[261] *R.A.V.*, 505 U.S. at 393–94 ("[F]ighting words of whatever manner that communicate messages of racial, gender or religious intolerance . . . would alone be enough to [find] the ordinance presumptively invalid.").

[262] *Id.* at 393.

[263] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983) (concluding that teacher mailboxes were a nonpublic forum based on the Court's unwillingness to suggest that "'students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for . . . unlimited expressive purposes'" (quoting Grayned v. City of Rockford, 408 U.S. 104, 117–18 (1972))).

[264] Vejdeland v. Sweden, App. No. 1813/07 ¶ 8 (Eur. Ct. H.R. Feb. 9, 2012), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109046.

[265] *Id.* ¶ 56.

[266] Brottsbalken [BrB] [Criminal Code] 12:1, 12:2, 12:6 (Swed.).

lamented the content of the leaflets in paragraphs fifty-four to fifty-five.[267]

But the ECHR's approach appears to have been colored by its disapproval of the applicants' viewpoint.[268] In his concurring opinion, Section President Judge Spielmann "confess[ed] that it is with the greatest hesitation that I voted in favour of finding no violation of Article 10 of the Convention."[269] He acknowledged that the place of distribution neither forms part of the *actus reus* of the crime nor is it an aggravating circumstance.[270] Yet *Vejdeland* would seem to be H.L.A. Hart's quintessential "hard case," decided on its facts and of limited precedential value.[271] If this is how the case comes to be seen, then we have little to fear. On the other hand, should it be followed, it marks a dramatic expansion in the definition of "hate speech" at the ECHR and a departure from settled ECHR orthodoxy. For now, the case leaves us in a state of flux where the only people who know whether someone is using protected offensive and shocking speech or criminal "serious or prejudicial" speech are the forty-seven judges of the ECHR.

CONCLUSION

"Hate speech" laws have a chilling effect on religious freedom when they are defined to mean that certain appeals to truth, whether moral or spiritual, are punishable by law. European nations have a duty to remain neutral with regard to value judgments about the content of religious speech. While a nation may legislate to promote conditions where competing worldviews live peaceably together, it may not legislate so that only one worldview has a voice in the public square and quash those voices that differ in content. Nor can governments dictate that people of faith may not speak publically what they deem to be moral truths.

The end product of this promotion of radical relativism is the incubation of an environment ripe for fundamentalism. For on the fringe of relativism lies a very attractive fringe of fundamentalism where

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[267] *Vejdeland*, App. No. 1813/07 ¶¶ 54–55, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109046. In coming to its conclusion, the ECHR applied the "test of necessity in a democratic society." *Id.* ¶ 51 ("The test of 'necessity in a democratic society' requires the Court to determine whether the inference complained of correspond[s] to a 'pressing social need.'").

[268] *Id.* ¶¶ 59–60.

[269] *Id.* ¶ 1 (Spielmann, J., concurring).

[270] *Id.* ¶ 6.

[271] H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607–08, 615 (1958).

people will go to extremes to find what they deem to be Truth with a capital "T."

Originally developed as a shield, the principles of tolerance and "hate speech" are now all too often being used as a sword to defeat the fundamental freedoms of religion and expression. Tolerance is slowly becoming totalitarianism. The freedom to express moral ideas based in sacred texts, as Åke Green did in his Biblically based sermon on homosexual behavior, is being met with prison sentences.

The practice of States in dictating what is and what is not acceptable speech based on content or opinion is blatant viewpoint discrimination and cannot be accepted within a democratic society. Such policies seep into educational requirements, restrictions on media, and into every facet of society. The policies amount to nothing less than social engineering. The ECHR finds itself within very troubled waters and would do well to reflect on its own history and precedent as well as take into consideration the United States Supreme Court's free speech framework.

We cannot forget, and we must not forget, the origins of "hate speech" restrictions as being a Soviet ploy to control free media and govern what is and what is not acceptable speech. Indeed, it was in large part because of the expression of democratic ideals and reform in Poland in the 1980s that the Soviet juggernaut was made to topple.

Freedom of expression must continue to be recognized as the fundamental human right it truly is. The European Court of Human Rights must make clear through its jurisprudence that, indeed, freedom of expression can only be limited in cases of necessity, and only then where the limitation is narrowly tailored and proportionate to one of the legitimate aims enumerated by Article 10 of the Convention. As with the settled case law of the United States Supreme Court, this means that limitations to free expression should be limited to speech that leads to an imminent and objective threat of violence. Established jurisprudence in Europe and the United States makes clear that existing time, place, and manner restrictions, as well as civil remedies such as for defamation and libel, are more than sufficient in protecting conflicting rights. History has proven that free exercise of speech transforms cultures, whereas heavy-handed restrictions on speech lead to totalitarianism and rampant State control. Just as the drafters of the Universal Declaration of Human Rights rejected "hate speech" limitations of expression, modern jurisprudence would do well to learn from history rather than repeat it.

ONLINE PRIVACY PROTECTION: PROTECTING PRIVACY, THE SOCIAL CONTRACT, AND THE RULE OF LAW IN THE VIRTUAL WORLD

Matthew Sundquist[*]

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INTRODUCTION

A host of laws and regulations engage with the legal,[1] technological,[2] and social[3] meanings[4] of privacy. In a country of more

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[1] Privacy is a multifaceted legal concept. For a discussion of privacy as a principle in law, see generally Brief *Amicus Curiae* of the Liberty Project in Support of Petitioner, Kyllo v. United States, 533 U.S. 27 (2000) (No. 99-8508) (describing the historical roots of the right to privacy); Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335 (exploring privacy as a legal concept, rather than a philosophical or moral concept). Samuel D. Warren and Louis D. Brandeis famously described the right to privacy as the "right of the individual to be let alone." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

than 300 million people[5] and plentiful law enforcement officers, there is likely to be abusive behavior. As a result, our society is flooded with claims about the definition, function, and value of privacy; with potential threats to privacy; and, increasingly, with debates about how to fashion remedies to address these issues. To survey the entire landscape of privacy dilemmas and threats, or to attempt to extract a representative sample of privacy policies and dilemmas, would be unwieldy and unproductive. This Article does not attempt to provide a systematic,

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Privacy is often covered by statutory law, *see* statutes cited *infra* note 88, and the Supreme Court has repeatedly acknowledged privacy rights, *see, e.g.*, Lawrence v. Texas, 539 U.S. 558, 567 (2003); Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977); Kelley v. Johnson, 425 U.S. 238, 251 (1976) (Marshall, J., dissenting); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Katz v. United States, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring); Griswold v. Connecticut, 381 U.S. 479, 483 (1965); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *Ex parte* Jackson, 96 U.S. 727, 733 (1877); *see also* Laura K. Donohue, *Anglo-American Privacy and Surveillance*, 96 J. CRIM. L. & CRIMINOLOGY 1059, 1065–73 (2006) (reciting the history of privacy in the Supreme Court's Fourth Amendment jurisprudence).

[2] Technology has created intriguing privacy problems. *See* Rakesh Agrawal & Ramakrishnan Srikant, *Privacy-Preserving Data Mining*, SIGMOD REC., June 2000, at 439, 439 (attempting to "develop accurate [data mining] models without access to precise information in individual data records"); Latanya Sweeney, *k-Anonymity: A Model for Protecting Privacy*, 10 INT'L J. OF UNCERTAINTY, FUZZINESS & KNOWLEDGE-BASED SYS. 557, 562 (2002) (explaining how to release data while maintaining privacy); Horst Feistel, *Cryptography and Computer Privacy*, SCI. AM., May 1973, at 15, 15, 23 (exploring enciphering and origin authentication as a means of protecting systems and personal databanks).

[3] Scholars have often advocated balanced frameworks for interpreting and protecting privacy. *See* JUDITH WAGNER DECEW, IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY 75–78 (1997) (arguing that privacy entails informational privacy, accessibility privacy, and expressive privacy); JOHN PALFREY & URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES 7 (2008) (arguing that the younger generation of technology users, due to its frequent and early adoption of technology, has different conceptions of privacy than its parents or grandparents); ALAN F. WESTIN, PRIVACY AND FREEDOM 31 (1967) (arguing that privacy is comprised of "solitude, intimacy, anonymity, and reserve"); Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1202–03 (1998) (arguing for privacy in our physical space, choice, and flow of personal information); Helen Nissenbaum, *A Contextual Approach to Privacy Online*, DÆDALUS, Fall 2011, at 32, 33 [hereinafter *Privacy Online*] (arguing that "entrenched norms" form our privacy expectations for the flow of information).

[4] I examine privacy of the personal information we create directly by communicating and completing forms, contracts, and documents as well as the information we create indirectly by using browsers, carrying phones with geo-tracking, and purchasing or using products and services. I focus on the assurances we receive about this information and whether they are complied with. *See* Memorandum from Clay Johnson III, Deputy Dir. for Mgmt., to the Heads of Exec. Dep'ts & Agencies 1–2 (May 22, 2007), *available at* http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-16.pdf (defining "personally identifiable information" and recommending steps to protect that information).

[5] PAUL MACKUN & STEVEN WILSON, U.S. CENSUS BUREAU, POPULATION DISTRIBUTION AND CHANGE: 2000 TO 2010, at 2 (2011).

theoretical account of privacy and technology, nor does it outline a typology of circumstances in which privacy might be threatened or abused by private or public entities. Instead, this Article advances a general framework for identifying circumstances wherein a legal or social response to a privacy threat is appropriate. The emergent areas I survey demonstrate the utility and application of my approach.

This Article is divided into four Parts. Part I introduces the following framework for assessing whether a virtual or online practice, law, or regulatory deficiency warrants a legal or social response: (1) a practice that violates the law should be prosecuted; (2) privacy laws that are ineffectually enforced necessitate heightened alert; and (3) an effective response is needed when a practice violates a valued social expectation regarding how information should flow.[6] Updating and enforcing our laws in light of technological change is crucial to the maintenance of the social contract, making the first two aspects of this framework vital to protecting privacy. Many of our expectations about information and privacy developed when tracking at the scale the government and businesses do so now was impossible. Information often flows based on what is technologically possible rather than on what is socially or legally acceptable.[7] These new realities require a novel response, as mandated by my third condition.

Part II examines how technology has allowed more information about people to be gathered and stored online.[8] Technology has, as Amazon founder Jeff Bezos explained, begun "eliminating all the gatekeepers" for companies and technical practices.[9] Vast digital trails are created by the approximately ninety percent of online adults who report using email or an online search engine on an average day.[10] The National Security Agency can intercept and download electronic communications equivalent to the contents of the Library of Congress every six hours.[11] And further, when challenged, businesses and the

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[6] *See Privacy Online*, *supra* note 3, at 45 ("If pursued conscientiously, the process of articulating context-based rules and [privacy] expectations and embedding some of them in law and other specialized codes will yield the safety nets that buttress consent in fields such as health care and research.").

[7] *Id.* at 34.

[8] *See* Sweeney, *supra* note 2, at 557 ("Society is experiencing exponential growth in the number and variety of data collections containing person-specific information as computer technology, network connectivity and disk storage space become increasingly affordable.").

[9] Thomas L. Friedman, *Do You Want the Good News First?*, N.Y. TIMES, May 20, 2012, § SR (Sunday Review), at 1.

[10] KRISTEN PURCELL, PEW RESEARCH CTR., SEARCH AND EMAIL STILL TOP THE LIST OF MOST POPULAR ONLINE ACTIVITIES 2 (2011), *available at* http://pewinternet.org/~/media//Files/Reports/2011/PIP_Search-and-Email.pdf.

[11] Jane Mayer, *The Secret Sharer: Is Thomas Drake an Enemy of the State?*, NEW

government can quickly create and begin to rely on new online practices they claim to be essential,[12] while in the process contributing to the growth of a massive online-tracking industry.[13]

While economic theory suggests people possess a rational capacity to process the stream of privacy threats and trade-offs we face, people simply cannot be expected to effectively navigate this uncertain terrain on their own.[14] Regulatory inaction—or a lack of regulations altogether—allows for more activity and the potential for further privacy violations to happen faster and at a larger scale.

Part III points out specific areas for change and argues for better laws, better case-precedents that weigh social expectations of privacy when determining what constitutes a reasonable expectation of privacy, and better enforcement efforts. Even as courts and Congress have addressed some questions involving the relationship between evolving technology and privacy, including constitutional issues, they have avoided others. The Supreme Court in recent years, for example, has declined to address whether the police can electronically track citizens[15] and has failed to examine whether texting on two-way pagers is private.[16] Additionally, Congress has not updated key privacy legislation[17] and has not responded when the government has invoked its

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YORKER, May 23, 2011, at 47, 49 ("Even in an age in which computerized feats are commonplace, the N.S.A.'s capabilities are breathtaking. . . . Three times the size of the C.I.A., and with a third of the U.S.'s entire intelligence budget, the N.S.A. has a five-thousand-acre campus at Fort Meade protected by iris scanners and facial-recognition devices. The electric bill there is said to surpass seventy million dollars a year."). Additionally, government analysts annually produce 50,000 intelligence reports. Dana Priest & William M. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST, July 19, 2010, at A1.

[12] *See generally* Comments from Pam Dixon, Exec. Dir., World Privacy Forum, to the Fed. Trade Comm'n (Feb. 18, 2011), *available at* www.ftc.gov/os/comments/privacyreportframework/00369-57987.pdf (discussing the Federal Trade Commission's narrow focus on online tracking).

> The Commission needs to focus on the broader picture here and to try to get ahead of developments before they become so embedded in business practices that any limit will be fought as the *end of the world as we know it*, a cry heard too often on the Internet.

Id. at 6.

[13] *See* Anne Klinefelter, *When to Research Is to Reveal: The Growing Threat to Attorney and Client Confidentiality from Online Tracking*, 16 VA. J.L. & TECH. 1, 5–18 (2011) (discussing the growth of the online tracking industry).

[14] *See infra* Part II. *See generally* Alessandro Acquisti & Jens Grossklags, *Privacy and Rationality in Individual Decision Making*, IEEE SECURITY & PRIVACY, Jan.–Feb. 2005, at 26, 26–27.

[15] United States v. Jones, 132 S. Ct. 945, 950 (2012).

[16] City of Ontario v. Quon, 130 S. Ct. 2619, 2630 (2010).

[17] *See* discussion *infra* Part III.B.

"secret interpretations" of the Patriot Act.[18] Regulatory agencies have accepted trivial concessions and non-financial settlements from companies charged with breaking the law.[19] Meanwhile, leaders struggle to grasp technology, and election-focused politicians prefer solving problems to preventing them as this yields greater credit from constituents.[20]

Lastly, Part IV concludes with a case study examining the recent Federal Trade Commission ("FTC") settlements with Google and Facebook. Both companies broke laws and violated our social expectations, settled with either undersized financial settlements or none at all, and then made trivial concessions to their customers and the FTC.[21] And while both companies continue to perpetrate similar offenses, the FTC rarely responds. The actions of these companies and the ensuing lack of enforcement meet all three criteria demanding a response: bad laws, broken social expectations, and deficient enforcement. I argue for better laws, better enforcement, and a change in the professional culture and values of the FTC. In conclusion, I draw lessons from the successful opposition to the Stop Online Piracy Act and emphasize the importance of privacy education.

I. VALUING PRIVACY AND DETERMINING WHEN TO RESPOND

Justice Brandeis considered privacy—"the right to be let alone"—to be "the most comprehensive of rights and the right most valued by civilized men."[22] But why is privacy so valuable and important?[23] Presumably, privacy has a political value in deterring government overreach into our lives. Privacy also seems necessary to ensure citizens can discuss and voice their views in private without fear of outside intervention, thus ensuring democratic participation.[24] It is, however,

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[18] Letter from Ron Wyden & Mark Udall, U.S. Senators, to Eric Holder, U.S. Att'y Gen. (Mar. 15, 2012) (on file with Regent University Law Review).

[19] *See* discussion *infra* Part IV.

[20] *See* discussion *infra* Part III.C.

[21] *See* discussion *infra* Part IV.

[22] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[23] While I briefly examine this question, others have given the subject a thorough treatment. *See generally* Paul A. Freund, *Privacy: One Concept or Many*, *in* PRIVACY NOMOS XIII 182, 195–96 (J. Roland Pennock & John W. Chapman eds., 1971) (arguing that privacy "serves an important socializing function"); James Rachels, *Why Privacy Is Important*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 290, 290–99 (Ferdinand David Schoeman ed., 1984).

[24] Thomas B. Kearns, *Technology and the Right to Privacy: The Convergence of Surveillance and Information Privacy Concerns*, 7 WM. & MARY BILL RTS. J. 975, 978 (1999) ("Without the ability to interact with one another in private, individuals cannot exchange ideas freely. This 'marketplace of ideas' is essential for a democracy to function properly and give rise to a free society."); *see also* Valerie Steeves, *Privacy and New Media*,

difficult to categorize privacy as a value,[25] let alone to quantify its risks or benefits.[26] We value some things as instrumental goods, for example, which provide a means to an end, like money. We also value intrinsic moral goods and virtues, like justice.[27] Privacy, however, is difficult to categorize as either clearly intrinsic or clearly instrumental. Professor Charles Fried notes, "[W]e do not feel comfortable about asserting that privacy is intrinsically valuable, an end in itself—privacy is always for or in relation to something or someone. On the other hand, to view privacy as simply instrumental, as one way of getting other goods, seems unsatisfactory too."[28]

So what is the value of privacy? Privacy creates a framework that allows other values to exist and develop. Where privacy is available, we can have freedom, liberty, and other intrinsic goods. We can develop friendships, relationships, and love.[29] As anyone who has had a camera pointed at them knows, we act differently when being recorded. Now consider that everything we do online, over the phone, or with a credit card can be monitored and recorded. If this information is used abusively, similar to how we might feel if we were filmed all the time, it compromises our ability to act naturally and freely. A social dynamic exists in this as well. In society, when people are around, we must react to external stimulants and forces. But alone, we can choose and create our stimulants and environment and react accordingly. Thus, we develop as independent beings and people when we have privacy.[30]

At this point, it is also worth addressing two common arguments against privacy. The first says, "You needn't worry about privacy if you haven't done anything wrong." I ask people making this argument if they believe they are doing something wrong by showering. They usually say "no." I then ask if they would be comfortable having a video of their

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in MEDIASCAPES: NEW PATTERNS IN CANADIAN COMMUNICATION 250, 255–57 (Paul Attallah & Leslie Regan Shade eds., 2d ed. 2006).

[25] For a thorough discussion of this problem, see Jeffery L. Johnson, *A Theory of the Nature and Value of Privacy*, 6 PUB. AFF. Q. 271, 272, 276–77 (1992).

[26] *See* Adam Shostack & Paul Syverson, *What Price Privacy? (and Why Identity Theft Is About Neither Identity nor Theft)*, *in* ECONOMICS OF INFORMATION SECURITY 129, 129, 133–35 (L. Jean Camp & Stephen Lewis eds., 2004).

[27] *See* Michael J. Zimmerman, *Intrinsic vs. Extrinsic Value*, STAN. ENCYCLOPEDIA PHIL. (Dec. 17, 2010), http://plato.stanford.edu/entries/value-intrinsic-extrinsic/.

[28] Charles Fried, *Privacy: A Rational Context*, *in* TODAY'S MORAL PROBLEMS 21, 21 (Richard Wasserstrom ed., 1975).

[29] *Id.* at 25 ("[P]rivacy creates the moral capital which we spend in friendship and love.").

[30] *See* Robert F. Murphy, *Social Distance and the Veil*, 66 AM. ANTHROPOLOGIST 1257, 1259 (1964) ("Interaction is threatening by definition, and reserve, here seen as an aspect of distance, serves to provide partial and temporary protection to the self. . . . [T]he privacy obtained makes other roles more viable . . . .").

shower projected to the internet. Again, the answer is usually "no." The point is this: we do, write, and say things, as individuals and in relationships, that, while not wrong, are private. We are comfortable showering, expressing our vulnerabilities or beliefs, or confessing our love because we believe our actions are private. Violating that security undermines our person, actions, and relationships. A second common argument is that we should trust the government to guard us against terrorism, crime, etc. As I discuss throughout this Article, the government and corporations often act in secret, shrouded behind a veil of secrecy that has permitted abuse of our privacy and existing laws. Secrecy, law-breaking, and privacy abuses, in my view, suggest we should closely scrutinize privacy practices and those managing them.

Given the value of privacy, I posit we should prioritize privacy threats of three types: (1) law-breaking; (2) insufficient enforcement; and (3) subversion of social expectations by laws, practices, or frameworks. The first two speak to the role of government and the social contract. According to the social contract, a pervasive idea in American society and government,[31] we trade the state of nature—the world without government—to form a society and enjoy protection, security, and property.[32] To protect our values, we create laws tasked with the goal of "secur[ing] a situation whereby moral goals which, given the current social situation in the country whose law it is, would be unlikely to be achieved without it."[33] The law should serve the common interest and secure values that will be broadly useful to society.[34] Once established, the law (and associated rules) must be enforced[35] since the government

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[31] Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 3 (1999) ("According to some historians, the American colonists relied upon liberal, Lockean notions of a social contract to spirit rebellion against unwanted British rule. Historians have maintained that social contractarian theories of political order significantly influenced the people who wrote and defended the Declaration of Independence, the original Constitution, and the Bill of Rights."); Christine N. Cimini, *The New Contract: Welfare Reform, Devolution, and Due Process*, 61 MD. L. REV. 246, 275 (2002) ("[T]he Declaration of Independence, original state constitutions, the Articles of Confederation, and the federal Constitution with its accompanying Bill of Rights all based their notions of the structure of democratic government on ideas of social contract. These documents amount to a formalization of the social contract between the government and its people.").

[32] *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 48–50 (Thomas P. Peardon ed., The Bobbs-Merrill Co. 1952) (1690); JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT 12–15 (Willmoore Kendall trans., Henry Regnery Co. 1954) (1762).

[33] Joseph Raz, *About Morality and the Nature of Law*, 48 AM. J. JURIS. 1, 12 (2003) [hereinafter *About Morality*].

[34] *See* JOHN RAWLS, A THEORY OF JUSTICE 29, 83, 187 (rev. ed. 1999).

[35] *See, e.g.*, Joseph Raz, *Reasoning With Rules*, 54 CURRENT LEGAL PROBS. 1, 18 (2001) ("Again we can see how rules are the inevitable backbone of any structure of authority, of which the law is a paradigm example.").

derives authority from creating and enforcing laws.[36] Thus, there is an immediate, positive benefit when we protect a valued good like privacy. Additionally, there is a broader benefit, as enforcing the law gives the government credibility and creates a stable society.[37]

The third prong of my privacy framework values social expectations. Norms and expectations allow people to feel secure and ensure that society functions well.[38] Privacy is a social expectation based on the ways in which information is collected and gathered. As Dr. Helen Nissenbaum points out, "When the flow of information adheres to entrenched norms, all is well; violations of these norms, however, often result in protest and complaint."[39] Problematically, technological limitations change and disappear quickly, allowing information to flow without the guidance of current expectations or social, ethical, legal, and political norms.[40] Businesses should nonetheless act in accordance with our social expectations, and when they do not, courts and legislatures should step in to protect those expectations. As noted, privacy has a value for us, and unmet expectations of privacy enforcement undermine our ability to be secure in our person and development. Exploitations and privacy invasions will persist if we do not respond, but as I detail in the next Part, regulating technology trends is costly, complicated, and cumbersome.

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[36] *See About Morality*, *supra* note 33, at 7–9.

[37] *See* RAWLS, *supra* note 34, at 154–55. Indeed, people expect good laws and efficient governmental enforcement; in one survey, ninety-four percent of internet users said that privacy violators should be disciplined. SUSANNAH FOX, PEW RESEARCH CTR., TRUST AND PRIVACY ONLINE: WHY AMERICANS WANT TO REWRITE THE RULES 3 (2000), *available at* http://www.pewinternet.org/~/media//Files/Reports/2000/PIP_Trust_Privacy_Report.pdf.pdf. Social contract theory is primarily based on natural law. Nonetheless, the legislative and judicial support for privacy, as well as the social expectation of the legal enforcement of privacy in the U.S., evidenced in part by the Pew Research Center findings, demonstrate that natural law arguments and legal positivism can be invoked to support the framework. However, I do not engage substantially with legal positivism in this paper, as I believe others have done so much more thoughtfully than I could. *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986) (emphasizing the interpretive defects of positivism); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978) (defending a liberal theory of law and arguing against legal positivism and the theory of utilitarianism); Leslie Green, *Legal Positivism*, STAN. ENCYCLOPEDIA PHIL. (Jan. 3, 2003), http://plato.stanford.edu/entries/legal-positivism/ ("What laws are in force in that system depends on what social standards its officials recognize as authoritative; for example, legislative enactments, judicial decisions, or social customs.").

[38] *See* HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE 3, 128 (2010).

[39] *Privacy Online*, *supra* note 3, at 33.

[40] *See id.* at 34.

II. COMPOUNDING PRIVACY PROBLEMS: RATIONAL CHOICE THEORY AND TECHNOLOGICAL GROWTH

Each year, consumers share more and more information online as a result of increased participation in internet activities.[41] Today, nearly half of American adults use smartphones.[42] In 2014, mobile data usage is projected to be at 3,506% of what it was in 2009.[43] Furthermore, "[t]he number of worldwide email accounts is expected to increase from . . . 3.1 billion in 2011 to nearly 4.1 billion by year-end 2015."[44]

By exploiting this technological growth, businesses and the government are capable of using private information in ways that would have been impossible just a few years ago. As such, our expectations are outdated. Consider, for example, that Lotame Solutions uses web beacons that record what a person types on a website in order to create a user profile,[45] while Apple,[46] Verizon,[47] Target,[48] and others[49] compile

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[41] *See, e.g.*, PURCELL, *supra* note 10, at 3 ("In January 2002, 52% of *all Americans* used search engines and that number grew to 72% in [2011]. In January 2002, 55% of *all Americans* said they used email and that number grew to 70% in [2011]."); U.S. CENSUS BUREAU, E-STATS 1 (2010), *available at* http://www.census.gov/econ/estats/2010/2010reportfinal.pdf (reporting that, in 2010, e-commerce grew faster than total economic activity, retail e-commerce sales increased 16.3% from 2009 to 2010, and e-commerce in the manufacturing industry accounted for 46.4% of total shipments for 2010).

[42] AARON SMITH, PEW RESEARCH CTR., 46% OF AMERICAN ADULTS ARE SMARTPHONE OWNERS 2 (2012), *available at* http://pewinternet.org/~/media//Files/Reports/2012/Smartphone%20ownership%202012.pdf.

[43] FED. COMMC'NS COMM'N, MOBILE BROADBAND: THE BENEFITS OF ADDITIONAL SPECTRUM, FCC STAFF TECHNICAL PAPER 18 (2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-302324A1.pdf.

[44] THE RADICATI GRP., INC., EMAIL STATISTICS REPORT, 2011–2015—EXECUTIVE SUMMARY 2–3 (2011), *available at* http://www.radicati.com/wp/wp-content/uploads/2011/05/Email-Statistics-Report-2011-2015-Executive-Summary.pdf.

[45] Julia Angwin, *The Web's New Gold Mine: Your Secrets*, WALL ST. J., July 31–Aug. 1, 2010, at W1.

[46] Nick Bilton, *Tracking File Found in iPhones*, N.Y. TIMES, Apr. 21, 2011, at B1 ("[A] new hidden file [on iPhones and certain iPads] began periodically storing location data, apparently gleaned from nearby cellphone towers and Wi-Fi networks, along with the time. The data is stored on a person's phone or iPad, but when the device is synced to a computer, the file is copied over to the hard drive . . . .").

[47] David Goldman, *Your Phone Company Is Selling Your Personal Data*, CNNMONEY (Nov. 1, 2011, 10:14 AM), http://money.cnn.com/2011/11/01/technology/verizon_att_sprint_tmobile_privacy/index.htm ("In mid-October, Verizon Wireless changed its privacy policy to allow the company to record customers' location data and Web browsing history, combine it with other personal information like age and gender, aggregate it with millions of other customers' data, and sell it on an anonymous basis.").

[48] Charles Duhigg, *Psst, You in Aisle 5*, N.Y. TIMES, Feb. 19, 2012, § 6 (Magazine), at 30 ("[L]inked to your [Target] Guest ID is demographic information like your age, whether you are married and have kids, which part of town you live in, how long it takes you to drive to the store, your estimated salary, whether you've moved recently, what credit cards you carry in your wallet and what Web sites you visit.").

information from customers' interactions with their products. Roughly 1,271 government organizations and 1,931 private companies work on "counterterrorism, homeland security and intelligence in about 10,000 locations across the United States."[50] It is estimated that 854,000 people hold top-secret security clearances.[51] Using a GPS device, police can do what would have formerly required "a large team of agents, multiple vehicles, and perhaps aerial assistance."[52] As a result, technology untested by law has flourished—examples include respawning cookies,[53] beacons and flash cookies,[54] and browser-history sniffing.[55] Governments and businesses build around new, unregulated technology and practices and then claim that changes would endanger their business or national security.[56]

Moreover, although mainstream microeconomic theory suggests we have a rational capacity to process information about privacy tradeoffs to which we assent in online activities, the fact of the matter is that choices about terms-of-use, browser settings and software, and purchases and credit cards, etc., are complicated, making it unlikely that the "complete information" criterion of rationality will be met when we face privacy decisions.[57] Even with full information, we may act against our better

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[49] Natasha Singer, *Following the Breadcrumbs on the Data-Sharing Trail*, N.Y. TIMES, Apr. 29, 2012, § BU (Sunday Business), at 4 ("In the United States, with the exception of specific sectors like credit and health care, companies are free to use their customers' data as they deem appropriate. That means every time a person buys a car or a house, takes a trip or stays in a hotel, signs up for a catalog or shops online or in a mall, his or her name might end up on a list shared with other marketers.").

[50] Priest & Arkin, *supra* note 11.

[51] *Id.*

[52] United States v. Jones, 132 S. Ct. 945, 963 (2012) (Alito, J., concurring).

[53] "Respawning" is "the ability to reinstate standard cookies that are deleted or otherwise lost by the user." Chris Jay Hoofnagle et al., *Behavioral Advertising: The Offer You Cannot Refuse*, 6 HARV. L. & POL'Y REV. 273, 278 (2012).

[54] *Tracking the Trackers: Our Method*, WALL ST. J., July 31–Aug. 1, 2010, at W3 ("HTML cookies are small text files, installed on a user's computer by a website, that assign the user's computer a unique identity and can track the user's movements on a site. . . . Beacons are bits of software code on a site that can transmit data about a user's browsing behavior.").

[55] Omer Tene & Jules Polonetsky, *To Track or "Do Not Track": Advancing Transparency and Individual Control in Online Behavioral Advertising*, 13 MINN. J.L. SCI. & TECH. 281, 299–300 (2012) ("Browser history sniffing exploits the functionality of browsers that display hyperlinks of visited and non-visited sites in different colors . . . . Websites apparently exploited this functionality by running Javascript code in order to list hundreds of URLs, thereby recreating a user's browsing history—all without the user's knowledge or consent.").

[56] *See* Dixon, *supra* note 12, at 6.

[57] *See* Acquisti & Grossklags, *supra* note 14, at 26–27. *See generally* 3 HERBERT A. SIMON, MODELS OF BOUNDED RATIONALITY: EMPIRICALLY GROUNDED ECONOMIC REASON 291–94 (1997). It is worth noting that there are similar rational bounds to our capacity to understand medicine, science, finance, etc.

judgment, owing to lack of self-control, false belief that we are immune from harm, or a desire for immediate gratification.[58] Privacy decision-making and privacy features are also incredibly complex.[59] Users cannot research these settings under reasonable circumstances, much less choose between them.[60] In a recent study of forty-five experienced web-users, participants were instructed to activate browsers and tools to block cookies.[61] Users blocked much less than they thought they did, often blocking nothing.[62] Users were unable to apply tools designed for privacy, while companies and governments creating technological, legal, and societal defaults aim to gather information.[63] Behavioral economics offers insight into these problems.[64] As I address in the next Part, comprehension challenges are compounded by legal confusion, inaction, and non-compliance.

III. LEGAL AND JUDICIAL PRIVACY GUIDANCE

A. Precedents

Chief Justice John Marshall said that it is "emphatically the province and duty of the judicial department to say what the law is."[65] The Supreme Court should do so in a manner that corresponds to social expectations regarding privacy in the virtual world we live in today. The Supreme Court has recognized that new technology can "shrink the realm of guaranteed privacy,"[66] and it should consider new technology as a highly relevant factor when defining "the existence, and extent, of privacy expectations" under our Fourth Amendment privacy

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58 Alessandro Acquisti, *Privacy in Electronic Commerce and the Economics of Immediate Gratification*, *in* EC'04: PROCEEDINGS OF THE 5TH ACM CONFERENCE ON ELECTRONIC COMMERCE 21, 24 (2004).

59 An examination of 133 privacy-software tools and services revealed a list of 1,241 privacy-related features. Benjamin Brunk, *Understanding the Privacy Space*, FIRST MONDAY (Oct. 7, 2002), http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/991/912.

60 *See id.*

61 PEDRO G. LEON ET AL., WHY JOHNNY CAN'T OPT OUT: A USABILITY EVALUATION OF TOOLS TO LIMIT ONLINE BEHAVIORAL ADVERTISING 8–9 (2012), *available at* http://www.cylab.cmu.edu/files/pdfs/tech_reports/CMUCyLab11017.pdf.

62 *Id.* at 15.

63 *Id.* at 14; *see also* MICHELLE MADEJSKI ET AL., THE FAILURE OF ONLINE SOCIAL NETWORK PRIVACY SETTINGS 1 (2011), *available at* http://www.cs.columbia.edu/~maritzaj/publications/2011-tr-madejski-violations.pdf ("We present the results of an empirical evaluation that measures privacy attitudes and intentions and compares these against the privacy settings on Facebook. Our results indicate a serious mismatch: every one of the 65 participants in our study confirmed that at least one of the identified violations was in fact a sharing violation.").

64 *See, e.g.*, Acquisti, *supra* note 58, at 21–22, 27.

65 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

66 Kyllo v. United States, 533 U.S. 27, 34 (2001).

guaranties.[67] Nonetheless, the Court has been cautious when grafting privacy protections and expectations onto technological changes: the Justices waited nearly a century after the invention of the telephone to protect phone calls from unwarranted government surveillance and, even then, granted protections only when the individual was justified in relying on the privacy of the conversation.[68] The Court now applies a two-part test, developed in Justice Harlan's concurrence in *Katz v. United States*, to determine whether an individual's Fourth Amendment rights are invoked. In order for government activity to fall under the gambit of the Fourth Amendment, (1) the activity must encroach on "an actual (subjective) expectation of privacy," and (2) "the expectation [must] be one that society is prepared to recognize as 'reasonable.'"[69]

We do expect that certain technology will not be used to exploit, expose, or abuse our privacy.[70] Federal courts have occasionally protected these expectations as they relate to government activity,[71] but

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[67] City of Ontario v. Quon, 130 S. Ct. 2619, 2629 (2010); *see also* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

[68] Katz v. United States, 389 U.S. 347, 352–53 (1967). For more instances of courts attempting to reconcile the Fourth Amendment with advances in technology, see United States v. Jones, 132 S. Ct. 945, 949–50 (2012) (holding that a vehicle is an "effect" as that term is used in the Fourth Amendment and that the warrantless use of a GPS tracking device constituted a search that violated the Fourth Amendment); United States v. Comprehensive Drug Testing, Inc., 579 F.3d 989, 1004–06 (9th Cir. 2009) (holding that the difficulty of separating electronic data that can be seized under a valid warrant from that which is not must not be allowed to become a license for the government to access broad, vast amounts of data which it has no probable cause to access).

[69] *Katz*, 389 U.S. at 361 (Harlan, J., concurring); *see* Minnesota v. Carter, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (explaining that the established *Katz* test "has come to mean the test enunciated by Justice Harlan's separate concurrence in *Katz*"); Renée McDonald Hutchins, *Tied Up in* Knotts*? GPS Technology and the Fourth Amendment*, 55 UCLA L. REV. 409, 427 (2007) ("In subsequent cases, the Court has adopted Justice Harlan's two-pronged formulation of Fourth Amendment application as the standard analysis for determining whether or not a search has occurred.").

[70] In one survey, ninety-one percent of respondents were concerned their identities might be stolen and "used to make unauthorized purchases." *Zogby Poll: Most Americans Worry About Identity Theft*, IBOPE INTELIGÊNCIA (Apr. 3, 2007), http://www.ibopezogby.com/news/2007/04/03/zogby-poll-most-americans-worry-about-identity-theft/. Ninety percent of cloud-computing users in the United States "would be very concerned" if cloud service providers sold their files to a third party. JOHN B. HORRIGAN, PEW RESEARCH CTR., USE OF CLOUD COMPUTING APPLICATIONS AND SERVICES 2, 7 (2008), *available at* http://www.pewinternet.org/~/media/Files/Reports/2008/PIP_Cloud.Memo.pdf.pdf.

[71] *See, e.g.*, *Kyllo*, 533 U.S. at 29–30, 34, 40 (holding that warrantless use of a thermal imaging device to detect heat emanating from a home constitutes an unlawful search and stating that to hold otherwise "would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment"); United States v. Warshak, 631 F.3d 266,

the Supreme Court has been hesitant to address the Fourth Amendment's relationship to recent technology, particularly in two cases. First, in *United States v. Jones*, the Court concluded that police must have a warrant to *place* a GPS tracker on a car because doing so and then using the device to monitor an individual is a Fourth Amendment search.[72] To be sure, this decision aligns with current societal expectations: a recent poll reveals that seventy-three percent of Americans believe police must have a warrant to put a GPS tracking device on a car.[73] Some members of the Court even recognized that long-term GPS monitoring without a warrant violates our social expectations.[74] The Court thought that tracking someone electronically (as opposed to placing the GPS on the vehicle) *could* be "an unconstitutional invasion of privacy."[75] The Court, however, concluded that addressing that question would lead "needlessly into additional thorny problems,"[76] despite our social expectations and the reality that long-term GPS monitoring is decreasingly reliant on an actual GPS device.[77] Second, in *City of Ontario v. Quon*, a case involving messages on a two-way pager, the Court faced what Justice Kennedy termed "issues of farreaching significance."[78] In its opinion, however, the Court avoided such issues, deeming two-way pagers, a decades-old device, an "emerging technology."[79] The judiciary, Kennedy concluded, would take a risk by engaging "the Fourth Amendment implications of emerging technology before its role in society has become clear."[80] At least one court sees this decision as unhelpful.[81]

Hesitancy and delay in recognizing social expectations is an inevitable outcome of the relationships among case law, technology, and legislation. Cases do not rise to the courts until years after an incident has occurred, and courts are beholden to the laws of Congress.

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288 (6th Cir. 2010) (holding that the government may not force a commercial internet service provider to provide it with the contents of subscribers' emails).

72 *Jones*, 132 S. Ct. at 949.

73 FAIRLEIGH DICKINSON UNIV.'S PUBLICMIND POLL, HIGH COURT AGREES WITH PUBLIC IN US V. JONES: ELECTRONIC TAILS NEED A WARRANT 1 (2012), *available at* http://publicmind.fdu.edu/2012/tailing/final.pdf.

74 *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring); *id.* at 964 (Alito, J., concurring).

75 *Id.* at 954.

76 *Id.*

77 *See id.* at 963–64 (Alito, J., concurring).

78 City of Ontario v. Quon, 130 S. Ct. 2619, 2624 (2010).

79 *Id.* at 2629.

80 *Id.*

81 *See* Rehberg v. Paulk, 611 F.3d 828, 844 (11th Cir. 2010) ("The Supreme Court's more-recent precedent [in *Quon*] shows a marked lack of clarity in what privacy expectations as to content of electronic communications are reasonable.").

Nonetheless, by the time a case reaches the Supreme Court, social expectations may be settled.[82] The Court should recognize this reality and find that certain communications and movement carry reasonable privacy expectations that society is prepared to recognize.

Justice Brennan believed that "[j]udges cannot avoid a definitive interpretation because they feel unable to, or would prefer not to, penetrate to the full meaning of the Constitution's provisions."[83] Judges can apply Fourth Amendment rules to the virtual world without creating new jurisprudence or frameworks.[84] Just as information in briefcases carries privacy protections,[85] so also our virtual identities, full of photos, correspondences, address books, etc., should carry similar protections.[86] The Court need not create a new privacy doctrine or theorize in a black box about expectations, as it can rely on polling to examine the social-expectation part of the *Katz* test. Polling is becoming increasingly easy to conduct and to evaluate for accuracy.[87] By using polling, the Court can determine and validate our social privacy expectations.

B. Statutory Guidance

A host of legislation addresses privacy.[88] No office or piece of legislation covers all personal information, however.[89] I apply my

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[82] For example, seventy-three percent of participants in a recent poll viewed it as extremely important not to have someone watching or listening to them without permission. HUMPHREY TAYLOR, HARRIS INTERACTIVE, MOST PEOPLE ARE "PRIVACY PRAGMATISTS" WHO, WHILE CONCERNED ABOUT PRIVACY, WILL SOMETIMES TRADE IT OFF FOR OTHER BENEFITS 2 (2003), *available at* http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-Most-People-Are-Privacy-Pragmatists-Who-While-Conc-2003-03.pdf.

[83] William J. Brennan, Jr., Speech to Georgetown University's Text and Teaching Symposium (Oct. 12, 1985), *in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 11, 13 (1986).

[84] *See, e.g.*, Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005, 1048–49 (2010).

[85] United States v. Freire, 710 F.2d 1515, 1519 (11th Cir. 1983).

[86] *See* New Jersey v. T.L.O., 469 U.S. 325, 339 (1985) (noting that students who carry school supplies, keys, money, hygiene supplies, purses, wallets, photographs, letters, and diaries to school do so without "necessarily waiv[ing] all rights to privacy in such items merely by bringing them onto school grounds"); David A. Couillard, *Defogging the Cloud: Applying Fourth Amendment Principles to Evolving Privacy Expectations in Cloud Computing*, 93 MINN. L. REV. 2205, 2219–20 (2009).

[87] *See* Nate Silver, *The Uncanny Accuracy of Polling Averages*, Part II: What the Numbers Say*, N.Y. TIMES (Sept. 30, 2010, 6:54 PM), http://fivethirtyeight.blogs.nytimes.com/2010/09/30/the-uncanny-accuracy-of-polling-averages-part-2-what-the-numbers-say/.

[88] *See, e.g.*, Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3402–3403(a) (2006); Fair Credit Reporting Act, 15 U.S.C. § 1681c(a) (2006); Fair and Accurate Credit Transactions Act of 2003, 15 U.S.C. § 1681m(e) (2006); Children's Online Privacy Protection Act of 1998, 15 U.S.C. § 6502 (2006); Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 (2006); Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7215(b)(5)(A) (2006); Stored

framework to three laws, pinpointing areas where legislation or a lack of legislation allows abuse, subversion, or violations of social expectations of privacy. Outdated legislation can become problematic in application, as can legislation with overly broad coverage of technology, people, and content. It is crucial to examine how federal agencies gather, use, and disclose our information and, because of the inherent impact on the social contract, whether the government keeps its word and mandates compliance with the law.

The Privacy Act of 1974 ("Privacy Act") regulates how the government may gather, use, and distribute personal information.[90] It states, "No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . . ."[91] But the Privacy Act only applies to the public sector. Members of Congress can skirt it by releasing information gathered by the government and buying back repurposed, enhanced versions of that information from data brokers.[92] Moreover, a Congressional Research Service report found that twenty-three federal agencies disclosed the personal information of their websites' users to other agencies, and at least four agencies shared the information with banks, retailers, distributors, and trade organizations.[93] The Privacy Act has about a

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Communications Act, 18 U.S.C. § 2701(a) (2006); Video Privacy Protection Act of 1988, 18 U.S.C. § 2710(b)(1) (2006); Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2721(a) (2006); Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g(a)(2) (2006); Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320a-7c(a)(3)(B)(ii) (2006); Cable Communications Policy Act of 1984, 47 U.S.C. § 551 (2006). This non-exhaustive list does not include state laws.

89 Julia Angwin, *Watchdog Planned for Online Privacy*, WALL ST. J. (Nov. 11, 2010, 8:03 PM), http://online.wsj.com/article/SB10001424052748703848204575608970171176014.html ("There is no comprehensive U.S. law that protects consumer privacy online."); *see also* ORG. FOR ECON. CO-OPERATION & DEV., INVENTORY OF INSTRUMENTS AND MECHANISMS CONTRIBUTING TO THE IMPLEMENTATION AND ENFORCEMENT OF THE OECD PRIVACY GUIDELINES ON GLOBAL NETWORKS 47–48 (1999) (showing the patchwork of legislation making up United States personal-information privacy law).

90 Privacy Act of 1974, 5 U.S.C. § 552a(a)–(e) (2006).

91 *Id.* § 552a(b).

92 Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1138–39 (2002) ("[T]he government routinely pour[s] [personal] information into the public domain . . . by posting it on the Internet . . . . This expanded profile would then be sold back to the government . . . ."). *See generally* Melissa Carrie Oppenheim, *The Dark Data Cycle: How the U.S. Government Has Gone Rogue in Trading Personal Data from an Unsuspecting Public* (Mar. 2012) (unpublished thesis, Harvard University) (thesis on file with the Regent University Law Review).

93 HAROLD C. RELYEA, CONG. RESEARCH SERV., RL 30824, THE PRIVACY ACT: EMERGING ISSUES AND RELATED LEGISLATION 5 (2002).

dozen exceptions,[94] including a widely-criticized,[95] broad exemption for "routine use."[96] There is little wonder it has been called "toothless."[97]

The Electronic Communications Privacy Act of 1986[98] ("ECPA") was drafted to protect the communication privacy of American citizens.[99] Written when copying records was a physical activity and records could be physically destroyed, the ECPA has not been significantly updated since it was passed in 1986. Applying it to email, texting, social networks, data storage, and other new technology is quite difficult.[100] Unnecessarily complex and overly technical distinctions—for instance, between opened and unopened email and email in transit and in storage—have emerged.[101] Although the ECPA may have seemed useful when it was passed, distinguishing privacy in this way or in other ways recognized by the ECPA now defies technological realities.

Lastly, the USA PATRIOT Act ("Patriot Act") defines the scope and types of information the federal government can gather in counter-terrorism efforts.[102] The Patriot Act allows the FBI to issue National Security Letters ("NSLs") with a demand for information and a gag order to prevent its recipient from discussing the request with anyone except an attorney (for legal advice) or someone "to whom such disclosure is

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[94] § 552a(b)(1)–(12); *see also* PHILIPPA STRUM, PRIVACY: THE DEBATE IN THE UNITED STATES SINCE 1945, at 50 (1998).

[95] Paul M. Schwartz, *Privacy and Participation: Personal Information and Public Sector Regulation in the United States*, 80 IOWA L. REV. 553, 584–85 (1995).

[96] § 552a(b)(3).

[97] ANNE S. KIMBOL, THE PRIVACY ACT MAY BE TOOTHLESS (2008), *available at* http://www.law.uh.edu/healthlaw/perspectives/2008/(AK)%20privacy%20act.pdf.

[98] Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510–2521 (2006).

[99] *See* S. REP. NO. 99-541, at 3, 5 (1986) ("With the advent of computerized recordkeeping systems Americans have lost the ability to lock away a great deal of personal and business information.... [T]he law must advance with the technology to ensure the continued vitality of the fourth amendment [sic].... Congress must act to protect the privacy of our citizens.... The Committee believes that [the ECPA] represents a fair balance between the privacy expectations of American citizens and the legitimate needs of law enforcement agencies.").

[100] *See* Achal Oza, Note, *Amend the ECPA: Fourth Amendment Protection Erodes as E-mails Get Dusty*, 88 B.U. L. REV. 1043, 1045, 1073 (2008) (arguing that technology has outpaced the ECPA); *see also* Patricia L. Bellia, *Surveillance Law Through Cyberlaw's Lens*, 72 GEO. WASH. L. REV 1375, 1396–97 (2004) ("Stored communications have evolved in such a way that [the ECPA's layers of statutory protection for stored communications] are becoming increasingly outdated and difficult to apply.").

[101] ROBERT GELLMAN, WORLD PRIVACY FORUM, PRIVACY IN THE CLOUDS: RISKS TO PRIVACY AND CONFIDENTIALITY FROM CLOUD COMPUTING 13 (2009) ("Distinctions recognized by ECPA include electronic mail in transit; electronic mail in storage for less than or more than 180 days; electronic mail in draft; opened vs. unopened electronic mail; electronic communication service; and remote computing service.").

[102] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, 18 U.S.C. § 2516(1) (2006).

necessary to comply with the request."[103] From 2003 to 2006 the FBI issued nearly 200,000 NSLs,[104] which must certify a relevance of this information to "an authorized investigation to protect against international terrorism or clandestine intelligence activities."[105] Notwithstanding the remarkably broad nature of these guidelines, an internal FBI audit of ten percent of NSLs suggests that the FBI has violated these limitations more than 1,000 times.[106] While courts have intermittently regulated NSLs,[107] two senators familiar with the Patriot Act claim that

> there is now a significant gap between what most Americans think the law allows and what the government secretly claims the law allows. This is a problem, because it is impossible to have an informed public debate about what the law should say when the public doesn't know what its government thinks the law says.[108]

The obvious conclusion is that the best way to prevent secret invasions of our privacy is to ban secret invasions of our privacy. That solution, admittedly, is complex, and I address it in the following Sections.

C. Analysis

Voters' interests tend to be limited to very few issues in elections.[109] Congress has on a few occasions considered privacy legislation,[110] but privacy is generally a low political priority. Part of this is due to how Congress approaches oversight.[111] One model Congress could choose to

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[103] *Id.* § 2709(c).

[104] *National Security Letters Reform Act of 2007: Hearing on H.R. 3189 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 11 (2008) (statement of Glenn A. Fine, Inspector General of the United States).

[105] § 2709(b)(1).

[106] John Solomon, *FBI Finds It Frequently Overstepped in Collecting Data*, WASH. POST, June 14, 2007, at A1; *see also* U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S USE OF NATIONAL SECURITY LETTERS: ASSESSMENT OF CORRECTIVE ACTIONS AND EXAMINATION OF NSL USAGE IN 2006, at 81 (2008) (noting that the Inspection Division of the FBI "identified 640 NSL-related possible intelligence violations in 634 NSLs").

[107] *E.g.*, John Doe, Inc. v. Mukasey, 549 F.3d 861, 883 (2d Cir. 2008).

[108] Wyden & Udall, *supra* note 18 (emphasis omitted).

[109] *See* Edward G. Carmines & James A. Stimson, *On the Structure and Sequence of Issue Evolution*, 80 AM. POL. SCI. REV. 901, 915 (1986) ("The issue space—that tiny number of policy debates that can claim substantial attention both at the center of government and among the passive electorate—is strikingly limited by mass inattention.").

[110] *See, e.g.*, Consumer Privacy Protection Act of 2011, H.R. 1528, 112th Cong. (2011); Commercial Privacy Bill of Rights Act of 2011, S. 799, 112th Cong. (2011); Building Effective Strategies to Promote Responsibility Accountability Choice Transparency Innovation Consumer Expectations and Safeguards Act, H.R. 611, 112th Cong. (2011).

[111] James B. Pearson, *Oversight: A Vital Yet Neglected Congressional Function*, 23 U. KAN. L. REV. 277, 281 (1975) ("Paradoxically, despite its importance, congressional oversight remains basically weak and ineffective."). *But see* Mathew D. McCubbins &

follow is the "police-patrol" model, which is "centralized, active, and direct."[112] Congress would pro-actively search for and remedy violations of its legislative goals.[113] Congress, however, seems to prefer a "fire-alarm" model that forces citizens and advocacy groups to bear the costs of detection.[114] Under this model, Congress establishes rules, procedures, and practices, but it requires individuals and interest groups to examine administrative decisions, charge those agencies that violate legislative goals, and seek remedies to hold those executive agencies accountable for their violations.[115] Legislators can then solve the problems, taking credit from those who sounded the alarm.[116] As noted, privacy is difficult to value and hard to understand, which may partially explain why Congress has not prioritized the issue.

Hyper-partisanship can impede compromise and action in the legislative branch,[117] and congressional members' interests in re-election can discourage active involvement in improving privacy policy.[118] Political parties also have the potential to shape our laws, but instead of championing privacy, both parties remain focused on using political processes to vie for power.[119] Established businesses have connections, experience, money, and lobbying capacity, and the government has far-reaching power. Privacy as a good, however, lacks these advantages. Under the shadow of discussions involving issues such as national security, child pornography, and the "War on Terror," privacy rights weaken. And, as previously mentioned, psychological processing

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Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrol Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 176 (1984) ("The widespread perception that Congress has neglected its oversight responsibility is a widespread mistake.").

[112] McCubbins & Schwartz, *supra* note 111, at 166.

[113] *Id.*

[114] *Id.* at 168.

[115] *Id.* at 166.

[116] *Id.* at 168.

[117] Sarah A. Binder, *The Dynamics of Legislative Gridlock, 1947–96*, 93 AM. POL. SCI. REV. 519, 527 (1999).

[118] *See* Gary Biglaiser & Claudio Mezzetti, *Politicians' Decision Making with Re-Election Concerns*, 66 J. PUB. ECON. 425, 442 (1997) (describing the "negative welfare effect" of politicians' re-election concerns). *See generally* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (2d ed. 2004).

[119] *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2006) ("Political competition and cooperation along relatively stable lines of policy and ideological disagreement quickly came to be channeled not through the branches of government, but rather through an institution the Framers could imagine only dimly but nevertheless despised: political parties."); *see also* Ezra Klein, *The Unpersuaded*, NEW YORKER, Mar. 19, 2012, at 32, 38 ("[W]e have a system that was designed to encourage division between the branches but to resist the formation of political parties. The parties formed anyway, and they now use the branches to compete with one another.").

problems and the low salience of privacy as an issue to voters also seems to play a role in its failure to motivate significant public outcry. Yet if each branch of government accepts legislative and regulatory inaction to privacy abuse, the separation of powers[120] will likewise fail to protect privacy.[121]

D. Looking Ahead

Senators, scholars, and advocates have asserted that agencies are infringing on our privacy.[122] The Supreme Court cannot easily interpret poorly written or imprecise laws; it is much more difficult to serve as a supplemental lawmaker capable of applying congressional intent when congressional intent is unclear.[123] Congress must handle this type of large-scale public problem legislatively.[124] It should begin by holding public hearings to examine secret abuses and current privacy legislation to bring the issue into the public eye. Congress should then update obsolete frameworks in the ECPA and the Privacy Act, amending them with an eye toward current and future technology-use.[125] It should empower courts and administrative agencies to revisit these issues. As necessary, it should redefine and amend legislative goals,[126] particularly in areas of abused or subverted legislation. Where the Department of

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[120] The Founders gave "each department, the necessary constitutional means, and personal motives, to resist encroachments of the others." THE FEDERALIST NO. 51, at 268 (James Madison) (George W. Carey & James McClellan eds., 2001); *see* John A. Fairlie, *The Separation of Powers*, 21 MICH. L. REV. 393, 393 (1923) ("This tripartite system of governmental authorities was the result of a combination of historical experience and a political theory generally accepted in this country as a fundamental maxim in the latter part of the eighteenth century.").

[121] *See generally* Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 44 (2003) (explaining the balance of powers and that the repetitive and staggered nature of United States policy creation can lead to a broad consensus and a guarantee that "contentious issues can be easily revisited"). Complacency among the branches can lead to inaction on other issues as well. *See, e.g.*, Matthew L. Sundquist, Worcester v. Georgia*: A Breakdown in the Separation of Powers*, 35 AM. INDIAN L. REV. 239, 255 (2010–2011).

[122] *See, e.g.*, *Privacy Online*, *supra* note 3, at 33, 41; Wyden & Udall, *supra* note 18.

[123] Beth M. Henschen, *Judicial Use of Legislative History and Intent in Statutory Interpretation*, 10 LEGIS. STUD. Q. 353, 353 (1985) ("Thus the role that the Supreme Court adopts as supplemental lawmaker depends in part on the opportunities for judicial policy making that Congress provides in its statutes.").

[124] Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 805–06 (2004).

[125] *See* Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1209 (2004) (recommending ways for Congress to amend the Stored Communications Act to better protect internet users' privacy).

[126] McCubbins & Schwartz, *supra* note 111, at 174 ("Congress also can redefine or reaffirm its goals by redefining or explicating the jurisdictional authority of an administrative agency.").

Justice has found violations within FBI and executive practices, it should vigilantly expose and oppose such violations. To counteract the fact that political leaders have trouble understanding technology,[127] Congress could rely on technologists when creating legislation, and courts could call on experts as witnesses or to file amicus curiae briefs.[128] The White House could call on Congress to pass robust privacy legislation, directing the FTC to enforce the FTC Act and protect privacy. The President should engage in the legislative arena,[129] enact executive policies to protect privacy,[130] and help mobilize interest groups.[131]

The government must have access to certain information, but rules governing access and practices should be public. Secret, unchallengeable demands threaten due process, prevent public debate, and invade our privacy. Secret policies and interpretations mean we cannot assess what political philosopher John Rawls called "justice as regularity"—"[t]he regular and impartial, and in this sense fair, administration of law."[132] If we do not know when, why, and how the government obtains and uses information, or is permitted to use information, how can we evaluate the justice of the government and its actions?

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[127] *See, e.g.*, Garrett M. Graff, *Don't Know Their Yahoo from Their YouTube*, WASH. POST, Dec. 2, 2007, at B1 (quoting Senator John McCain's classification of "information technology" as a "less important issue[]"); Mike Masnick, *Supreme Court Justices Discuss Twitter*, TECHDIRT (May 25, 2010, 12:05 AM), http://www.techdirt.com/articles/20100521/1631459536 (revealing the lack of understanding Justices Scalia and Breyer have of Twitter); *Your Own Personal Internet*, WIRED (June 30, 2006, 12:47 AM), http://www.wired.com/threatlevel/2006/06/your_own_person/ (quoting U.S. Senator Ted Stevens referring to the internet as "a series of tubes").

[128] A novel solution is moving Camp David to Silicon Valley so the President and Senators can interact with technology and technologists. *See* Nigel Cameron, President, Ctr. for Policy on Emerging Techs., Jim Dempsey, Vice President for Pub. Policy, Ctr. for Democracy and Tech., Rebecca Lynn, Partner, Morgenthaler Ventures, Christine Peterson, President, Foresight Inst., David Tennenhouse, Partner, New Venture Partners, Conference Panel at the Tech Policy Summit and the Center for Policy on Emerging Technologies Breakfast, *Bridging the Continental Divide: From the Valley to D.C*, (Nov. 15, 2011), *available at* http://vimeo.com/32851257.

[129] The President could push for legislation to reverse or address court decisions that punt on important privacy questions. For example, in response to the Supreme Court's decision (not concerning privacy) in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), President Barack Obama signed the Lilly Ledbetter Fair Pay Act of 2009, to restore the law to where it was before the Supreme Court's decision. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2, 123 Stat. 5, 5.

[130] *See generally* Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 132, 155 (1999).

[131] *See generally* Mark A. Peterson, *The Presidency and Organized Interests: White House Patterns of Interest Group Liaison*, 86 AM. POL. SCI. REV. 612, 615 (1992).

[132] RAWLS, *supra* note 34, at 207.

IV. CASE STUDY OF FTC ENFORCEMENT

Having reviewed where privacy has stalled legislatively and judicially, and having offered some potential solutions, I now turn to enforcement. In Part III, I focused on government abuses to privacy, and, in this Part, I deal with private abuses to privacy. In both arenas, abuses occur because of similar problems—poor laws, poor enforcement, and broken social expectations—that trigger all three aspects of my proposed privacy framework. In this case, Congress has charged the FTC and the Federal Communications Commission ("FCC") with regulating businesses and protecting consumers. Privacy laws, however, can be confusing and difficult to apply, especially to new technologies.[133] The agencies have tepidly retaliated against companies that have broken laws and violated our social expectations.[134] The lack of regulation sends mixed messages: if companies break the law and violate privacy, as the FTC claims and is evident, why are there no meaningful consequences, fines, or prosecutions? The FTC should exercise its litigation and compliance authorities, extract financial and business reparations from legal violators, and pursue criminal charges.

The Facebook[135] and Google[136] cases illustrate an FTC strategy also employed against MySpace,[137] Twitter,[138] and others. As matters stand, it is rational for prosecuted companies to settle and enter into a consent decree with the FTC,[139] thereby avoiding admittance of wrongdoing and fines.[140] In a consent decree, companies are required to develop privacy plans, submit to privacy reviews, seek their customers' permission before sharing their information, and pledge not to further misrepresent their

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[133] *See* Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005, 1048 (2010).

[134] *See, e.g.*, Comments from the Elec. Privacy Info. Ctr. to the Fed. Trade Comm'n 2 (Dec. 27, 2011), *available at* http://www.epic.org/privacy/facebook/Facebook-FTC-Settlement-Comments-FINAL.pdf ("[T]he proposed [settlement agreement with Facebook] is insufficient to address the concerns originally identified by EPIC and the consumer coalition, as well as those findings established by the [FTC].").

[135] Facebook, Inc., FTC No. 092 3184, at 1 (July 27, 2012) (providing a settlement agreement).

[136] Google, Inc., FTC No. 102 3136, at 1 (Oct. 13, 2011) (providing a settlement agreement).

[137] Myspace, LLC, FTC No. 102 3058, at 1 (Aug. 30, 2012) (providing a settlement agreement).

[138] Twitter, Inc., FTC No. 092 3093, at 1 (Mar. 2, 2011) (providing a settlement agreement).

[139] Malcolm B. Coate et al., *Fight, Fold or Settle?: Modelling the Reaction to FTC Merger Challenges*, 33 ECON. INQUIRY 537, 537, 550 (1995).

[140] *See, e.g.*, Facebook, Inc., 76 Fed. Reg. 75883, 75883 (Fed. Trade Comm'n Dec. 5, 2011) (analysis of proposed consent order) (settling "*alleged* violations of federal law" (emphasis added)).

privacy policies.[141] This requirement raises the unsettling question of whether the companies were previously permitted to misrepresent their policies.

Google and Facebook used and gathered information in a host of ways that violated their terms, privacy policies, and our broader social expectations. The absence of meaningful censure for these repeated offenses is a further violation of our social expectations. The Google Decree arose over the ways that Google Buzz shared information.[142] Then, Google Street View cars gathered e-mails, passwords, photos, chat messages, and sites visited from bystanders, even if users were not using a computer at the time.[143] Google blamed an engineer, but the practice was planned and known to supervisors.[144] Google later subverted Safari's "Do Not Track" features, despite user indications that they did not wish to be tracked.[145] Google claimed, "We didn't anticipate that this would happen."[146] Google altered its privacy policies in a widely criticized way that used users' information in a new fashion.[147] Google settled with the FCC for $25,000 after having "impeded" and "delayed" a federal inquiry;[148] this fine accounts for 0.000066% of their annual revenue of $37.9 billion.[149] Another $22.5 million settlement for subverting "do not track" features relative to the infraction and their revenue was a miniscule fine.[150] As it turns out, Google also kept the information they had gathered through Street View cars.[151]

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[141] *See, e.g.*, Facebook, Inc., FTC No. 092 3184, at 3–6 (July 27, 2012); Google, Inc., FTC No. 102 3136, at 3–5.

[142] Complaint at 3–6, Google, Inc., FTC No. 102 3136.

[143] David Streitfeld & Kevin J. O'Brien, *Protecting Its Own Privacy: Inquiries on Street View Get Little Cooperation from Google*, N.Y. TIMES, May 23, 2012, at B1 (noting that Google Street View cars collected "e-mails, photographs, passwords, chat messages, postings on Web sites and social networks—all sorts of private Internet communications").

[144] David Streifeld, *Google Engineer Told Others of Data Collection, Full Version of F.C.C. Report Reveals*, N.Y. TIMES, Apr. 29, 2012, at A22.

[145] Statement of the Commission at 1, Google, Inc., FTC No. 102 3136.

[146] Heather Perlberg & Brian Womack, *Google Dodged iPhone Users' Privacy With DoubleClick, Stanford Study Finds*, BLOOMBERG (Feb. 17, 2012, 5:39 PM), http://www.bloomberg.com/news/2012-02-17/google-dodged-iphone-users-privacy-with-doubleclick-stanford-study-finds.html.

[147] Google began compiling tracked-user information across multiple sites including Gmail, YouTube, and its search engine; users were unable to opt out of the policy. Cecilia Kang, *Google to Track Users Across All Its Sites*, WASH. POST, Jan. 25, 2012, at A1.

[148] David Streitfeld, *Google Is Faulted for Impeding U.S. Inquiry on Data Collection*, N.Y. TIMES, Apr. 15, 2012, at A1.

[149] Brian Womack & Todd Shields, *Google Gets Maximum Fine After 'Impeding' Privacy Probe*, BLOOMBERG (Apr. 16, 2012, 2:32 PM), http://www.bloomberg.com/news/2012-04-15/fcc-seeks-25-000-fine-from-google-in-wireless-data-privacy-case.html.

[150] Claire Cain Miller, *Google, Accused of Skirting Privacy Provision, Is to Pay $22.5 Million to Settle Charges*, N.Y. TIMES, Aug. 10, 2012, at B2; *see also* Geoff Duncan, *Google's $22.5 Million FTC Penalty Is Not Enough: Here's Why*, DIGITAL TRENDS (July 10, 2012),

Facebook publicly displayed information users thought was private, allowed advertisers to gather users' personal information, and allowed access to users' information even if users deleted their profile.[152] The FTC called these practices "unfair and deceptive."[153] The FTC did not respond when Facebook tracked users who were logged out of their Facebook accounts[154] or when Facebook unveiled "Timeline," which shared information in new, intrusive ways.[155] Although these repeated privacy abuses may suggest otherwise, the FTC does have tools to respond to law-breakers, particularly once companies have entered consent agreements such as the ones Google and Facebook have with the FTC.

A. Solution: Enhanced Enforcement

The FTC has broad powers to investigate cases, bring complaints against companies, and punish lawbreakers.[156] The FTC Policy Statement on Deception says deception is a "representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."[157] The FTC Act stipulates that "unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."[158] If a user is misled, the FTC can bring a civil action.[159] The FTC can assess penalties of $10,000 per violation of "unfair" and "deceptive" practices,[160] practices of the type Facebook and Google have employed. Although courts has prevented the government from imposing excessively large fines,[161] large fines may be exactly what

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http://www.digitaltrends.com/mobile/googles-22-5-million-ftc-penalty-is-not-enough-heres-why/ ("[I]t's hard to believe any company trying to compete with Google or Facebook will consider dodgy privacy practices anything more than a minor cost of doing business.").

[151] Streitfeld, *supra* note 148.

[152] Somini Sengupta, *F.T.C. Settles Privacy Issue at Facebook*, N.Y. TIMES, Nov. 30, 2011, at B1.

[153] Complaint at 7, Facebook, Inc., FTC No. 092 3184 (July 27, 2012).

[154] Dina ElBoghdady & Hayley Tsukayama, *Facebook Tracking Probe Sought*, WASH. POST, Sept. 30, 2011, at A14.

[155] *Id.*

[156] *See, e.g.*, 15 U.S.C. §§ 45, 46(a), 49, 56, 57b-1 (2006).

[157] Cliffdale Associates, Inc., 103 F.T.C. 110, 176 (1984).

[158] § 45(a)(1); *see also* 12 C.F.R. § 227.1(b) (2012).

[159] § 45(m)(1)(A).

[160] *Id.* ("In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation."); 16 C.F.R. § 1.98(d) (2012) (increasing the penalty under 15 U.S.C. § 45(m)(1)(A) (2006) from $10,000 to $16,000).

[161] *See, e.g.*, United States v. Bajakajian, 524 U.S. 321, 324 (1998) (holding that the imposed fine was unconstitutional under the Eighth Amendment).

is necessary to deter future misconduct.[162] The repeated occurrence of multiple privacy violations perpetrated on millions of Google and Facebook users could justify leveling substantial fines of the type that would attract companies' attention. One can imagine businesses reacting by accusing the FTC of unprecedented, anti-business practices, stifling creativity, or not understanding technology. However, breaking the law necessitates punishment.

In the past, the FTC has relied upon self-regulation—trying to provide consumers with access to information to protect their own privacy.[163] Critics of self-regulation tend to believe it does not work[164] or that it might work too well.[165] In a large group of companies, in which no individual contribution or lack thereof makes a notable difference, it is unlikely that a solution will emerge without coercion or exogenous factors.[166] As such, privacy self-regulation initiatives have often stalled or failed.[167]

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[162] *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.").

[163] *See* Joseph Turow et al., *The Federal Trade Commission and Consumer Privacy in the Coming Decade*, 3 J.L. & POL'Y FOR INFO. SOC'Y 723, 729 (2007).

[164] *See generally id.* at 729–44.

[165] FTC Commissioner J. Thomas Rosch voiced this second concern, noting that although certain best practices are desirable, there is a danger in "large, well-entrenched firms engaging in 'self-regulation'" because it could lead to them "dictat[ing] what the privacy practices of their competitors should be." *Internet Privacy: The Views of the FTC, FCC, and NTIA: Testimony Before the Subcomm. on Commerce, Mfg. & Trade and Subcomm. on Commc'ns & Tech. of the H. Comm. on Energy & Commerce*, 112th Cong. 3 n.4 (2011) (statement of J. Thomas Rosch, Commissioner, FTC).

[166] MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION 44 (1965).

[167] *See, e.g.*, PAM DIXON, WORLD PRIVACY FORUM, THE NETWORK ADVERTISING INITIATIVE: FAILING AT CONSUMER PROTECTION AND AT SELF-REGULATION 6–7 (2007). The Network Advertising Initiative ("NAI") is an FTC-supported example of "behavioral" advertising self-regulation. *Id.* at 2 ("[T]he agreement and the related self-regulatory body—called the Network Advertising Initiative or NAI—have failed to protect consumers and have failed to self-regulate the behavioral targeting industry."). In one study, however, only 11% of participants were able to determine the function of the NAI opt-out website. Aleecia M. McDonald & Lorrie Faith Cranor, *Americans' Attitudes About Internet Behavioral Advertising Practices*, WORKSHOP ON PRIVACY ELECTRONIC SOC'Y, Oct. 2010, at pt. 7 (pre-press version), *available at* http://www.aleecia.com/authors-drafts/wpes-behav-AV.pdf. The FTC found that, in the NAI, "[c]urrent membership constitutes over 90% of the network advertising industry in terms of revenue and ads served" and "only legislation can compel the remaining 10% of the industry to comply with fair information practice principles. Self-regulation cannot address recalcitrant and bad actors, new entrants to the market, and drop-outs from the self-regulatory program." FED. TRADE COMM'N, ONLINE PROFILING: A REPORT TO CONGRESS (PART 2): RECOMMENDATIONS 10 (2000). Another example is the Platform for Privacy Preferences ("P3P"), a self-regulatory mechanism for websites to communicate privacy policies to user agents. Thousands of websites use P3P compact policies to misrepresent their privacy practices. PEDRO GIOVANNI LEON ET AL.,

Perhaps the FTC fears that if it litigated a case and lost, its authority would erode. If so, the FTC should request that Congress pass legislation clarifying the extent to which online privacy violations are illegal and empowering the FTC to punish wrongdoers, and Congress should do so. Perhaps FTC commissioners are hindered by the lack of available technology.[168] Perhaps FTC commissioners, many of whom come from or go to the corporate world,[169] are concerned about future job prospects.[170] If that is the case, the Commission should consider appointing candidates less concerned about their post-Commission professional prospects.[171] Perhaps the FTC is under-staffed.[172] If so, it could request a larger staff. FTC Commissioners may genuinely believe in unbridled capitalism and worry that robust fines or regulations will

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TOKEN ATTEMPT: THE MISREPRESENTATION OF WEBSITE PRIVACY POLICIES THROUGH THE MISUSE OF P3P COMPACT POLICY TOKENS 1 (2010).

[168] *See* Peter Maass, *How a Lone Grad Student Scooped the Government and What It Means for Your Online Privacy*, PROPUBLICA (June 28, 2012, 6:30 AM), http://www.propublica.org/article/how-a-grad-student-scooped-the-ftc-and-what-it-means-for-your-online-privac ("The desktop in their [FTC] office is digitally shackled by security filters that make it impossible to freely browse the Web. Crucial websites are off-limits, due to concerns of computer viruses infecting the FTC's network, and there are severe restrictions on software downloads. . . . Only one FTC official has an unfiltered desktop . . . ."). *But see* Kashmir Hill, *The FTC, 'Your Privacy Watchdog,' Does Have Some Teeth*, FORBES (Jun. 29, 2012, 4:21 PM), http://www.forbes.com/sites/kashmirhill/2012/06/29/your-privacy-watchdog-does-have-some-teeth (defending the FTC's capabilities in direct response to the ProPublica article).

[169] Former government employees frequently provide expert policy advice. *See* Kevin T. McGuire, *Lobbyists, Revolving Doors and the U.S. Supreme Court*, 16 J.L. & POL. 113, 120 (2000) ("[I]n the world of pressure politics, policy-makers reward those representatives who provide them with the types of reliable information that enable them to advance their respective goals."). I have examined this pattern as it relates to the Supreme Court. *See* Matthew L. Sundquist, *Learned in Litigation: Former Solicitors General in the Supreme Court Bar*, 5 CHARLESTON L. REV. 59, 60 (2010).

[170] For example, as of September 2012, Robert Pitofsky, former Chairman of the FTC, serves as Counsel at Arnold & Porter LLP; Timothy Muris, another former FTC Chairman, is Of Counsel to Kirkland & Ellis LLP; Pamela Jones Harbour, former FTC Commissioner, is a partner at Fulbright & Jaworski LLP; Deborah Platt Majoras, former FTC Chairman, is the CLO at Procter & Gamble; and Thomas Leary, former FTC Commissioner, is Of Counsel to Hogan Lovells.

[171] Officials elsewhere in the government have sought to reduce the revolving-door pattern by extending the no-lobbying period. *See* Close the Revolving Door Act of 2010, S. 3272, 111th Cong. § 5 (2010). The White House could look outside the corporate world for regulatory candidates and recruit policy experts, advocates, scholars and others less interested in a corporate job after their tenure. Congress could ban former regulators and staffers from lobbying, advocating, consulting, or representing companies governed by the agency they worked for, either indefinitely or for five to ten years.

[172] *See* Maass, *supra* note 168 ("The mismatch between FTC aspirations and abilities is exemplified by its Mobile Technology Unit, created earlier this year to oversee the exploding mobile phone sector. The six-person unit consists of a paralegal, a program specialist, two attorneys, a technologist and its director . . . .").

discourage innovation or competition.[173] Regardless, as the World Privacy Forum points out, the unfortunate reality is that "companies that are the target of Commission actions know that the penalties are often weak in comparison to the profits, and that it is more cost-effective to exploit consumers today and say that they are sorry tomorrow if they are caught."[174]

B. Coalition Solutions

Given that legislation and self-regulation are unlikely to be sufficiently successful tactics for privacy protection, and given that the FTC can serve as a successful but necessarily limited agent for privacy enforcement, this Section considers another strategic approach. Stakeholders in business, technology, government, and consumer protection have advocated better privacy or created privacy frameworks that can be realized through standardized agreements. None are perfect, but they are a good start. In essence, there are two distinct problems to address. First, how should we lobby Congress, corporations, and other politicians to implement and enforce meaningful privacy policies? Second, in the absence of effective lobbying, or perhaps as a supplement, how can we promote effective behavior among users and businesses? Education is a crucial factor, and advocacy must come from all stakeholders.

A handful of allied government, industry, and advocacy groups have defined "best practices," supported responsible data usage, and advocated privacy in the cloud, many of them calling for ECPA reforms.[175] Government-led coalitions have already begun to leverage their organizational capacity.[176] Cisco, SAP, EMC, and others have

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[173] *See* FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY 1 (2003) ("Competition through free enterprise and open markets is the organizing principle for most of the U.S. economy. Competition among firms generally works best to achieve optimum prices, quantity, and quality of goods and services for consumers.").

[174] Dixon, *supra* note 12, at 2.

[175] *See generally* COMPUTER & COMMC'NS INDUS. ASS'N, PUBLIC POLICY FOR THE CLOUD: HOW POLICYMAKERS CAN ENABLE CLOUD COMPUTING 22–35 (2011); CONSUMER FED'N OF AM., CONSUMER PROTECTION IN CLOUD COMPUTER SERVICES: RECOMMENDATIONS FOR BEST PRACTICES 5–6 (2010); INDUSTRY RECOMMENDATIONS ON THE ORIENTATION OF A EUROPEAN CLOUD COMPUTING STRATEGY (2011); OPEN IDENTITY EXCH., AN OPEN MARKET SOLUTION FOR ONLINE IDENTITY ASSURANCE 9 (2010); TECHAMERICA FOUND., SUMMARY REPORT OF THE COMMISSION ON THE LEADERSHIP OPPORTUNITY IN U.S. DEPLOYMENT OF THE CLOUD (CLOUD^2) 2–3, 6 (2011).

[176] The White House has advocated for a Consumer Privacy Bill of Rights, identifying a "need for transparency to individuals about how data about them is collected, used, and disseminated and the opportunity for individuals to access and correct data that has been collected about them." THE WHITE HOUSE, CONSUMER DATA PRIVACY IN A NETWORKED WORLD: A FRAMEWORK FOR PROTECTING PRIVACY AND PROMOTING

embraced an Open Cloud Manifesto supporting standardization based on customer requirements.[177] The cloud-computing industry has created semi-standardized privacy policies and practices in the form of End User License Agreements ("EULA"),[178] Terms of Services, and Service Level Agreements. These may be informative,[179] but they are infrequently read and difficult to understand.[180] Best practices for information security management have also been defined by the international information security standard known as ISO/IEC 27001 and 27002,[181] though they remain imperfect.[182] For these groups to be successful, they will need to find broad areas of agreement where they can pursue specific, tangible goals as the coalition opposing the Stop Online Piracy Act did.

INNOVATION IN THE GLOBAL DIGITAL ECONOMY 13 (2012). The National Strategy for Trusted Identities in Cyberspace ("NSTIC") is another White House initiative to work with companies, advocacy groups, and agencies to improve online privacy. The Strategy calls for inter-operable technology where people, companies, and technology can be authenticated. The idea is to create a system wherein individuals could choose to securely validate their identities when necessary. *See About NSTIC*, NAT'L STRATEGY TRUSTED IDENTITIES CYBERSPACE, http://www.nist.gov/nstic/about-nstic.html (last visited Oct. 17, 2012); *see also* THE WHITE HOUSE, NATIONAL STRATEGY FOR TRUSTED IDENTITIES IN CYBERSPACE 2 (2011).

[177] *Clash of the Clouds*, ECONOMIST, Apr. 4, 2009, at 66, 66. Amazon, Google, Microsoft, and Salesforce.com did not join, demonstrating how far away industry agreement may be. *Id.* at 67; *see also* OPEN CLOUD MANIFESTO (2009), *available at* http://www.opencloudmanifesto.org/Open%20Cloud%20Manifesto.pdf.

[178] *See* Jens Grossklags & Nathan Good, *Empirical Studies on Software Notices to Inform Policy Makers and Usability Designers*, *in* FINANCIAL CRYPTOGRAPHY AND DATA SECURITY 341 (Sven Dietrich & Rachna Dhamija eds., 2007).

[179] *See* Robert W. Gomulkiewicz & Mary L. Williamson, *A Brief Defense of Mass Market Software License Agreements*, 22 RUTGERS COMPUTER & TECH. L.J. 335, 346–52 (1996).

[180] Balachandra Reddy Kandukuri et al., *Cloud Security Issues*, *in* 2009 IEEE INT'L CONF. ON SERVICES COMPUTING 517, 519 (2009); *see also* Grossklags & Good, *supra* note 178 (noting the length of software program EULAs averaged at eleven double-spaced pages); Turow, *supra* note 163.

[181] *See Security Zone: Promoting Accountability Through ISO/IEC 27001 & 27002 (Formerly ISO/IEC 17799)*, COMPUTER WKLY. (Dec. 2008), http://www.computerweekly.com/feature/Security-Zone-Promoting-accountability-through-ISO-IEC-27001-27002-formerly-ISO-IEC-17799; *see also* Thomas J. Smedinghoff, *It's All About Trust: The Expanding Scope of Security Obligations in Global Privacy and E-Transactions Law*, 16 MICH. ST. J. INT'L L. 1, 41–42 (2007) ("This [ISO/IEC 27001] standard . . . defines the requirements for an Information Security Management System (ISMS) and provides a model for establishing, implementing, operating, monitoring, reviewing, maintaining, and improving an ISMS.").

[182] *See* Smedinghoff, *supra* note 181, at 42 (noting that ISO/IEC 27001 is a good starting point for security but "does not guarantee legal compliance"); *ISO/IEC 27002*, ISO 27001 SECURITY, http://www.iso27001security.com/html/27002.html (last visited Sept. 2, 2012) (acknowledging the difficulties in assessing whether an organization has complied with ISO/IEC 27002 standards).

C. Lessons from the Collaboration Against SOPA

The multi-stakeholder process to prevent the Stop Online Piracy Act ("SOPA")[183] is a useful template for a privacy coalition. SOPA would make internet service providers responsible for filtering copyright infringement material, targeting those who enable or facilitate copyright infringement.[184] Commentators argued that Google, YouTube, and other sites could be blocked, while some claimed it would lead to an internet "blacklist"[185] or a "great firewall of America."[186] Nonetheless, the deck was stacked in favor of SOPA. Well-established players in the industry enjoy better financing, established organization, and superior institutional knowledge and relationships.[187] As the president of the Computer and Communications Industry Association pointed out, "If you are a member of the Judiciary Committee, year after year after year, the content industry has been at your fundraisers over and over."[188] Organizations supporting SOPA had given nine times as much money to members of Congress as organizations in opposition.[189] Indeed, Representative Lamar Smith, the sponsor, called just one opposition witness at the House Judiciary Committee; he called five supportive witnesses.[190] The Center for Democracy and Technology and the Electronic Frontier Foundation were initial opponents of SOPA, but soon more stakeholders joined a coalition organizing "American Censorship Day," supported by Mozilla, Wikimedia, and others.[191] Google, AOL, and

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[183] Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011).

[184] *Id.* § 103.

[185] David Carr, *The Danger of an Attack on Piracy Online*, N.Y. TIMES, Jan. 2, 2012, at B1.

[186] Rebecca MacKinnon, Op-Ed., *Stop the Great Firewall of America*, N.Y. TIMES, Nov. 15, 2011, http://www.nytimes.com/2011/11/16/opinion/firewall-law-could-infringe-on-free-speech.html?_r=0.

[187] Jennifer Martinez, *Shootout at the Digital Corral*, POLITICO (Nov. 16, 2011, 4:31 AM), http://www.politico.com/news/stories/1111/68448.html.

[188] *Id.*

[189] *H.R. 3261 - Stop Online Piracy Act (SOPA)*, MAPLIGHT, http://www.maplight.org/us-congress/bill/112-hr-3261/1019110/total-contributions.table (last visited Aug. 27, 2012).

[190] Will Oremus, *The Rise of the Geek Lobby*, SLATE (Nov. 30, 2011, 8:02 PM), http://www.slate.com/articles/technology/technocracy/2011/11/stop_online_piracy_act_can_the_geek_lobby_stop_hollywood_from_wrecking_the_internet_.html; *see also Online Piracy: Stopping SOPA*, ECONOMIST, Jan. 21, 2012, at 33, 33.

[191] Kristen Salyer, *'American Censorship Day' Makes an Online Statement: The Ticker*, BLOOMBERG (Nov. 16, 2011, 5:02 PM), http://www.bloomberg.com/news/2011-11-16/-american-censorship-day-makes-an-online-statement-the-ticker.html; *see also American Censorship Day: Nov. 16, 2011*, AM. CENSORSHIP DAY, http://americancensorship.org (last visited Oct. 17, 2012); FIGHT FOR THE FUTURE, http://fightforthefuture.org (last visited Oct. 17, 2012).

Facebook criticized SOPA in a full-page *New York Times* ad.[192] The Twitter hashtag "DontBreakTheInternet" trended upwards, and 87,000 people called Congress to voice their opposition in one day.[193] President Obama then publicly opposed SOPA.[194] Continued work on the bill was indefinitely delayed.[195]

SOPA showed a moment of unity, but in privacy, everyone has varied interests. Consumers have different views of privacy than do businesses and governments. Opposing legislation is quite different from formulating ideas and advocating policy positions or legislation. However, as the anti-SOPA group and groups like the Future of Privacy Forum and Digital Due Process Coalition demonstrate,[196] there are areas where stakeholders can work together. Social media is empowering in this regard, as is calling Congress, signing petitions,[197] and, on an individual level, filing complaints with the FTC,[198] FCC,[199] and your attorney general or governor.[200] I file as often as I find privacy infringements or misleading terms or policies, and I encourage others to do likewise.

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[192] *We Stand Together to Protect Innovation*, N.Y. TIMES, Nov. 16, 2011, at A11 ("[T]he bills as drafted would expose law-abiding U.S. Internet and technology companies to new and uncertain liabilities, private rights of action, and technology mandates that would require monitoring of websites. We are concerned that these measures pose a serious risk to our industry's continued track record of innovation and job creation, as well as to our nation's cybersecurity.").

[193] Oremus, *supra* note 190.

[194] Edward Wyatt, *White House Takes Issue with 2 Antipiracy Bills*, N.Y. TIMES, Jan. 15, 2012, at A22.

[195] Jonathan Weisman, *Antipiracy Bills Delayed After an Online Firestorm*, N.Y. TIMES, Jan. 21, 2012, at B6.

[196] The Future of Privacy Forum is a D.C.-based think tank that brings together privacy advocates from academia, technology, business, and consumer protection. *Our Mission*, FUTURE OF PRIVACY F., http://www.futureofprivacy.org/about/our-mission/ (last visited Oct. 17, 2012). The Digital Due Process Coalition is a group of business and advocacy groups that advocate amending the ECPA. *See About the Issue*, DIGITAL DUE PROCESS COALITION, http://www.digitaldueprocess.org/index.cfm?objectid=37940370-2551-11DF-8E02000C296BA163 (last visited Oct. 17, 2012).

[197] Issue-specific petitions have been compiled in this vein. *See, e.g.*, NOT WITHOUT A WARRANT, https://notwithoutawarrant.com (last visited Oct. 17, 2012) (advocating amending the ECPA).

[198] *See Before You Submit a Complaint*, FED. TRADE COMMISSION, https://www.ftccomplaintassistant.gov (last updated Aug. 1, 2012, 9:30 AM).

[199] *See File Complaint*, FED. COMM. COMMISSION, http://www.fcc.gov/complaints (last visited Oct. 17, 2012).

[200] *See, e.g.*, *Consumer Alerts, Information & Complaints*, CAL. DEP'T JUST., http://oag.ca.gov/consumers/general (last visited Oct. 17, 2012).

CONCLUSION

In the short term, education is needed to inform users of privacy practices and allow them to determine if their expectations are realistic, in tune with the law, and enforced. Advocacy groups have written helpful educational materials.[201] The FTC has shown exceptional energy in educating consumers, leading industry discussions, and advocating that companies promote privacy.[202] Once society understands and is eager to fix these problems, we can set off fire-alarms, putting our representatives on notice that we value the social contract and that privacy is a highly valued good.

Kinakuta, a fictional island in the science fiction novel *Cryptonomicon*, is used to traffic data outside legal regulations.[203] A large corporation with the will-power and financing could theoretically create a floating data center, beyond government reach or user

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[201] *See, e.g.*, *Fact Sheet 18: Online Privacy: Using the Internet Safely*, PRIVACY RTS. CLEARINGHOUSE (last updated Aug. 2012), https://www.privacyrights.org/fs/fs18-cyb.htm; *Getting Started: Web Site Privacy Policies*, CENTER FOR DEMOCRACY & TECH., https://www.cdt.org/privacy/guide/start/privpolicy.php (last visited Oct. 17, 2012). "Disconnect" is a browser extension that prevents major third parties and search engines from tracking users' online activity. DISCONNECT, http://disconnect.me/db/ (last visited Oct. 17, 2012). An iPhone tracker visualizes what information can be gleaned from the files on your phone. IPHONE TRACKER, http://petewarden.github.com/iPhoneTracker/ (last visited Oct. 17, 2012). "Take This Lollipop" is a short video that, using Facebook Connect, depicts a crazed man stalking you in Facebook, revealing the extent of your personal information available online. *JARRETTHOLT2, Take This Lollipop*, YOUTUBE (Nov. 3, 2011), http://www.youtube.com/watch?v=1pA_UatfFW0. In general, Facebook applications can access an incredible amount of information. *See Permissions Reference*, FACEBOOK, http://developers.facebook.com/docs/authentication/permissions/ (last visited Aug. 22, 2012). Pleaserobme.com combines information from Foursquare and Twitter to identify when people have willingly provided their location information. Dan Fletcher, *Please Rob Me: The Risks of Online Oversharing*, TIME BUS., Feb. 18, 2010, http://www.time.com/time/business/article/0,8599,1964873,00.html. Ghostery blocks cookies and displays which cookies have tracked you. GHOSTERY, http://www.ghostery.com (last visited Oct. 17, 2012). Similar programs have minimal effectiveness. Jonathan Mayer, *Tracking the Trackers: Self-Help Tools*, CENTER FOR INTERNET & SOC'Y (Sept. 13, 2011, 4:35 AM), http://cyberlaw.stanford.edu/node/6730 ("Most desktop browsers currently do not support effective self-help tools."). The Electronic Frontier Foundation has a project to demonstrate to users all the information computers transmit to websites. *See* PANOPTICLICK, https://panopticlick.eff.org/ (last visited Oct. 17, 2012).

[202] *See, e.g.*, FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS 14 (2012).

[203] *See generally* NEAL STEPHENSON, CRYPTONOMICON (1999). In a real-world comparison, an abandoned WWII Fortress island off the coast of England, "Sealand," nearly became a data center targeting customers looking for complete freedom from government. *See* James Grimmelmann, *Sealand, HavenCo, and the Rule of Law*, 2012 U. ILL. L. REV. 405, 406–07 (2012).

protection.[204] Given the legal gray area surrounding founding countries[205] and data storage in space,[206] it is not inconceivable to imagine a corporation or group of individuals creating a real-world Kinakuta where information that threatens or violates our privacy could be gathered, processed, and exploited. Corporations, however, need not resort to the safety of clandestine islands: privacy violations happen on our own shores, but quietly, secretly, and beyond the scope of challenge or knowledge. And they occur brazenly, in the open, when laws are sufficiently vague or poorly enforced so that companies and the government need not establish a physical haven. Their havens are ignorance, obfuscation, secrecy, complacency, and confusion.

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[204] *See* Paul T. Jaeger et al., *Where is the Cloud? Geography, Economics, Environment, and Jurisdiction in Cloud Computing*, FIRST MONDAY (May 4, 2009), http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2456/2171.

[205] *See* Doug Bandow, *Getting Around Big Government: The Seastead Revolution Begins to Take Shape*, FORBES (July 20, 2012, 9:45 AM), http://www.forbes.com/sites/dougbandow/2012/07/30/getting-around-big-government-the-seastead-revolution-begins-to-take-shape (discussing the vision to create a floating city beyond any country's jurisdiction). *See generally* JEROME FITZGERALD, SEA-STEADING: A LIFE OF HOPE AND FREEDOM ON THE LAST VIABLE FRONTIER (2006).

[206] *See* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 610 U.N.T.S. 206. *See generally* MYRES S. MCDOUGAL ET AL., LAW AND PUBLIC ORDER IN SPACE (1963); GEORGE S. ROBINSON & HAROLD M. WHITE, JR., ENVOYS OF MANKIND: A DECLARATION OF FIRST PRINCIPLES FOR THE GOVERNANCE OF SPACE SOCIETIES (1986); Barton Beebe, Note, *Law's Empire and the Final Frontier: Legalizing the Future in the Early* Corpus Juris Spatialis, 108 YALE L.J. 1737 (1999).

VIRGINIA IN THE DRIVER'S SEAT: HOW THE SUPREME COURT OF VIRGINIA CAN HELP THE SUPREME COURT OF THE UNITED STATES FINALLY ESTABLISH THE DRUNK-DRIVING EXCEPTION TO ANONYMOUS TIPS LAW*

INTRODUCTION

If a police officer receives an anonymous tip that there is a drunk driver on the road, must the officer wait to pull the driver over until the driver swerves? Or may he immediately pull the driver over to quickly avert an accident and potentially save a life? Thankfully, most states[1] and the only federal circuit[2] to rule on the issue have held that police may immediately stop the driver without violating the Constitution. However, a minority of states, including Virginia, have ruled that uncorroborated anonymous tips of drunk driving do not justify a traffic stop.[3] The Supreme Court has punted on the issue and left federal and state courts "deeply divided."[4]

In order to pass constitutional muster under the Fourth Amendment, investigative stops by the police must be supported by at least reasonable suspicion that a crime has been committed.[5] The Supreme Court has held that anonymous tips may give officers reasonable suspicion, but only if sufficiently corroborated by police observations.[6] Basically, anonymous tipsters must provide police with at least some information predicting the behavior of the suspected criminal, and police must subsequently observe at least some of that behavior. For example, an anonymous tip can justify a stop if it informs the police that someone carrying illegal drugs is going to leave a certain location in a

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1 State v. Boyea, 765 A.2d 862, 868 (Vt. 2000); *see also* Denise N. Trauth, Comment, *Requiring Independent Police Corroboration of Anonymous Tips Reporting Drunk Drivers: How Several State Courts Are Endangering the Safety of Motorists*, 76 U. CIN. L. REV. 323, 323 (2007).

2 United States v. Wheat, 278 F.3d 722, 729 (8th Cir. 2001).

3 Harris v. Commonwealth, 668 S.E.2d 141, 146 (Va. 2008); Trauth, *supra* note 1, at 323–24.

4 Virginia v. Harris, 130 S. Ct. 10, 10 (2009) (Roberts, C.J., dissenting from denial of certiorari).

5 Brown v. Texas, 443 U.S. 47, 51 (1979) (citing Delaware v. Prouse, 440 U.S. 648, 663 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 880–83 (1975)).

6 Alabama v. White, 496 U.S. 325, 326–27 (1990).

certain vehicle and travel to a certain location, but only if the police observe at least some of that behavior and description. In such a scenario, the police have not observed the criminal activity (i.e., trafficking drugs), but have verified the tipster's basis of knowledge by corroborating the predictive information in the tip.

This test becomes troublesome, however, when the anonymous tip involves imminently dangerous activities such as drunk driving. If an anonymous tipster informs the police that they witnessed someone driving "erratically" (i.e., drunk), the police may not stop the vehicle until they have verified the predictions of the tipster; that is, they must observe the suspect drive erratically. Thus, to avoid violating the Fourth Amendment, police officers are forced to follow drunk drivers and "do nothing until they see the driver actually do something unsafe on the road—by which time it may be too late."[7]

The solution to this dilemma is what this Note and other scholarship calls the "drunk-driving exception."[8] Under this principle, as the majority of states and the only federal circuit to officially rule on the issue have held, police officers may act on anonymous tips of drunk driving by conducting traffic stops without independently observing any indicia of intoxication.[9]

Virginia has played a special role in the development of this area of law, originally recognizing the police's right to pull over drivers reported by anonymous tipsters to be drunk[10] and later overturning that conclusion.[11] The United States Supreme Court denied certiorari in the latter case, but Chief Justice Roberts dissented in that denial, expressing a desire to resolve the debate that has "deeply divided" the lower courts.[12] Virginia courts also have the opportunity to play a large role in settling this area of law by using doctrines that are slightly off-point but nonetheless support the drunk-driving exception in principle.

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[7] *Harris*, 130 S. Ct. at 10 (Roberts, C.J., dissenting from denial of certiorari) (emphasis omitted).

[8] *See, e.g.*, Chris La Tronica, Comment, *Could You? Should You?* Florida v. J.L.: *Danger Dicta, Drunken Bombs, and the Universe of Anonymity*, 85 TUL. L. REV. 831, 833 (2011). Although no court has explicitly named it so, this Note will refer to this exception as the "drunk-driving exception." However, this Note does not view this principle as an "exception" in the true sense of the word; it does not argue that when officers receive tips of drunk drivers, they are not subject to the Fourth Amendment. Rather, it argues that officers who receive tips of drunk driving are not confined to an "individual suspicion" requirement in a reasonable-suspicion analysis. In this sense, this Note's analysis might fall into what many call the "special needs" Fourth Amendment cases.

[9] *See supra* notes 1–2 and accompanying text.

[10] Jackson v. Commonwealth, 594 S.E.2d 595, 603 (Va. 2004) (citing State v. Boyea, 765 A.2d 862, 867 (Vt. 2000)).

[11] Harris v. Commonwealth, 668 S.E.2d 141, 146 (Va. 2008).

[12] *Harris*, 130 S. Ct. at 10 (Roberts, C.J., dissenting from denial of certiorari).

Under the "community caretaker" doctrine, Virginia courts recognize that police officers have a duty to protect citizens, pursuant to which they may briefly detain people without reasonable suspicion for the safety of the community.[13] This doctrine, combined with Supreme Court precedent in the checkpoint cases recognizing a similar interest to protect the community from drunk driving,[14] sets the table for a recently restructured Virginia Supreme Court to recognize the drunk-driving exception to anonymous-tips law and give the United States Supreme Court another chance to "answer the question and resolve the conflict."[15]

Part I of this Note briefly describes the basic Fourth Amendment rules regarding investigatory stops and how they apply to anonymous tips. Part II explains the drunk-driving exception by exploring the landmark decisions of two states—Vermont and Virginia—that came to opposite conclusions on the issue. Part III proposes that the Virginia Supreme Court utilize the checkpoint and community caretaker doctrines which, although not directly on point, support the establishment of the drunk-driving exception. Finally, this Note proposes a two-pronged test to determine whether an anonymous tip of drunk or erratic driving justifies an investigatory stop.

I. BACKGROUND

A. Investigatory Stops and Reasonable Suspicion

To understand the law of anonymous tips, it is necessary to review the basics of search and seizure jurisprudence. The Fourth Amendment protects citizens, inter alia, "against unreasonable searches and seizures."[16] Thus, to determine whether a police officer acted within constitutional bounds in the context of an investigatory stop, such as a traffic stop, courts must determine first whether the stop constituted a seizure and then whether that seizure was reasonable.[17]

In its landmark decision in *Terry v. Ohio*, the Supreme Court held that a seizure takes place "whenever a police officer accosts an individual and restrains his freedom to walk away"[18] and that such restraining can be "by means of physical force or show of authority."[19]

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[13] Commonwealth v. Waters, 456 S.E.2d 527, 530 (Va. Ct. App. 1995); Barrett v. Commonwealth, 447 S.E.2d 243, 245 (Va. Ct. App. 1994), *rev'd on other grounds*, 462 S.E.2d 109 (Va. 1995).

[14] *E.g.*, City of Indianapolis v. Edmond, 531 U.S. 32, 39 (2000); Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990).

[15] *Harris*, 130 S. Ct. at 10 (Roberts, C.J., dissenting from denial of certiorari).

[16] U.S. CONST. amend. IV.

[17] *See id.*; Terry v. Ohio, 392 U.S. 1, 16, 19 (1968).

[18] *Terry*, 392 U.S. at 16.

[19] *Id.* at 19 n.16.

Twelve years later, the Court elaborated on what constitutes a "show of authority" by establishing a totality-of-the-circumstances test to determine whether an officer's behavior constituted a seizure.[20] Under the so-called *Mendenhall* test, a police officer conducts a seizure "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[21] This test is an objective one; that is, the test is "not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person."[22] Under this test, it is no surprise that "[t]he law is settled that in Fourth Amendment terms a traffic stop entails a seizure of the driver 'even though the purpose of the stop is limited and the resulting detention quite brief.'"[23] In other words, traffic stops are quintessential examples of seizures under the Fourth Amendment and, thus, must be reasonable to pass constitutional muster.

Whether a traffic stop is reasonable tends to be the point of contention in search and seizure cases.[24] An officer can justify an investigative stop, such as a traffic stop, with "reasonable suspicion, based on objective facts, that the individual is involved in criminal activity."[25] However, "[t]he officer must be able to articulate more than an 'inchoate and unparticularized suspicion or "hunch"' of criminal activity."[26] It is also worth noting that because the facts in each reasonable-suspicion case are so different, "one determination will seldom be a useful precedent for another."[27]

B. Anonymous Tips

When police officers personally observe criminal or suspicious driving behavior, whether they have reasonable suspicion to conduct a traffic stop is not a difficult question. Things get tricky, however, when police use anonymous tips rather than personal observations as the basis for conducting the stop.[28] Faced with this issue, the Supreme Court

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[20] United States v. Mendenhall, 446 U.S. 544, 557 (1980).

[21] *Id.* at 554.

[22] California v. Hodari D., 499 U.S. 621, 628 (1991).

[23] Brendlin v. California, 551 U.S. 249, 255 (2007) (quoting Delaware v. Prouse, 440 U.S. 648, 653 (1979)).

[24] *See, e.g.*, Whren v. United States, 517 U.S. 806, 810 (1996).

[25] Brown v. Texas, 443 U.S. 47, 51 (1979) (citing *Prouse*, 440 U.S. at 663; United States v. Brignoni-Ponce, 422 U.S. 873, 880–83 (1975)).

[26] Illinois v. Wardlow, 528 U.S. 119, 123–24 (2000) (quoting Terry v. Ohio, 392 U.S. 1, 27 (1968)).

[27] Ornelas v. United States, 517 U.S. 690, 698 (1996) (internal quotation marks omitted).

[28] *See* Adams v. Williams, 407 U.S. 143, 147 (1972).

established rules to govern whether such tips would constitute reasonable suspicion sufficient to justify traffic stops. In *Illinois v. Gates*, the Supreme Court upheld a search warrant based on an anonymous letter informing police that the defendants were trafficking drugs.[29] Although this case analyzed probable cause (as opposed to reasonable suspicion) and did not involve a traffic stop, it stands as a primary case for analyzing anonymous tips because it abandoned the "rigid" tests previously used to determine whether a tip is sufficient to justify a search or seizure.[30] In place of the old rule, the Court adopted a totality-of-the-circumstances test whereby courts assess the veracity, reliability, and basis of knowledge of the informant.[31]

The Court applied this totality-of-the-circumstances test in *Alabama v. White*, holding that an anonymous tip, partially corroborated by police observations, constituted reasonable suspicion and, thus, justified a traffic stop.[32] In *White*, a tipster told the police that the defendant would be leaving a certain apartment complex at a certain time and heading to a certain destination with an ounce of drugs in her possession.[33] Additionally, the tipster described the defendant's car in detail, including the fact that the right taillight lens was broken.[34] Police located the vehicle the tipster had described that was parked at the location the tipster had described, saw the defendant enter the vehicle (with nothing in her hands), and followed the vehicle as it proceeded along the most direct route to the destination the tipster had reported.[35] Apparently convinced that the tipster was reliable because so much of the information had been corroborated, police stopped the defendant's car just short of the reported destination.[36]

The Court in *White* upheld the defendant's conviction because "the anonymous tip had been sufficiently corroborated to furnish reasonable suspicion."[37] Adopting the totality-of-the-circumstances test established in *Gates* and applying it to its reasonable-suspicion analysis,[38] the Court

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29 462 U.S. 213, 225, 246 (1983).

30 *Id.* at 230–31.

31 *Id.* at 233.

32 496 U.S. 325, 326–27, 332 (1990).

33 *Id.* at 327.

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.* at 331.

38 *Id.* at 328–29. ("*Illinois v. Gates*, 462 U.S. 213 (1983), dealt with an anonymous tip in the probable-cause context. The Court there abandoned the 'two-pronged test' of *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), in favor of a 'totality of the circumstances' approach to determining whether an informant's tip establishes probable cause. *Gates* made clear, however, that those factors that had been considered critical under *Aguilar* and *Spinelli*—an informant's 'veracity,' 'reliability,' and

placed heavy emphasis on the predictive nature of the information given by the informant.[39] In other words, the tip predicted the defendant's behavior, and the tip was also corroborated by independent police observations. The Court explained its conclusion:

> When significant aspects of the caller's predictions were verified, there was reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop.
>
> Although it is a close case, we conclude that under the totality of the circumstances the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop of respondent's car.[40]

Thus, the rule emerged that an anonymous tip alone is not enough to justify an investigatory stop,[41] but must be at least partially corroborated by police to verify the reliability and veracity of the tip.[42] To constitute reasonable suspicion—or probable cause—a tip must contain sufficient indicia of reliability, as determined by the totality-of-the-circumstances test found in *White* and *Gates*.[43] This test generally helps determine whether the "quality" and "quantity" of the information in the tip was sufficient to constitute reasonable suspicion.[44] As the United States Court of Appeals for the Eighth Circuit later succinctly put it, "Whether an anonymous tip suffices to give rise to reasonable suspicion depends on both the quantity of information it conveys as well as the quality, or degree of reliability, of that information, viewed under the totality of the circumstances."[45]

There are several reasons for requiring anonymous tips to be of sufficient quality and quantity. First, anonymous tipsters do not make themselves available for prosecution if their tip turns out to be frivolous

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'basis of knowledge'—remain 'highly relevant in determining the value of his report.' 462 U.S. at 230. These factors are also relevant in the reasonable-suspicion context, although allowance must be made in applying them for the lesser showing required to meet that standard.").

[39] *Id.* at 331–32 ("[I]t is not unreasonable to conclude in this case that the independent corroboration by the police of significant aspects of the informer's predictions imparted some degree of reliability to the other allegations made by the caller."); *id.* at 331 ("[B]ecause an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity." (citing *Gates*, 462 U.S. at 244)).

[40] *Id.* at 332.

[41] *Id.* at 329 ("Simply put, a tip such as this one, standing alone, would not '"warrant a man of reasonable caution in the belief" that [a stop] was appropriate.'" (quoting Terry v. Ohio, 392 U.S. 1, 22 (1968)).

[42] *See id.* at 332.

[43] *Id.*; *Gates*, 462 U.S. at 233.

[44] *White*, 496 U.S. at 330. The "quality" of the information is also described using terms such as "veracity," "reliability," and "basis of knowledge." *See id.* at 329.

[45] United States v. Wheat, 278 F.3d 722, 726 (8th Cir. 2001) (citing *White*, 496 U.S. at 330).

or false. In *Adams v. Williams*, the Court explained that a case involving an identified informant is

> a stronger case than obtain[ed] in the case of an anonymous telephone tip . . . . Indeed, under Connecticut law, [an identified] informant might have been subject to immediate arrest for making a false complaint had [the officer's] investigation proved the tip incorrect. Thus, while the Court's decisions indicate that this informant's unverified tip may have been insufficient for a narcotics arrest or search warrant, the information carried enough indicia of reliability to justify the officer's forcible stop of [the suspect].[46]

In other words, anonymous tipsters have nothing to lose by making false reports to police, so their information should be given less weight than that of an identified informant or the independent observations of a police officer.

In his dissent in *White*, Justice Stevens expressed fear not only of frivolous anonymous tips, but that police might also abuse the rule.[47] "Anybody with enough knowledge about a given person to make her the target of a prank, or to harbor a grudge against her, will certainly be able to formulate a tip" sufficient to justify a traffic stop and perhaps result in an arrest.[48] Police officers could also simply "testify that the warrantless stop was based on an anonymous tip predicting whatever conduct the officer just observed."[49] Although he noted that "the vast majority of those in our law enforcement community would not adopt such a practice,"[50] Justice Stevens thought that allowing anonymous tips to support reasonable suspicion "makes a mockery" of Fourth Amendment protections.[51]

II. THE DRUNK-DRIVING EXCEPTION

In light of the rules regarding anonymous tips and reasonable suspicion, police officers are placed in a difficult situation when they receive anonymous tips of imminently dangerous activity such as drunk driving.[52] As Chief Justice Roberts put it, if anonymous tips of drunk driving must be corroborated as they were in *White*, the rule would effectively "command[] that police officers following a driver reported to

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46 407 U.S. 143, 146–47 (1972) (footnote and citation omitted).

47 *White*, 496 U.S. at 333 (Stevens, J., dissenting).

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 *See* Virginia v. Harris, 130 S. Ct. 10, 10–11 (2009) (Roberts, C.J., dissenting from denial of certiorari).

be drunk *do nothing* until they see the driver actually do something unsafe on the road—by which time it may be too late."[53]

The United States Supreme Court has been reluctant to recognize the drunk-driving exception.[54] In 2000, however, the Supreme Court used language that strongly suggested the possibility of an independent corroboration exception for anonymous tips in situations of imminent danger, but stopped short of confirming that such an exception exists.[55] In *Florida v. J.L.*, the police stopped a juvenile in response to an anonymous tip that "a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun."[56] The police arrived at the bus stop, saw the defendant in a plaid shirt "just hanging out," conducted a search, found a gun, and charged the defendant with carrying a concealed firearm without a license and possessing a firearm while under the age of eighteen.[57] The trial court granted the motion to suppress the evidence, but the Supreme Court found that the tip "lacked the moderate indicia of reliability" required by *White* and consequently affirmed the Supreme Court of Florida's overturning of the conviction.[58]

Although *J.L.* did not involve a drunk driver, the Court acknowledged the possibility of a drunk-driving exception but declined to speculate:

> The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk. Nor do we hold that public safety officials in quarters where the reasonable expectation of Fourth Amendment privacy is diminished, such as airports and schools, cannot conduct protective searches on the basis of information insufficient to justify searches elsewhere.[59]

This language, although in dicta, strongly suggests that the Court might at least be willing to consider arguments in favor of the drunk-driving exception.

Despite the Supreme Court's reluctance to rule on the issue,[60] state and federal trial and appellate courts are forced to confront it. In light of

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53 *Id.* at 10.

54 *See id.*

55 Florida v. J.L., 529 U.S. 266, 273–74 (2000).

56 *Id.* at 268.

57 *Id.* at 268–69 (internal quotation marks omitted).

58 *Id.* at 271.

59 *Id.* at 273–74 (citations omitted).

60 In addition to the Court's language in *J.L.*, it also denied certiorari in two leading state cases, examined below that produced opposite holdings on the drunk-driving

the danger posed by drunk drivers, many states have held that bare-boned anonymous tips of erratic or drunk driving constitute reasonable suspicion and, thus, justify investigative traffic stops.[61] At least one federal circuit court has held similarly.[62] It is beyond the scope of this Note to analyze every state and federal court decision regarding the drunk-driving exception,[63] but the holdings of two state supreme courts, Vermont's and Virginia's, are particularly helpful in understanding the issue.

In *State v. Boyea*, the Supreme Court of Vermont issued perhaps the most comprehensive justification for allowing traffic stops when officers receive anonymous tips of drunk driving.[64] That court firmly accepted the drunk-driving exception just over eight months after the Supreme Court refused to speculate about the exception in *J.L.*[65]

The facts of *Boyea* were fairly straightforward. The dispatcher informed the officer about an anonymous tip describing the color, make, model, and license plate state of a car with a driver who was driving "erratically" on a certain stretch of road.[66] The officer quickly located the subject of the tip and, without independently observing any indicia of intoxication, initiated a traffic stop.[67] Based on observations made subsequent to the traffic stop, the officer arrested the driver for driving under the influence.[68]

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exception. *See* Virginia v. Harris, 130 S. Ct. 10, 10 (2009) (Roberts, C.J., dissenting from denial of certiorari) (denying certiorari to a Virginia case that rejected the drunk-driving exception); Boyea v. Vermont, 533 U.S. 917 (2001) (denying certiorari to a Vermont case that upheld the drunk-driving exception).

[61] State v. Boyea, 765 A.2d 862, 868 (Vt. 2000); State v. Melanson, 665 A.2d 338, 341 (N.H. 1995); State v. Tucker, 878 P.2d 855, 864 (Kan. Ct. App. 1994); *see also* Trauth, *supra* note 1, at 323.

[62] United States v. Wheat, 278 F.3d 722, 729 (8th Cir. 2001) ("The question we now face is whether, in light of *J.L.*, an anonymous tip about the dangerous operation of a vehicle whose innocent details are accurately described may still possess sufficient indicia of reliability to justify an investigatory stop by a law enforcement officer who does not personally observe any erratic driving. Recognizing the complexity of this issue, we answer affirmatively . . . .").

[63] For a near-comprehensive analysis of the breakdown of states that recognize the drunk-driving exception and the difference in their approaches to the question, see Trauth, *supra* note 1, at 323–24, 329–30.

[64] *Boyea*, 765 A.2d 862. *Boyea* was not the first time the Vermont Supreme Court upheld the drunk-driving exception. Indeed, the court's decision in *Boyea* relies heavily on *State v. Lamb*, 720 A.2d 1101 (Vt. 1998). *See Boyea*, 765 A.2d at 868. *Lamb* is a decision by the Vermont Supreme Court in which the court came to the same conclusion on similar facts. *Lamb*, 720 A.2d at 1106.

[65] Florida v. J.L., 529 U.S. 266, 273–74 (2000) (refusing to consider an exception in March of 2000); *Boyea*, 765 A.2d at 868 (adopting the exception in December of 2000).

[66] *Boyea*, 765 A.2d at 863.

[67] *Id.*

[68] *Id.*

The *Boyea* court carefully framed its discussion to highlight the seriousness of the issue. The majority began its opinion by explaining that an officer placed in this situation had three options:

> He could, as the officer here, stop the vehicle as soon as possible, thereby revealing a driver with a blood alcohol level nearly three times the legal limit and a prior DUI conviction. Or, in the alternative, he could follow the vehicle for some period of time to corroborate the report of erratic driving. This could lead to one of several endings. The vehicle could continue without incident for several miles, leading the officer to abandon the surveillance. The vehicle could drift erratically—though harmlessly—onto the shoulder, providing the corroboration that the officer was seeking for an investigative detention. Or, finally, the vehicle could veer precipitously into oncoming traffic, causing an accident.[69]

The court held that the Constitution does not compel an officer in such a conundrum to "wait, at whatever risk to the driver and the public," for independent corroboration of the tip's veracity.[70] "Rather, an anonymous report of erratic driving must be evaluated in light of the imminent risks that a drunk driver poses to himself and the public."[71]

The court viewed the accuracy of the informant's information—the make, model, color, location, license plate state, and direction of travel of the defendant's car—as "supporting the informant's credibility and the reasonable inference that the caller had personally observed the vehicle."[72] Furthermore, the court noted that the detention, "as in most DUI cases, consisted of a simple motor vehicle stop, 'a temporary and brief detention that is exposed to public view.'"[73] Most importantly, the court distinguished the case from *J.L.*, recognizing that "[i]n contrast to the report of an individual in possession of a gun, an anonymous report of an erratic or drunk driver on the highway presents a qualitatively different level of danger, and concomitantly greater urgency for prompt action."[74] Indeed, the court compared a drunk driver to "a 'bomb,' and a mobile one at that."[75]

The court then balanced the urgency of stopping a drunk driver against the intrusion created by the stop, which, in *Boyea*, "consisted initially of a brief motor-vehicle stop and questioning, not a hands-on violation of the person."[76] This intrusion, the court noted, "did not rise to

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69 *Id.* at 862.

70 *Id.* at 862–63.

71 *Id.* at 863.

72 *Id.* at 868.

73 *Id.* (quoting State v. Zumbo, 601 A.2d 986, 988 (Vt. 1991)).

74 *Id.* at 867.

75 *Id.*

76 *Id.* at 868.

the level which confronted the Court in *J.L.*"[77] Therefore, the court concluded, "Balancing the public's interest in safety against the relatively minimal intrusion posed by a brief investigative detention, the scale of justice in this case must favor the stop; a reasonable officer could not have pursued any other prudent course."[78] In short, the court upheld the stop, first, because the informant's information was accurate and, second, because the imminent danger posed by the threat of drunk driving outweighed the relatively small intrusion imposed by the stop.[79] To support this holding, the court cited a litany of cases that recognize the drunk-driving exception[80] and emphasized that the "vast majority" of courts that have taken up the issue have recognized the drunk-driving exception.[81]

Virginia has taken the opposite position as Vermont. While the Vermont Supreme Court took seriously the hints in *J.L.* that a drunk-driving exception exists, the Virginia Supreme Court rejected the exception in 2008 in *Harris v. Commonwealth*.[82]

But the rejection did not come without controversy.[83] Just four years earlier, the Virginia Supreme Court had decided an anonymous-tip case in *Jackson v. Commonwealth*, a case with facts remarkably similar to those in *J.L.*[84] In *Jackson*, several officers were dispatched to a location where an anonymous tipster had reported that "three black males in a white Honda . . . were disorderly and one of the subjects brandished a firearm."[85] When the officers arrived at the location, a white Honda pulled out in front of one officer, allowing the officer's headlights to shine

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77 *Id.*

78 *Id.* (internal citation omitted).

79 *Id.*

80 *Id.* at 864–66. The principle cases the court analogized were *State v. Melanson*, 665 A.2d 338 (N.H. 1995) and *State v. Tucker*, 878 P.2d 855 (Kan. Ct. App. 1994).

81 *Boyea*, 765 A.2d at 868; *see also* Trauth, *supra* note 1, at 323. Interestingly, the court suggests that the case might have turned out differently if the officer had actually attempted to corroborate the tip as the officers did in *White*. *See Boyea*, 765 A.2d at 863. Noting that the officer only had visual contact with the defendant for a limited period of time before initiating the stop, the court explains, "This was not an officer seeking independent verification that a driver was intoxicated, but rather one intent upon catching and stopping as soon as practically possible a driver whom he already suspected of being under the influence." *Id.* In other words, the police officer was exercising his duty to protect the public as opposed to his law enforcement obligations, a fact that apparently altered the court's analysis. This explanation by the court parallels the discussion in this Note about sobriety checkpoints and the community caretaker doctrine. *See infra* Part III and Conclusion.

82 668 S.E.2d 141, 146 (Va. 2008).

83 *See id.* at 148, 150 (Kinser, J., dissenting).

84 594 S.E.2d 595, 601 (Va. 2004).

85 *Id.* at 597 (internal quotations omitted).

into the car so the officer could see three black males.[86] Another officer, patrolling the surrounding area, noticed no other white Honda.[87] The officer, who had identified the vehicle, initiated a traffic stop and noticed a bulge in the shirt of the defendant who was sitting in the front passenger seat.[88] When the defendant did not cooperate with the officer's questioning about the bulge, the officer arrested him, conducted a search subsequent to arrest, and seized a firearm and cocaine on the defendant's person.[89] Based on this evidence, the defendant was convicted of possession of cocaine, possession of a firearm while in possession of a controlled substance, and possession of a concealed weapon.[90] Overturning the conviction of the lower court, the Virginia Supreme Court relied heavily on *J.L.*, noting that "[r]arely are the facts of two cases as congruent as the facts in *J.L.* and this case."[91]

Despite overturning the conviction, the court in *Jackson* found it prudent to express, in dicta, agreement with the Vermont Supreme Court's decision in *Boyea* that "a drunk driver is not at all unlike a 'bomb,' and a mobile one at that."[92] The court explained that the rules of anonymous tips of firearms crimes are different from the rules when the tip is of drunk driving: "We agree that '[i]n contrast to the report of an individual in possession of a gun, an anonymous report of an erratic or drunk driver on the highway presents a qualitatively different level of danger, and concomitantly greater urgency for prompt action.'"[93] Thus, the Virginia Supreme Court speculated where the United States Supreme Court in *J.L.* would not, concluding that circumstances exist "'under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability.'"[94]

In 2008, the Virginia Supreme Court got a chance to put its money where its mouth was regarding anonymous tips of drunk driving. But the outcome was far from what the court had indicated just four years earlier in *Jackson*. In *Harris v. Commonwealth*, the court reversed a DUI conviction, holding that an anonymous tip of drunk driving was "not sufficient to create a reasonable suspicion of criminal activity."[95] In *Harris*, the officer responded to a call that there was an intoxicated

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[86] *Id.*

[87] *Id.* at 597–98.

[88] *Id.* at 597.

[89] *Id.*

[90] *Id.* at 596.

[91] *Id.* at 601 (alteration in original) (quoting Jackson v. Commonwealth, 583 S.E.2d 780, 795 (Va. Ct. App. 2003) (Benton, J., dissenting)).

[92] *Id.* at 603 (quoting State v. Boyea, 765 A.2d 862, 867 (Vt. 2000)).

[93] *Id.* (alteration in original) (quoting *Boyea*, 765 A.2d at 867).

[94] *Id.* at 601 (quoting Florida v. J.L., 529 U.S. 266, 273 (2000)).

[95] 668 S.E.2d 141, 147 (Va. 2008).

driver in a green Altima headed south on Meadowbridge Road.[96] The dispatcher also gave the officer the partial license plate number "Y8066."[97] The officer located and began following a green Altima driving south on Meadowbridge Road with the license plate number "YAR-8046."[98] Although the defendant did not exceed the speed limit or swerve at any time, the officer observed some unusual conduct.[99] First, the defendant "slowed down at an intersection although he had the right of way."[100] Second, the defendant "slowed down as he approached the red traffic light" fifty feet away.[101] Finally, the defendant, for no apparent reason, brought his car to a stop on the side of the road "of his own accord."[102] It was then that the officer activated his emergency lights and pulled behind the defendant's parked car, initiating the stop.[103] Observing signals of intoxication during the traffic stop, the officer arrested the defendant for DUI.[104] Harris argued that the officer's observations were not sufficient to constitute reasonable suspicion and justify a traffic stop.[105] The court agreed and overturned Harris's conviction, ignoring the *Jackson* dicta that indicated the court would recognize the drunk-driving exception.[106]

In fact, the court went further than rejecting the drunk-driving exception, explicitly stating that officers who receive anonymous tips of drunk driving must conduct the stop as though they had not even received the tip: "[T]he crime of driving while intoxicated is not readily observable unless the suspected driver operates his or her vehicle in some fashion objectively indicating that the driver is intoxicated; such conduct must be observed before an investigatory stop is justified."[107]

Thus, despite strong indications from both the Virginia Supreme Court and the United States Supreme Court to the contrary, the *Harris*

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96 *Id.* at 144.

97 *Id.*

98 *Id.*

99 *Id.*

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

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

102 *Id.* The Virginia Supreme Court's language regarding Harris's driving behavior is much more forgiving than that of the Virginia Court of Appeals. While the Virginia Supreme Court called it "subjectively . . . unusual," *id.* at 147, the Virginia Court of Appeals described it as "erratic." Harris v. Commonwealth, No. 2320-06-2, 2008 WL 301334, at *1 (Va. Ct. App. Feb. 5, 2008), *rev'd*, *Harris*, 668 S.E.2d 141.

103 *Harris*, 668 S.E.2d at 144.

104 *Id.*

105 *Id.* at 145.

106 *Id.* at 147; *see also* Jackson v. Commonwealth, 594 S.E.2d 595, 603 (Va. 2004).

107 *Harris*, 668 S.E.2d at 146.

court effectively held that the danger of drunk driving does not outweigh the minor intrusions of a traffic stop.[108]

This holding is seemingly supportable by *White*, but closer inspection reveals that the observations required by the *Harris* court before making a stop are quite different in nature than those required by *White*. True, the *White* Court placed heavy emphasis on the officer's observations that corroborated the informant's tip.[109] However, the *Harris* decision requires observation of the criminal behavior itself (erratic driving indicating intoxication) rather than the predictive information in the tip (where the car is going, where it came from, etc.).[110] Ignoring this difference, the *Harris* court effectively adopted Justice Stevens's dissent in *White* in which he suggested that anonymous tips should not even be factored into reasonable-suspicion analysis.[111]

Given that the majority in *Harris* ignored the dicta Chief Justice Kinser, prior to becoming the chief justice, had written just four years ago for the majority in *Jackson*, it is unsurprising that she wrote a spirited dissent, reprimanding the majority:

> [W]e explained in *Jackson* that "'[i]n contrast to the report of an individual in possession of a gun, an anonymous report of an erratic or drunk driver on the highway presents a qualitatively different level of danger, and concomitantly greater urgency for prompt action.'" We further stated, "'[A] drunk driver is not at all unlike a "bomb," and a mobile one at that.'" Although the majority analogizes the case before us to *Jackson*, *it ignores this portion of the* Jackson *opinion and never addresses the distinction between an intoxicated driver on the highway and a person carrying a concealed weapon in terms of the need for prompt action by the police.*[112]

Although the law in Virginia presently rejects the drunk-driving exception, the lack of analysis in *Harris* leaves the question unsettled. Additionally, the sharply divided court in *Harris* has recently received two new justices[113] and the dissent opinion writer, then Justice Kinser, is now the chief justice of the court.[114] It would, therefore, not be surprising if the court decides to take the issue up again and reach the conclusion it espoused in *Jackson*, a position adopted by the majority of states.[115]

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[108] *Id.* at 147.

[109] Alabama v. White, 496 U.S. 325, 330 (1990).

[110] *Harris*, 668 S.E.2d at 146.

[111] *See supra* notes 47–51 and accompanying text.

[112] *Harris*, 668 S.E.2d at 150 (Kinser, J., dissenting) (second and third alteration in original) (emphasis added) (citations omitted).

[113] S. Res. 512, 2011 Leg., 1st Spec. Sess. (Va. 2011).

[114] Press Release, Supreme Court of Va. (Aug. 31, 2010), *available at* http://www.courts.state.va.us/news/items/2010_0831_scv_press_release.pdf.

[115] *See supra* note 61 and accompanying text.

III. OFF-POINT DOCTRINES THE VIRGINIA SUPREME COURT COULD USE TO JUSTIFY THE DRUNK-DRIVING EXCEPTION

A drunk-driving exception would not be without foundation. The United States Supreme Court itself has recognized the dangers of drunk driving and consequently eased reasonable suspicion requirements regarding sobriety checkpoints.[116] Additionally, Virginia courts have recognized that "[p]olice officers have an obligation to aid citizens who are ill or in distress, as well as a duty to protect citizens from criminal activity."[117] These doctrines also take into account the reason for the stop, thus representing a slight departure from the general rule that "[t]he officer's subjective motivation is irrelevant" to Fourth Amendment analysis.[118] By recognizing the danger of drunk driving and the duty of the police to protect the public, these doctrines could pave the way for the Virginia Supreme Court, and perhaps the United States Supreme Court, to recognize the drunk-driving exception.

A. Checkpoints

The Supreme Court has recognized the dangerousness of drunk driving in a number of contexts, most notably in the checkpoint cases.[119] In the 1990 case of *Michigan Department of State Police v. Sitz*, the Supreme Court upheld a sobriety checkpoint program in Michigan because "the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program."[120] The Court analyzed both the magnitude of the drunk-driving problem and the level of intrusion the checkpoints created.[121]

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[116] Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990).

[117] *See, e.g.*, Commonwealth v. Waters, 456 S.E.2d 527, 530 (Va. Ct. App. 1995).

[118] Brigham City v. Stuart, 547 U.S. 398, 404 (2006); *see also* Bond v. United States, 529 U.S. 334, 338 n.2 (2000) ("[T]he subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment . . . . [T]he issue is not his state of mind, but the objective effect of his actions."); Whren v. United States, 517 U.S. 806, 813 (1996) ("[W]e have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers . . . ."); Graham v. Connor, 490 U.S. 386, 397 (1989) ("[T]he subjective motivations of individual officers, which our prior cases make clear[,] [have] no bearing on whether a particular seizure is 'unreasonable' under the Fourth Amendment.").

[119] *E.g.*, *Sitz*, 496 U.S. at 451; South Dakota v. Neville, 459 U.S. 553, 558 (1983); Breithaupt v. Abram, 352 U.S. 432, 439 (1957) ("The increasing slaughter on our highways . . . now reaches the astounding figures only heard of on the battlefield.").

[120] *Sitz*, 496 U.S. at 455.

[121] *Id.*

Chief Justice Rehnquist, writing for the majority, explained the seriousness of the danger drunk driving poses:

> No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical. Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage. For decades, this Court has repeatedly lamented the tragedy.[122]

The Chief Justice then weighed the risks associated with drunk driving against the level of intrusion imposed by the checkpoints in a fashion remarkably similar to the analysis in *Boyea*[123]: "Conversely, the weight bearing on the other scale—the measure of the intrusion on motorists stopped briefly at sobriety checkpoints—is slight."[124] The Court used this simple balancing test to resolve the central constitutional issue: "whether such seizures are 'reasonable' under the Fourth Amendment."[125] The Court concluded that the great risk of drunk driving outweighed the "slight" intrusion created by the checkpoints and accordingly deemed the sobriety checkpoint program constitutional.[126]

In contrast, in *City of Indianapolis v. Edmond*, the Court struck down a drug-trafficking checkpoint program in Indianapolis "[b]ecause the primary purpose of the . . . checkpoint program [was] to uncover evidence of ordinary criminal wrongdoing."[127] The Court distinguished this decision from its decision in *Sitz* by "drawing the line at roadblocks designed primarily to serve the general interest in crime control" in order to prevent checkpoint intrusions from becoming "a routine part of American life."[128]

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[122] *Id.* at 451 (internal citations and quotation marks omitted).

[123] State v. Boyea, 765 A.2d 862, 868 (Vt. 2000) ("Balancing the public's interest in safety against the relatively minimal intrusion posed by a brief investigative detention, the scale of justice in this case must favor the stop; a reasonable officer could not have pursued any other prudent course." (internal citations omitted)).

[124] *Sitz*, 496 U.S. at 451.

[125] *Id.* at 450.

[126] *Id.* at 455. Notably, the Court declined to review the "effectiveness" of the checkpoint program. *Id.* at 453–54. Such an inquiry would "transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger." *Id.* at 453.

[127] 531 U.S. 32, 41–42 (2000); *see also id.* at 44 ("[W]e decline to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control."); *id.* at 48 ("Because the primary purpose of the Indianapolis checkpoint program is ultimately indistinguishable from the general interest in crime control, the checkpoints violate the Fourth Amendment.").

[128] *Id.* at 42.

Thus, the Supreme Court allowed checkpoints to protect the public against the dangers of drunk driving, but struck them down when used for general crime control. This important distinction illustrates that when police work to combat dangerous activities such as drunk driving, the intent of the police is an important factor in deciding whether the police's efforts are constitutional.[129] In other words, police have greater latitude to stop vehicles without particularized suspicion when they are acting to protect the public rather than to combat crime. The Vermont Supreme Court expressed the same principle in *Boyea* in the context of the drunk-driving exception: "This was not an officer seeking independent verification that a driver was intoxicated, but rather one intent upon catching and stopping as soon as practically possible a driver whom he already suspected of being under the influence."[130]

Therefore, when danger to the public is great enough, and when the officer is not acting "primarily to serve the general interest in crime control,"[131] certain searches are not "unreasonable" under the Fourth Amendment when police fail to make personal observations of criminal behavior. This reasoning can likewise apply to anonymous tips and allow officers to stop drivers reported by anonymous tipsters to be drunk.

B. The Community Caretaker Doctrine

Although the inquiry into the purpose of a checkpoint stop "is not an invitation to probe the minds of individual officers acting at the scene,"[132] the community caretaker doctrine recognized by Virginia courts does justify such an inquiry. This doctrine recognizes that "reasonable suspicion of criminal activity is not the only justification for an investigative seizure"[133] because "police officers have an obligation to aid citizens who are ill or in distress."[134] Pursuant to this duty, the community caretaker doctrine allows police officers to stop individuals "in the routine execution of community-caretaking functions, totally divorced from the detection or investigation of crime."[135] The community caretaker doctrine applies when: "(1) the officer's initial contact or investigation is reasonable; (2) the intrusion is limited; and (3) the officer

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[129] *See id.* at 48. It is important to note that the Court in *Edmond* warned that "the purpose inquiry in this context is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene." *Id.*

[130] State v. Boyea, 765 A.2d 862, 863 (Vt. 2000); *see also supra* note 81.

[131] *Edmond*, 531 U.S. at 42.

[132] *Id.* at 48.

[133] Barrett v. Commonwealth, 447 S.E.2d 243, 245 (Va. Ct. App. 1994), *rev'd on other grounds*, 462 S.E.2d 109 (Va. 1995).

[134] Commonwealth v. Waters, 456 S.E.2d 527, 530 (Va. Ct. App. 1995).

[135] *Id.* at 529 (quoting *Barrett*, 447 S.E.2d at 245).

is not investigating criminal conduct under the pretext of exercising his community caretaker function."[136]

Virginia courts first recognized the community caretaker doctrine in 1994 in *Barrett v. Commonwealth*.[137] In that case, a police officer pulled over a car traveling with its wheels partially on the shoulder of the road and partially in a private yard.[138] The police officer conducted the stop only "to determine whether the driver was experiencing mechanical problems and not to investigate any perceived violation of law," but he subsequently noticed signs of intoxication and arrested the driver for DUI.[139] The Court of Appeals of Virginia found that because the officer "reasonably perceived a situation of mechanical breakdown or personal distress," the officer "acted appropriately in the discharge of his duty as a community caretaker."[140]

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[136] *Id.* at 530.

[137] *Barrett*, 447 S.E.2d at 246.

[138] *Id.* at 244.

[139] *Id.*

[140] *Id.* at 246. The *Barrett* court also cited a number of other jurisdictions that recognize the same or similar rule:

> Other jurisdictions have acknowledged that the duty of the police extends beyond the detection and prevention of crime, to embrace also an obligation to maintain order and to render needed assistance. This duty is aptly termed the community caretaker function. *See State v. Chisholm*, 39 Wash.App. 864, 867, 696 P.2d 41, 43 (1985) (a police officer may stop a vehicle briefly to warn the occupants that an item of their property is in danger. Such a momentary seizure, being "reasonable," does not require the suppression of contraband or other evidence of crime thereby discovered); *State v. Goetaski*, 209 N.J.Super. 362, 507 A.2d 751, *cert. denied*, 104 N.J. 458, 517 A.2d 443 (1986) (upholding the use of evidence disclosed when an officer stopped a vehicle, being driven slowly on the shoulder with left turn signal flashing, to inquire whether there was "something wrong"); *Crauthers v. State*, 727 P.2d 9 (Alaska App.1986) (a car pulled next to a police car. The driver rolled down his window and appeared to seek assistance. The officer activated his flashing lights as a safety precaution and stopped the car to inquire what was needed); *State v. Anderson*, 142 Wis.2d 162, 417 N.W.2d 411 (1987) (police authority to stop a vehicle is not limited to circumstances of criminal investigation); *State v. Pinkham*, 565 A.2d 318 (Me.1989) (upholding evidence obtained during stop to promote safety. "If we were to insist upon suspicion of activity amounting to a criminal or civil infraction . . . , we would be overlooking the police officer's legitimate role as a public servant to assist those in distress and to maintain and foster public safety"); *State v. Quigley*, 226 Ill.App.3d 598, 168 Ill.Dec. 19, 589 N.E.2d 133, *appeal denied*, 146 Ill.2d 645, 176 Ill.Dec. 815, 602 N.E.2d 469 (1992) (upholding an arrest based on evidence obtained when officers stopped a car to investigate an altercation between drivers); *Provo City v. Warden*, 844 P.2d 360 (Utah App.1992) (recognizing community caretaker function as a predicate for investigative seizure, but requiring "circumstances threatening life or safety"); *State v. Marcello*, 157 Vt. 657, 599 A.2d 357 (1991) (upholding the use of evidence obtained upon an investigative stop of a vehicle based upon another motorist's report, "there's something wrong with that man"); *State v. Vistuba*, 251 Kan. 821, 840 P.2d 511 (1992) (upholding the stop of a vehicle being driven

Less than a year later, the Virginia Court of Appeals authored another opinion, based largely on *Barrett*, recognizing the community caretaker doctrine.[141] In *Commonwealth v. Waters*, the court held that a police officer was justified by the community caretaker doctrine when he stopped a man who was "swaying and walking unsteadily" in an apartment complex.[142] In that case, the officer testified that he was concerned for the defendant's safety and that he wanted to make sure the defendant could find his way home.[143] When the officer approached him, the defendant began making threatening gestures, and the officer smelled a strong odor of alcohol.[144] Seeing a bulge in the defendant's pocket, the officer patted down the defendant and discovered "a BB gun and a corncob pipe with an odor of marijuana."[145] The court of appeals reversed the trial court's suppression of the evidence, ruling that the officer had a "reasonable belief that aid or assistance is warranted" and that the officer's initial stop "was brief and limited to voicing his concern and making a determination whether [the defendant] was in distress."[146] Accordingly, the court concluded that the stop was justified by the community caretaker exception.[147]

The community caretaker doctrine was well established by the court of appeals for an entire four months before the Virginia Supreme Court complicated the issue. In September of 1995, the Virginia Supreme Court reversed *Barrett* on other grounds, noting that "we need not decide whether the so-called 'community caretaking functions' doctrine will be applied in Virginia."[148] However, the state's highest court did not

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such that the officer feared that the driver was falling asleep); *United States v. King*, 990 F.2d 1552 (10th Cir.1993) (recognizing the right of an officer to effect an appropriate seizure to maintain order at the scene of a traffic accident).

Id. at 245–46.

[141] *Waters*, 456 S.E.2d at 529.

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.* at 529, 530–31.

[147] *Id.* at 530.

[148] Barrett v. Commonwealth, 462 S.E.2d 109, 112 (Va. 1995). This conclusion is particularly vexing given that the United States Supreme Court recognized a similar community caretaker doctrine in *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973), a case heavily relied on by both the *Barrett* and *Waters* courts. *See Barrett*, 462 S.E.2d at 111; Commonwealth v. Waters, 456 S.E.2d 527, 529–30 (Va. Ct. App. 1995). In *Cady*, officers found evidence used to indict and convict the defendant for murder in an automobile they searched subsequent to an accident. 413 U.S. at 434, 436–39. The Court held that the evidence was admissible because police officers "frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection,

overturn *Waters*, leaving the community caretaker doctrine intact in the lower courts.[149]

Viewing the community caretaker doctrine together with the checkpoint cases, it is clear that police have greater latitude in conducting traffic stops when they are not furthering the state's "general interest in crime control,"[150] but are acting pursuant to their "obligation to aid citizens."[151] While the United States Supreme Court in *Edmond* limited inquiries into police purposes to "programmatic purposes . . . undertaken pursuant to a general scheme,"[152] under the community caretaker doctrine, courts can allow individual police officers to act on anonymous tips of drunk driving so long as the officer is not acting merely to investigate crime.

CONCLUSION

Fourth Amendment analysis does not normally take into account the "[s]ubjective intentions" of the officer,[153] but it may be necessary in some situations. The United States Supreme Court conducted such an inquiry in *Edmond* to draw the line between acceptable and unconstitutional checkpoints.[154] The Virginia Court of Appeals also took the officer's intentions into account when applying the community caretaker doctrine. The common theme in these cases was that the police officers were validly acting to protect the community and not to investigate crime, although criminal activity was subsequently discovered and even perhaps suspected. It is, therefore, not unreasonable for courts to inquire into whether the police acted out of their duty to protect the community or their duty to investigate crime.

It is also sound for courts to conduct a balancing test similar to the ones used by the Supreme Court in *Sitz*[155] and *Boyea*.[156] That is, to weigh the "magnitude of the drunken driving problem" against the level of intrusion imposed by the stop to determine whether the stop was "unreasonable" under the Fourth Amendment.[157] To skip this step, as the

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investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* at 441–43.

149 *See Barrett*, 462 S.E.2d at 112.

150 City of Indianapolis v. Edmond, 531 U.S. 32, 48 (2000).

151 *Waters*, 456 S.E.2d at 530.

152 *Edmond*, 531 U.S. at 45–46.

153 Whren v. United States, 517 U.S. 806, 813 (1996).

154 *See Edmond*, 531 U.S. at 44.

155 Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 450 (1990).

156 State v. Boyea, 765 A.2d 862, 868 (Vt. 2000).

157 *Sitz*, 496 U.S. at 450–51.

Virginia Supreme Court did in *Harris*,[158] is to ignore the danger posed by drunk driving altogether in the analysis.

Thus, the test for whether a stop pursuant to an anonymous tip of drunk driving violates the Fourth Amendment should consist of two prongs. First, courts should determine the purpose of the stop. Was the officer acting to protect the public or to investigate a crime? This prong is supported not only by the checkpoint[159] and community caretaker[160] doctrines, but by the reasoning in *Boyea*.[161] The court in *Boyea* was persuaded by the fact that the officer "was not an officer seeking independent verification that a driver was intoxicated, but rather one intent upon catching and stopping as soon as practically possible a driver whom he already suspected of being under the influence."[162] Thus, permitting a drunk-driving exception only when the police are acting to protect the community and not to investigate crime is a good buffer to prevent abuse.

Second, courts should balance the magnitude of the drunk-driving problem and the level of intrusion imposed by the stop. To determine the magnitude of the drunk-driving problem, courts could take into account facts other than national statistics: Does the community have a particularly bad drunk-driving problem? Did the tip come on a day or time known for excessive drinking such as a holiday or closing time for the bars? Did the tip report the vehicle to be near a location or establishment in the community known for excessive alcohol consumption? Did the tip report the driver to be at a location in the community especially dangerous for drunk drivers, such as windy or unlit roads? Additionally, the level of intrusion should be case-specific and take into account the totality of the circumstances. How long was the stop? Did the officer ask probing questions, or did he simply check the sobriety of the driver? Did the officer search the vehicle or require the driver to exit the vehicle? By asking these and other questions, courts should be able to balance the interest of the state in protecting the community from drunk drivers against the privacy interest of the individual.

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158 *See* Harris v. Commonwealth, 668 S.E.2d 141, 147 (Va. 2008).

159 City of Indianapolis v. Edmond, 531 U.S. 32, 44, 48 (2000) (noting the Court's disapproval of a checkpoint program due to Fourth Amendment violations "[b]ecause the primary purpose of the Indianapolis checkpoint program [was] ultimately indistinguishable from the general interest in crime control").

160 Commonwealth v. Waters, 456 S.E.2d 527, 530 (Va. Ct. App. 1995) (noting the community caretaker doctrine only applies when "the officer is not investigating criminal conduct under the pretext of exercising his community caretaker function").

161 *Boyea*, 765 A.2d at 863.

162 *Id.*

This balancing test is also supported by the *Boyea* rationale[163] and the checkpoint doctrine.[164] In *Boyea*, the Vermont Supreme Court "[b]alanc[ed] the public's interest in safety against the relatively minimal intrusion posed by a brief investigative detention,"[165] and, in *Sitz,* the United States Supreme Court "balance[d] . . . the State's interest in preventing drunken driving . . . and the degree of intrusion upon individual motorists who are briefly stopped."[166]

Of course, there is a temptation to dismiss such a rule as nothing more than a policy determination subject to the biases of judges.[167] Obviously a bright-line test would be convenient, but the very text of the Fourth Amendment does not support such a test. Rather, the Founders intentionally infused a balancing test into the Fourth Amendment by prohibiting only unreasonable searches and seizures. Thus, the balancing test is not a policy test at all but a weighing of interests legitimately held by both the individual and the state. The gravity of the potential harm being reported by an anonymous tipster, therefore, is relevant to the reasonableness inquiry, and, on the other hand, the greatness of the intrusion must also be considered. Courts have been balancing such interests in multiple areas of law for decades.[168] Inserting the intent prong found in the checkpoint and community caretaker cases is simply an added protection to prevent police from circumventing the Fourth Amendment under the "pretext" of the drunk-driving exception.[169]

In any case, what is an officer to do if he cannot act on anonymous tips without corroborating dangerous activity such as drunk driving? Police officers receiving anonymous tips of drunk driving are placed in a constitutional and moral dilemma; they must either intrude on an individual's privacy or risk serious injury or death to someone. Of course, only law students, professors, and judges find this dilemma difficult. In the real world, the decision is easy. Police officers who receive

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[163] *Id.* at 868.

[164] Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990).

[165] *Boyea*, 765 A.2d at 868.

[166] *Sitz*, 496 U.S. at 455.

[167] La Tronica, *supra* note 8, at 861.

[168] *E.g.*, Mathews v. Eldridge, 424 U.S. 319, 334–35, 347 (1976) (noting that procedural due process analysis "requires analysis of the governmental and private interests that are affected" and an "appropriate due process balance"); Branzburg v. Hayes, 408 U.S. 665, 710 (1972) (noting that the determination of whether forcing a newsman to testify violates freedom of the press requires a "striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct").

[169] Commonwealth v. Waters, 456 S.E.2d 527, 530 (Va. Ct. App. 1995) (explaining that the community caretaker doctrine only applies when "the officer is not investigating criminal conduct under the pretext of exercising his community caretaker function").

anonymous tips of drunk driving will likely conduct the stop and risk violating the Constitution rather than risk the life of a community member. Nevertheless, in order to comply with Fourth Amendment jurisprudence, an officer must not only read the complex, fact-intensive, and often cryptic opinions establishing anonymous-tips and reasonable-suspicion law, but he must also put on his lawyer hat and apply those cases to his own unique set of facts before acting on any anonymous tip.[170] Of course, no officers do this; they simply err on the side of safety and receive criticism in the case opinions afterward.[171]

This constitutional dilemma will never be resolved if the United States Supreme Court does not at least hear the issue. Chief Justice Roberts said as much in his dissent to the denial of certiorari in *Harris*:

> I am not sure that the Fourth Amendment requires . . . independent corroboration before the police can act, at least in the special context of anonymous tips reporting drunk driving. This is an important question that is not answered by our past decisions, and that has deeply divided federal and state courts. The Court should grant the petition for certiorari to answer the question and resolve the conflict.[172]

The Virginia Supreme Court is in a particularly convenient position to give Chief Justice Roberts his wish by overturning itself (again) and recognizing the drunk-driving exception (again) using the checkpoint and community caretaker cases for support. If the highest court in Virginia does so, it can kill two birds with one stone by correcting its mistake in *Harris* and officially sanctioning the community caretaker doctrine the court of appeals has recognized for over a decade. Such a case might find its way up to the United States Supreme Court and finally end this debate, hopefully protecting communities from drunk drivers in the process.

Andrew B. Kartchner

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[170] The United States Supreme Court has consistently recognized the need for avoiding cryptic legal standards that confuse law enforcement officers. *See* Illinois v. Lafayette, 462 U.S. 640, 648 (1983) ("'[A] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" (quoting New York v. Belton, 453 U.S. 454, 458 (1981))).

[171] *See, e.g.*, Harris v. Commonwealth, 668 S.E.2d 141, 147 (Va. 2008) ("Officer Picard's observations, when considered together with the anonymous tip, were not sufficient to create a reasonable suspicion of criminal activity, and . . . therefore, Harris was stopped in violation of his rights under the Fourth Amendment."); Alabama v. White, 496 U.S. 325, 333 (1990) (Stevens, J., dissenting) ("[E]very citizen is subject to being seized and questioned by any officer who is prepared to testify that the warrantless stop was based on an anonymous tip predicting whatever conduct the officer just observed.").

[172] Virginia v. Harris, 130 S. Ct. 10, 10 (2009) (Roberts, C.J., dissenting from denial of certiorari).

PLAYING BY THE RULES: FRCP 55(A) AND THE CIRCUIT SPLIT REGARDING ITS MEANING

INTRODUCTION

American jurisprudence disfavors default judgments.[1] Why? Because default judgments are entered without a trial on the merits.[2] A trial on the merits of the case is essential to the American legal system—"the adversary system."[3]

The adversary system's central precept is that it is more likely that "a neutral and passive decision maker can resolve a litigated dispute in a manner that is acceptable both to the parties and to society" when there

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[1] U.S. Fid. & Guar. Co. v. Petroleo Brasileiro S.A., 220 F.R.D. 404, 406 (S.D.N.Y. 2004) ("The determination of whether to grant a motion for default judgment is within the sound discretion of the district court. However, '[i]t is well established that default judgments are disfavored. A clear preference exists for cases to be adjudicated on the merits.'" (alteration in original) (citations omitted) (quoting Pecarsky v. Galaxiworld.com Ltd., 249 F.3d 167, 174 (2d Cir. 2001))); United States v. Gant, 268 F. Supp. 2d 29, 32 (D.D.C. 2003) ("Because courts strongly favor resolution of disputes on their merits, and because it seems inherently unfair to use the court's power to enter judgment as a penalty for filing delays, default judgments are not favored by modern courts. Accordingly, default judgment usually is available only when the adversary process has been halted because of an essentially unresponsive party[, as] the diligent party must be protected lest he be faced with interminable delay and continued uncertainty as to his rights." (alteration in original) (citation omitted) (internal quotation marks omitted)); 10 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 55.02 (3d ed. 2012) ("In considering how courts deal with defaults and default judgments, one must be aware of the conflicting principles at play with default. On the one hand, default promotes efficient administration of justice by requiring a responding party to conform with the requirements set out in the Federal Rules in a timely fashion. Rule 55 provides a mechanism to deal with a party against whom affirmative relief is sought who does nothing or very little to respond to the complaint. . . . On the other hand, there is a strong desire to decide cases on the merits rather than on procedural violations. For this reason, most courts traditionally disfavor the entry of a default judgment. This is a reflection of the oft-stated preference for resolving disputes on the merits.").

[2] *See U.S. Fid. & Guar. Co.*, 220 F.R.D. at 406.

[3] Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 713 (1983) ("Since approximately the time of the American Revolution, courts in the United States have employed a system of procedure that depends upon a neutral and passive fact finder (either judge or jury) to resolve disputes on the basis of information provided by contending parties during formal proceedings. This dispute-resolving mechanism is most frequently termed 'the adversary system.'"); *see also* Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 57 (1998) ("In its simplest terms, an adversary system resolves disputes by presenting conflicting views of fact and law to an impartial and relatively passive arbiter, who decides which side wins what. In the United States, however, the phrase 'adversary system' is synonymous with the American system for the administration of justice—a system that was constitutionalized by the Framers and that has been elaborated by the Supreme Court for two centuries.").

is a "sharp clash of proofs presented by adversaries in a highly structured forensic setting."[4]

Default judgments, however, prevent this "sharp clash of proofs presented by adversaries." In this way, a default judgment is similar to a forfeited game in baseball.[5] A forfeit in baseball prevents the sharp clash of athletic skill presented by the would-be competing athletes; a default judgment prevents the sharp clash of competing proofs. Surely, the American citizenry (or, at least baseball fans) prefer that baseball games be decided by actual play, instead of the technicality that is a forfeited game. Similarly, a legal decision based on a trial on the merits is preferred over a decision by default judgment because a trial on the merits more nearly assures that the victor is victorious for good cause, rather than for some meritless technicality.[6]

Under Rule 55(a) of the Federal Rules of Civil Procedure ("Rule 55(a)"), default judgments are available to a party if the opposing party fails "to plead or otherwise defend."[7] In other words, a default judgment is available to *A* if *B* does not plead or otherwise defend. The federal circuits are split, however, regarding when *A* can win by default judgment under Rule 55(a).[8] Some circuits consider default judgment under Rule 55(a) available to *A* only when *B* neither pleads nor otherwise defends.[9] By contrast, other circuits consider default judgment available when *B* does plead but does not also defend.[10]

Part I of this Note provides a short background on default judgments, generally, and default judgments for failure to "otherwise defend," specifically. Part II summarizes the federal circuits' decisions and rationales regarding the interpretation of failure "to plead or otherwise defend" in Rule 55(a). Part III briefly looks at state courts' interpretations of failure "to plead or otherwise defend" in state procedure rules that parallel Rule 55(a). Finally, Part IV presents

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4 Landsman, *supra* note 3, at 714.

5 COMM'R OF BASEBALL, 2010 OFFICIAL RULES OF MAJOR LEAGUE BASEBALL R. 2.00, at 26 (2010) ("A FORFEITED GAME is a game declared ended by the umpire-in-chief in favor of the offended team by the score of 9 to 0, for violation of the rules."). In other words, the umpire declares the victor even though no baseball was actually played.

This is not a perfect analogy. Certainly, there are many differences between a default judgment and a forfeited game. This analogy is included, however, to immediately paint a picture—however rough—of what a default judgment feels like in some cases. A forfeited game does not allow a game of athletics to begin, and a default judgment does not allow a case on the merits to begin.

6 *See* Jackson v. Beech, 636 F.2d 831, 835 (D.C. Cir. 1980); *Gant*, 268 F. Supp. 2d at 32; MOORE ET AL., *supra* note 1.

7 FED. R. CIV. P. 55(a).

8 *See infra* notes 33–35 and accompanying text.

9 *See infra* note 34 and accompanying text.

10 *See infra* note 35 and accompanying text.

arguments that show that a narrow construction of Rule 55(a) is the preferable approach.

I. BACKGROUND ON DEFAULT JUDGMENT

A. Default Judgment History

In 1937, the "Supreme Court exercised its statutory rulemaking authority when it adopted the Federal Rules of Civil Procedure,"[11] which included Rule 55.[12] Since its 1938 enactment, Rule 55 has governed default judgments in federal courts.[13] Before 1938, the Equity Rules of 1912 controlled.[14]

Much of the idea for Rule 55's text comes from Rules 16 and 17 of the Equity Rules of 1912.[15] In pertinent part, Equity Rule 16 states that a defendant shall "file his answer or other defense to the bill in the clerk's office within the time named in the subpoena."[16] If the defendant fails to timely file, Equity Rule 17 states that "the court may proceed to a final decree" against the defendant after a specified amount of time has passed.[17]

The similarity between the text of Rule 55 and the text of Equity Rules 16 and 17 is not surprising, as "[t]he policy reasons for allowing default judgments are basically the same now as they were in the early days of English and American practice."[18] In *H. F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, the United States Court of Appeals for the District of Columbia Circuit explained the policy of default judgments this way:

> [A] default judgment must normally be viewed as available only when the adversary process has been halted because of an essentially unresponsive party. In that instance, the diligent party must be

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11 1 MOORE ET AL., *supra* note 1, § 1.04[2][a]; *see also* FED. R. CIV. P. hist. n. ("The original Rules of Civil Procedure for the District Courts were adopted by order of the Supreme Court on Dec. 20, 1937, transmitted to Congress by the Attorney General on Jan. 3, 1938, and became effective on Sept. 16, 1938.").

12 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2681, at 8 (3d ed. 1998).

13 *See id.* § 2681, at 7, 8.

14 *See id.* § 2681, at 8; *New Federal Equity Rules*, 18 VA. L. REG. 641 (1913).

15 WRIGHT, MILLER & KANE, *supra* note 12; *see also* FED. R. CIV. P. 55 advisory committee's note ("This represents the joining of the equity decree *pro confesso* ([former] Equity Rules 12 (Issue of Subpoena—Time for Answer), 16 (Defendant to Answer—Default—Decree *Pro Confesso*), 17 (Decree *Pro Confesso* to be Followed by Final Decree—Setting Aside Default), 29 (Defenses—How Presented), 31 (Reply—When Required—When Cause at Issue)) and the judgment by default now governed by U.S.C., Title 28, [former] § 724 (Conformity act)." (alterations in original)).

16 *New Federal Equity Rules*, *supra* note 14, at 644.

17 *Id.* at 645.

18 WRIGHT, MILLER & KANE, *supra* note 12, § 2681, at 9.

> protected lest he be faced with interminable delay and continued uncertainty as to his rights. The default judgment remedy serves as such a protection. Furthermore, the possibility of a default is a deterrent to those parties who choose delay as part of their litigative strategy.[19]

Although the policy behind default judgments has remained constant, court construction of default judgments has not.[20] That is, although at one time courts construed strictly the Federal Rules of Civil Procedure, there has been a "modernization of federal procedure" or a "relaxation of restrictive rules which prevent the hearing of cases on their merits."[21] In deciding whether the United States District Court for the District of Columbia erred when it refused to set aside a default judgment, the District of Columbia Circuit Court in *H. F. Livermore* explained that it was "mindful of this [relaxed] policy in its construction of the Rules in order to afford litigants a fair opportunity to have their disputes settled by reference to the merits."[22]

The *H. F. Livermore* court's explanation, although written over forty years ago, is in line with modern juridical sentiment.[23] That is, courts generally disfavor default, preferring, instead, adjudication on the merits.[24]

B. Entry of Default for Failure to Otherwise Defend

The text of Rule 55(a), which addresses the failure to otherwise defend, is straightforward (besides the distance between the subject and its verb): "When a party against whom a judgment for affirmative relief is sought has *failed* to plead or *otherwise defend* . . . the clerk must enter the party's default."[25] Although seemingly plain, the language of Rule 55(a) has led the federal circuits to different results.[26]

In essence, federal circuits take one of two approaches. The first approach does not permit a Rule 55(a) default judgment against a party

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19 432 F.2d 689, 691 (D.C. Cir. 1970).

20 WRIGHT, MILLER & KANE, *supra* note 12, § 2681, at 9.

21 *H. F. Livermore Corp.*, 432 F.2d at 691.

22 *Id.*

23 *See* WRIGHT, MILLER & KANE, *supra* note 12 § 2681, at 9.

24 *See* sources cited *supra* note 1.

25 FED. R. CIV. P. 55(a) (emphasis added).

26 *Compare* Bass v. Hoagland, 172 F.2d 205, 210 (5th Cir. 1949) (ruling that the defendant prevented default judgment because he filed a responsive pleading), *with* City of N.Y. v. Mickalis Pawn Shop, L.L.C., 645 F.3d 114, 129–30 (2d Cir. 2011) (affirming entry of default judgment against defendants who answered plaintiff's complaint, appeared in litigation for several years, moved to dismiss multiple times, and actively defended throughout discovery).

if that party has either (1) pled or (2) otherwise defended.[27] The other approach does permit a Rule 55(a) default judgment if a party does one of those actions (pleads or otherwise defends) but not the other.[28]

According to one Federal Procedure scholar: "The words 'otherwise defend' refer to the interposition of various challenges to such matters as service, venue, and the sufficiency of the prior pleading, any of which might prevent a default if pursued in the absence of a responsive pleading."[29] Another leading expert notes,

> The term "otherwise defend" is not defined in Rule 55, but the term does include the assertion of those defenses that, under Rule 12(b), may be made by motion rather than in the pleadings. These defenses include challenges to subject matter or personal jurisdiction, venue, and sufficiency of process or service of process; motions to dismiss for failure to state a claim on which relief may be granted; and motions raising the issue of failure to join a party under Rule 19.[30]

Unlike these leading experts who agree on the interpretation of Rule 55(a), the federal circuits read "otherwise defend" differently from one another.[31] In other words, the circuits are split regarding their interpretation of failure "to plead or otherwise defend" in Rule 55(a).[32]

II. THE CIRCUITS ARE SPLIT OVER THE MEANING OF FAILURE "TO PLEAD OR OTHERWISE DEFEND" IN RULE 55(A)

A party who is served with a complaint has three options: "[(1)] plead, [(2)] 'otherwise defend,' or [(3)] suffer a default,"[33] according to at least a minority of the circuits.[34] Other circuits seem to read Rule 55(a) to offer only two options: (1) plead and otherwise defend or (2) suffer a default.[35]

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27 *Bass*, 172 F.2d at 207–11 (reversing the district court's grant of default judgment against defendant, holding that defendant's pleading was enough to prevent a Rule 55 default).

28 Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 917–18 (3d Cir. 1992) (affirming the district court's grant of default judgment against defendants for failing to comply with the order to obtain new counsel and to appear at trial).

29 WRIGHT, MILLER & KANE, *supra* note 12, § 2682, at 16–17.

30 MOORE ET AL., *supra* note 1, § 55.11[2][b][i].

31 *See* cases cited *supra* note 26.

32 FED. R. CIV. P. 55(a); MOORE ET AL., *supra* note 1, § 55.11[2][b][iii].

33 MOORE ET AL., *supra* note 1, § 55.11[2][b][iii].

34 *See, e.g.*, Solaroll Shade & Shutter Corp. v. Bio-Energy Sys., Inc., 803 F.2d 1130, 1134 (11th Cir. 1986); Bass v. Hoagland, 172 F.2d 205, 209–10 (5th Cir. 1949); Olsen v. Int'l Supply Co., 22 F.R.D. 221, 222–23 (D. Alaska 1958).

35 *See, e.g.*, City of N.Y. v. Mickalis Pawn Shop, L.L.C., 645 F.3d 114, 129 (2d Cir. 2011) (affirming entry of default against defendants who not only answered plaintiff's complaint, but also appeared in litigation for several years, "repeatedly moved to dismiss," and "vigorously defended" throughout discovery); United States v. $23,000 in U.S. Currency, 356 F.3d 157, 160–63 (1st Cir. 2004) (affirming default judgment in forfeiture

A. Circuits That Do Not Permit Default Judgment Against a Party That Has Pled

1. Fifth Circuit

The Fifth Circuit addressed the responsive but otherwise non-defensive defendant in *Bass v. Hoagland*, a 1949 case.[36] In *Bass*, the Fifth Circuit ruled that there should not have been a Rule 55(a) default judgment when the defendant responded to the complaint with "an answer to the merits" but neither he nor his attorney appeared at trial.[37]

In *Bass*, the plaintiff sued the defendant for personal injury.[38] The defendant "appeared by counsel and filed an answer to the merits."[39] Although the defendant's counsel later withdrew from the case, he "did not withdraw the appearance and answer."[40] At trial, instead of making the plaintiff prove his case, the district court simply ruled the defendant was in default.[41]

The circuit court reversed the district court and thereby ruled that the defendant was not in default, based on the following reasoning:

> Rule 55(a) authorizes the clerk to enter a default "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules." This does not require that to escape default the defendant must not only file a sufficient answer to the merits, but must also have a lawyer or be present in court when the case is called for a trial. The words "otherwise defend" refer to attacks on the service, or motions to dismiss, or for better particulars, and the like, which may prevent default without presently pleading to the merits. When [defendant] Bass by his attorney filed a denial of the plaintiff's case neither the clerk nor the judge could enter a default against him. The burden of proof was put on the plaintiff in any trial. When neither Bass nor his attorney appeared at the trial, no default was generated; the case was

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action when claimant answered but failed to file verified statement); Ackra Direct Mktg. Corp. v. Fingerhut Corp., 86 F.3d 852, 856 (8th Cir. 1996) (affirming default judgment against defendants who did not participate in litigation); Home Port Rentals, Inc. v. Ruben, 957 F.2d 126, 133 (4th Cir. 1992) (affirming default judgment for failure to defend or participate in discovery); Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 917–19 (3d Cir. 1992) (affirming entry of default against a party who answered but failed to appear at trial); Ringgold Corp. v. Worrall, 880 F.2d 1138, 1141 (9th Cir. 1989) (affirming default judgment against defendants who repeatedly failed to attend pretrial conferences, did not participate in litigation, and did not attend the first day of trial).

[36] *See Bass*, 172 F.2d at 207–08; WRIGHT, MILLER & KANE, *supra* note 12, § 2682, at 17–18 (discussing the Fifth Circuit's early decision in *Bass*).

[37] *Bass*, 172 F.2d at 207–10.

[38] *Id.* at 207.

[39] *Id.*

[40] *Id.* at 207–08.

[41] *Id.* at 208.

> not confessed. The plaintiff might proceed, but he would have to prove his case.[42]

In the *Bass* court's opinion, then, Rule 55(a) does not require a party to "otherwise defend" in addition to pleading, but rather allows a party to "otherwise defend" in place of pleading.[43]

Although the *Bass* decision has been criticized by some,[44] including other circuits,[45] it has been acknowledged as binding precedent within the Fifth Circuit[46] and has been championed by leading experts in federal procedure.[47]

2. Seventh Circuit[48]

The United States District Court for the Eastern District of Wisconsin agreed with the *Bass* court's interpretation of Rule 55(a) and held in *Wickstrom v. Ebert* that a Rule 55(a) default judgment is not appropriate when the defendants did not plead but did move to dismiss the plaintiffs' claim.[49] The *Wickstrom* court did not cite *Bass* directly, but it did cite another case within the Fifth Circuit, *George & Anna Portes Cancer Prevention Center, Inc. v. Inexco Oil Co.*, when it explained Rule 55(a)'s "otherwise defend" language:

> Pursuant to Rule 55 of the Federal Rules of Civil Procedure, default judgment is appropriate when "a party against whom a

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42 *Id.* at 210.

43 *Id.* ("The words 'otherwise defend' refer to attacks on the service, or motions to dismiss, or for better particulars, and the like, which may prevent default *without presently pleading to the merits*." (emphasis added)).

44 *E.g.*, Note, *Extending Collateral Attack: An Invitation to Repetitious Litigation*, 59 YALE L.J. 345, 350 (1950) ("The Fifth Circuit limited the rule to the traditional default situation by interpreting the crucial words 'otherwise defend' to mean only motions made in place of pleadings. . . . Since [defendant] had notice of the trial date, his failure to appear is as much an admission of plaintiff's claim as is failure to plead within the allotted time . . . ." (footnote omitted)).

45 *E.g.*, Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 918 (3d Cir. 1992) ("Although we acknowledge that some courts have stated that a Rule 55 default cannot be based on a failure to appear at trial, *see, e.g.*, *Bass v. Hoagland*, we are not persuaded by their reasoning and decline to follow it." (citation omitted)).

46 Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 400 n.2 (5th Cir. 1981).

47 *See, e.g.*, MOORE ET AL., *supra* note 1, § 55.11[2][b][iii] ("The better view is that Rule 55(a)'s 'otherwise defend' language may not be extended to justify a default once there has been an initial responsive pleading or an initial action that constitutes a defense."); WRIGHT, MILLER & KANE, *supra* note 12, § 2682, at 18 ("Although the Third Circuit has disagreed, the Bass [sic] court's conclusion seems preferable." (footnote omitted)).

48 In the interest of uniformity, Part II.A.2 is captioned "Seventh Circuit." But the included opinion is from a district court within the Seventh Circuit and not from the Seventh Circuit Court of Appeals. As such, the ruling does not per se represent the opinion of the entire Seventh Circuit. Since no other federal court within the Seventh Circuit has ruled otherwise, the opinion included here is a fair representation.

49 Wickstrom v. Ebert, 101 F.R.D. 26, 33 (E.D. Wis. 1984).

> judgment for affirmative relief is sought has failed to plead *or otherwise defend* as provided by these rules . . . ." The words "otherwise defend" presume the absence of some affirmative action on the part of a defendant which would operate as a bar to the satisfaction of the moving party's claim.[50]

As a result, the *Wickstrom* court agreed with the *Bass* rationale that "failure" under Rule 55(a) occurs when the party fails to take some sort of affirmative action, whether it is pleading *or* otherwise defending.[51]

3. Ninth Circuit[52]

Similar to the district court in the Seventh Circuit, the United States District Court for the District of Nevada in *Rashidi v. Albright* found a Rule 55(a) default not permissible when the defendants did not answer the plaintiff's complaint but did move for summary judgment.[53] The *Rashidi* court, just like the district court in the Seventh Circuit, reasoned that "[f]ailure to 'otherwise defend' presumes the absence of some affirmative action."[54] Interestingly, the *Rashidi* court cited *Wickstrom* for the foregoing proposition.[55] Thus, to keep track, *Rashidi* cited *Wickstrom*,[56] *Wickstrom* cited *George & Anna Portes*,[57] and *George & Anna Portes* cited *Bass*[58] to support the logical rationale that a defendant can prevent default judgment under Rule 55(a) if the defendant either pleads or otherwise defends.[59]

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50 *Id.* at 32 (alterations in original) (citation omitted) (citing George & Anna Portes Cancer Prevention Ctr., Inc. v. Inexco Oil Co., 76 F.R.D. 216 (W.D. La. 1977)). Not surprisingly, *George & Anna Portes* cited *Bass*, 172 F.2d 205, 210 (5th Cir. 1949), to support its interpretation of "otherwise defend." *George & Anna Portes*, 76 F.R.D. at 217.

51 *Wickstrom*, 101 F.R.D. at 32.

52 In the interest of uniformity, Part II.A.3 is captioned "Ninth Circuit." The included opinion, however, is from a district court within the Ninth Circuit, and not from the Ninth Circuit Court of Appeals. As such, the ruling does not per se represent the opinion of the entire Ninth Circuit. See also *infra* Part II.B.6 for the discussion of a Ninth Circuit decision that appears to undercut the decision discussed in this Section.

53 818 F. Supp. 1354, 1356 (D. Nev. 1993) ("If challenges less strenuous than those pleading to the merits can prevent the entry of default, clearly a summary judgment motion which speaks to the merits of the case and demonstrates a concerted effort and an undeniable desire to contest the action is sufficient to fall within the ambit of 'otherwise defend' for purposes of FED. R. CIV. P. 55."). *But see infra* note 116 and accompanying text.

54 *Rashidi*, 818 F. Supp. at 1355.

55 *Id.* at 1356.

56 *Id.*

57 Wickstrom v. Ebert, 101 F.R.D. 26, 32 (E.D. Wis. 1984).

58 George & Anna Portes Cancer Prevention Ctr., Inc. v. Inexco Oil Co., 76 F.R.D. 216, 217 (W.D. La. 1977).

59 *See* Bass v. Hoagland, 172 F.2d 205, 210 (5th Cir. 1949).

4. Eleventh Circuit

While the Eleventh Circuit has not yet addressed a case with facts that would allow it to follow *Bass's* precedent, in *Solaroll Shade & Shutter Corp. v. Bio-Energy Systems, Inc.* it did make it quite clear that the circuit would follow such precedent if given the chance.[60] Indeed, although it cited *Bass* and discussed the intricacies of Rule 55(a) default, the court ultimately determined that the district court based its decision on the merits of the case.[61] As such, the Eleventh Circuit distinguished the case from *Bass* because the district court's judgment was not a default judgment, and, therefore, Rule 55(a) did not apply.[62]

Although Rule 55(a) did not apply to *Solaroll Shade*, the Eleventh Circuit expressed *Bass's* rationale better than perhaps any other court:

> Rule 55 applies to parties against whom affirmative relief is sought who fail to "plead or otherwise defend." Fed. R. Civ. P. 55(a). Thus a court can enter a default judgment against a defendant who never appears or answers a complaint, for in such circumstances the case never has been placed at issue. If the defendant has answered the complaint but fails to appear at trial, issue has been joined, and the court cannot enter a default judgment. However, the court can proceed with the trial. If plaintiff proves its case, the court can enter judgment in its favor although the defendant never participated in the trial.[63]

B. Circuits Permitting a Default Judgment Against a Party Who Has Pled but Fails to Also "Otherwise Defend"

As mentioned above, one group of circuits reads Rule 55(a) to include three options: (1) plead, (2) "otherwise defend," or (3) suffer a default.[64] This next set of circuits, however, reads 55(a) to include only two options: (1) plead *and* "otherwise defend" or (2) suffer a default.[65]

1. First Circuit

In *Alameda v. Secretary of Health, Education & Welfare*, the United States Court of Appeals for the First Circuit reviewed a district court decision to enter default judgment against a defendant who had answered the plaintiffs' complaint but failed to file supportive documents the Court requested.[66] Although the circuit court remanded to the district court because the district court failed to follow the old Rule

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60 803 F.2d 1130, 1134 (11th Cir. 1986).

61 *Id.*

62 *Id.*

63 *Id.* (citing Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 400 n.2 (5th Cir. 1981); *Bass*, 172 F.2d at 209–10 (5th Cir. 1949)).

64 *See supra* note 34 and accompanying text.

65 *See supra* note 35 and accompanying text.

66 622 F.2d 1044, 1045, 1048 (1st Cir. 1980).

55(e),[67] the circuit court stated that "the . . . [defendant's] failure to file the requested memoranda or even explain the failure after months of delay, amounted to a failure under Fed. R. Civ. P. 55(a) to 'otherwise defend' the suit."[68] Stated more succinctly, had the district court properly applied Rule 55(e), the circuit court likely would have affirmed the Rule 55(a) default judgment.[69] Indeed, other courts within the First Circuit have similarly interpreted *Alameda*.[70]

2. Second Circuit

In one of the more recent encounters with Rule 55(a) default judgments, the Second Circuit in *City of New York v. Mickalis Pawn Shop* affirmed the district court's entry of default judgment against the defendants that not only answered the plaintiff's complaint, but also (1) appeared in litigation for several years, (2) "repeatedly moved to dismiss," and (3) "vigorously defended" throughout discovery.[71] The circuit court highlighted the defendants' withdrawal from litigation as the basis for its decision.[72]

Mickalis Pawn stands in stark contrast to the decisions of the Fifth Circuit,[73] the district court from the Seventh Circuit,[74] the district court from the Ninth Circuit,[75] and the Eleventh Circuit.[76] Indeed, *Mickalis*

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67 *Id.* at 1047 ("The problem of the court's authority to enter these judgments arises from the requirement of FED. R. CIV. P. 55(e) [now (d), based on Dec. 1, 2007 amendment] that a default judgment may issue against the United States only if 'the claimant establishes his claim or right to relief by evidence satisfactory to the court.'").

68 *Id.* at 1048.

69 *See id.*

70 Estates of Ungar & Ungar v. Palestinian Auth., 325 F. Supp. 2d 15, 65 (D.R.I. 2004) ("The First Circuit has also observed that a 'failure to file the requested memoranda or even explain the failure after months of delay, amounted to a failure under Fed. R. Civ. P. Rule 55(a) to "otherwise defend" the suit . . . .'" (quoting *Alameda*, 622 F.2d at 1048)); Santiago v. Sec'y of Health & Human Servs., 599 F. Supp. 722, 723–24 (D.P.R. 1984) ("However, the Secretary's failure to file the requested memorandum or even explain the failure after months of delay amounted to a failure under Rule 55(a) of the Federal Rules of Civil Procedure to 'otherwise defend' the suit." (citing *Alameda*, 622 F.2d at 1048)).

71 645 F.3d 114, 129 (2d Cir. 2011).

72 *Id.* at 130 ("First, each defendant affirmatively signaled to the district court its intention to cease participating in its own defense, even after the defendant was clearly warned that a default would result. . . . Second, in the case of Mickalis Pawn, a Rule 55(a) default was also proper under *Eagle Associates* and like cases insofar as this defendant withdrew its counsel without retaining a substitute. Finally, both defendants clearly indicated that they were aware that their conduct likely would result in a default." (citation omitted)).

73 Bass v. Hoagland, 172 F.2d 205, 207–08, 210 (5th Cir. 1949).

74 Wickstrom v. Ebert, 101 F.R.D. 26, 33 (E.D. Wis. 1984).

75 Rashidi v. Albright, 818 F. Supp. 1354, 1355–56 (D. Nev. 1993).

Pawn might conflict with the First Circuit,[77] which the Second Circuit deems a "sister circuit"[78] (or at least with the First Circuit's rationale in *Alameda*[79]). Perhaps the reason why the *Mickalis Pawn* court did not even cite, let alone analogize, *Alameda* was due to the contrast between the two circuits' rationales.[80] Instead of citing *Alameda*, the *Mickalis Pawn* court cited *Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit International, Inc.*,[81] which—as it turns out—fails to even mention Rule 55(a).[82]

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[76] Solaroll Shade & Shutter Corp. v. Bio-Energy Sys., Inc., 803 F.2d 1130, 1134 (11th Cir. 1986).

[77] *See* Alameda v. Sec'y of Health, Educ. & Welfare, 622 F.2d 1044, 1048 (1st Cir. 1980). Admittedly, this conflict is one of degree, not of kind. Still, there is apparent conflict between *Mickalis Pawn* from the Second Circuit and (at least) *Alameda* from the First Circuit. In essence the Second Circuit in *Mickalis Pawn* extends the scope of 55(a) dramatically more than does the First Circuit in *Alameda*. *Compare Mickalis Pawn*, 645 F.3d at 129 (affirming the district court's 55(a) default judgment entry notwithstanding defendants' pleading (i.e., answering plaintiff's complaint) and otherwise defending (i.e., appearing in litigation for several years, moving to dismiss multiple times, and actively defending throughout discovery)), *with Alameda*, 622 F.2d at 1046–48 (agreeing with the district court that a 55(a) default judgment entry against defendant would be proper (but for the district court's improper ruling on a *different* Federal Rule) because defendant, while she did answer plaintiff's complaint, did not provide the brief the district court requested, which was "essential in helping a judge wend his or her way efficiently through a record sometimes dominated by medical specialists' nomenclature"). The extensive defense exhibited by defendants in *Mickalis Pawn* versus the *Alameda* defendant's lack of defense highlights only one significant difference between the two cases. That *Alameda* was a social security case is an important difference between the cases as well. 622 F.2d at 1046. That is, the proceeding before the Agency was complex in its own right before it ever reached the district court. *Id.* ("We fully agree with the district court that a government brief is often essential in helping a judge wend his or her way efficiently through a record sometimes dominated by medical specialists' nomenclature."). Due to the complexity, it was reasonable for the First Circuit in *Alameda* to require the defendant to provide explanatory memoranda. The same cannot be said for the Second Circuit in *Mickalis Pawn*.

[78] *Mickalis Pawn*, 645 F.3d at 131.

[79] *See supra* note 77.

[80] *See supra* note 77.

[81] *Mickalis Pawn*, 645 F.3d at 131 (citing Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit Int'l, Inc., 982 F.2d 686, 692–93 (1st Cir. 1993)).

[82] *Medfit Int'l*, 982 F.2d at 687–93. Granted, *Alameda* did not affirm outright the district court's 55(a) default judgment, *see supra* Part II.B.1, which may have caused the *Mickalis Pawn* court not to rely on it. Still, *Alameda* took space to explain its Rule 55(a) "otherwise defend" interpretation, *see* 622 F.2d at 1048, whereas *Medfit International* failed to even give the rule's citation, *Medfit Int'l*, 982 F.2d 686, 692–93 (1st Cir. 1993). Instead, the court in *Medfit International* perfunctorily affirmed the district court's default judgment against defendant for defendant's "failure to appear at trial." *Id.* at 692. It never analyzed whether the defendant surpassed the Rule 55(a) default judgment threshold. *Id.* at 687–93.

In addition to citing the First Circuit, *Mickalis Pawn* did cite other circuits—some for its position, some against.[83] As is expected, the court relied primarily on precedent from its own circuit.[84] It also found the Third Circuit's decision in *Hoxworth v. Blinder, Robinson & Co.* persuasive.[85]

To support its ruling with precedent from its own circuit, the *Mickalis Pawn* court discussed the *Brock v. Unique Racquetball & Health Clubs, Inc.* decision.[86] Like many of the appellate cases discussed thus far, *Brock* reviewed the district court's default judgment entry against the defendants.[87] Interestingly, though, the circuit court remanded the case to the district court to decide on the defendants' motion to vacate the default before entering judgment.[88] But, while it did vacate and remand, the circuit court agreed entirely with the district court's entry of default for the dilatory tactics of the defendants' counsel.[89] It is unclear, however, whether the *Brock* court approved the entry of default judgment based on the failure "to plead or otherwise defend" language of Rule 55(a) or whether it was based instead on sanction principles.[90] This obscurity stems from two things in the *Brock* opinion.

First, while it does begin its default judgment analysis with a passing reference to Rule 55(a),[91] the court never analyzes the breadth of Rule 55(a)'s failure "to plead or otherwise defend" language and, thereby, never decides whether counsel's actions were a failure to "otherwise defend."[92] Second, the court characterizes the judge's authority to enter a default judgment as a "sanction" against counsel for his dilatory ways.[93]

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83 *Mickalis Pawn*, 645 F.3d at 131 (citing, as favorable, the First, Third, Fourth, Eighth, and Ninth Circuits and, as unfavorable, the Fifth and Eleventh Circuits).

84 *Id.* at 129–30.

85 *Id.* at 130 (citing Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 917–18 (3d Cir. 1992)); *see also infra* Part II.B.3.

86 *Mickalis Pawn*, 645 F.3d at 129 (citing Brock v. Unique Racquetball & Health Clubs, Inc., 786 F.2d 61, 63–65 (2d Cir. 1986)).

87 *Brock*, 786 F.2d at 62.

88 *Id.* at 65.

89 *Id.* at 64.

90 *See id.* ("Instead, this is the unusual case where a default is entered because counsel fails to appear during the course of a trial. In this context, a trial judge, responsible for the orderly and expeditious conduct of litigation, must have broad latitude to impose the *sanction* of default for non-attendance occurring after a trial has begun." (emphasis added)).

91 *Id.* ("Entry of default under Fed. R. Civ. P. 55(a) is proper whenever a defendant has failed to plead 'or otherwise defend.'").

92 *Id.* at 64–65.

93 *Id.* at 64; *see also* Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 918 (3d Cir. 1992) ("Although the [*Brock*] court noted that '[t]his is not the typical Rule 55 case in which a default has entered because a defendant failed to file a timely answer,' it concluded

If the court entered the default as a sanction via the court's inherent powers, or via another federal procedure rule, then it should have been characterized as such.[94]

3. Third Circuit

In *Hoxworth v. Blinder, Robinson & Co.*, the Third Circuit affirmed the district court's Rule 55(a) default judgment against the defendants because the defendants "fail[ed] to comply with the order to obtain counsel and to appear at trial."[95] To start its analysis of Rule 55(a), the court noted that the "or otherwise defend" language in Rule 55(a) "is broader than the mere failure to plead."[96] The court then analogized its opinion to *Farzetta v. Turner & Newall, Ltd.*[97] *Farzetta* is another Third Circuit opinion that ostensibly held legitimate the district court's entry of a default judgment against defendants who failed to defend after filing answers to the complaint.[98]

Hoxworth's reliance on *Farzetta* is troubling on several fronts. First, the *Farzetta* court "assumed" the district court entered a default judgment against the defendants, but was not entirely sure.[99] Second, the *Farzetta* opinion neither cites Rule 55(a) nor references the Rule's "otherwise defend" language.[100] Third, the Rule 55(a) default question—whether a court can enter a Rule 55(a) default against a defendant who has already pled—was not at issue in *Farzetta*.[101] Instead, the issue was

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that the Rule authorizes the entry of default as a *sanction*." (second alteration in original) (emphasis added) (citations omitted) (quoting *Brock*, 786 F.2d at 64)).

94 *See infra* Part IV.C.3; *see also* MOORE ET AL., *supra* note 1, § 55.11[2][b][iii] ("The more expansive reading of 'otherwise defend' is not justified. This does not mean that a court lacks the power to sanction a party for post-pleading misconduct; but rather that the sanctions should be imposed under a more appropriate rule or pursuant to the court's inherent powers.").

95 *Hoxworth*, 980 F.2d at 917–18.

96 *Id.* at 917. While technically true, the language's breadth could actually cut against the court's ruling just as easily. *See* MOORE ET AL., *supra* note 1, § 55.11[2][b][iii] ("Rule 55(a) is phrased disjunctively (plead *or* otherwise defend), showing an intent that either one or the other should be sufficient to avoid a Rule 55 default."). If Moore's interpretation proves persuasive, then the breadth of "or otherwise defend" would make it *easier* for the defendant to satisfy Rule 55(a) and, therefore, *easier* to avoid default.

97 *Hoxworth*, 980 F.2d at 917–18 (citing Farzetta v. Turner & Newell, Ltd., 797 F.2d 151, 155 (3d Cir. 1986)).

98 *Farzetta*, 797 F.2d at 155 (3d Cir. 1986).

99 *Id.* at 153 n.1 ("The appendix that accompanied the parties' appellate briefs does not include a copy of an order entering the default judgment, and there is some question as to whether the district court issued any such order. However, in light of the text of the above-cited transcript and the district court docket sheet, which reflects the entry of judgments against [appellants], we assume that both appellants are subject to default judgments.").

100 *See id.* at 152–55.

101 *See id.* at 154.

framed as follows: "The issue we must resolve is whether there were *proved at trial facts* that as a matter of logic preclude the liability of [defendants]."[102] More simply stated, had there been facts that precluded the defendants' liability, then the Third Circuit would have reversed the district court's entry of default judgment. This analysis focuses not on procedure but on the merits of the case. Because the *Farzetta* court analyzed not the pre-trial procedural aspects of the case but, instead, the facts of the trial, *Hoxworth* was wrong to rely on *Farzetta* as Rule 55(a) default judgment precedent.

4. Fourth Circuit

Although very short on Rule 55(a) analysis, the Fourth Circuit in *Home Port Rentals, Inc. v Ruben* affirmed the district court's entry of default judgment.[103] The court in *Home Port Rentals* was unsure under which Federal Rule the district court entered default judgment.[104] The district court identified three justifications for its order: (1) the defendants' lack of "cooperation in discovery matters"; (2) the defendants' refusal to "submit to depositions"; and (3) the defendants' failure "to participate in prosecution and defense" of the case.[105] While the circuit court determined that the first two justifications fell under Rule 37, it decided Rule 55(a) controlled the last justification.[106]

Where the court went wrong, however, was its failure to cite or discuss a single case—from the Fourth Circuit or otherwise—to support its Rule 55(a) interpretation (hence the "short on analysis" comment above).[107] Instead, the court merely reasoned in the alternative without examining controlling or persuasive authority: "Thus, even if we assume that the district court lacked authority in this case to impose default judgment under Rule 37, its judgment nonetheless would be authorized under Rule 55 because of the defendants' failure to defend."[108]

5. Eighth Circuit

The defendants in *Ackra Direct Marketing Corp. v. Fingerhut Corp.* participated (albeit below par) in litigation for twenty-two months before their counsel withdrew from the case, yet the Eighth Circuit affirmed the district court's Rule 55(a) default judgment against the defendants

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102 *Id.* (emphasis added).

103 957 F.2d 126, 133 (4th Cir. 1992).

104 *Id.* ("The district court did not recite whether it was issuing its default judgment pursuant to Rule 37 or Rule 55.").

105 *Id.*

106 *Id.*

107 *See id.* at 128–33.

108 *Id.*

for "failure to defend."[109] Although the circuit court did not discuss at length—or at all, really—applicable Rule 55(a) case law for determining "failure to defend,"[110] it did refer to *United States v. Harre*.[111] *Harre* is an Eighth Circuit case that the court decided three years earlier.[112] Relying on the *Harre* case, the *Ackra* court opined, "Default judgment for failure to defend is appropriate when the party's conduct includes 'willful violations of court rules, contumacious conduct, or intentional delays.'"[113] Applying this definition to the facts in *Ackra*, the circuit court found that the district court did not abuse its discretion in entering the default judgment against the defendants.[114]

6. Ninth Circuit[115]

The Ninth Circuit, in *Ringgold Corp. v. Worrall*, affirmed the district court's (seemingly unspecified) default judgment against the defendants who did not attend pretrial conferences, did not participate in litigation, and did not attend the first day of trial.[116] The court recognized that the case did not concern "a typical default judgment, where a party shows no interest in defending a claim."[117] "Rather," the court continued, "this case is analogous to *Brock*" because the defendants—like in *Brock*—defended their claims but failed to appear at key stages of the litigation of the case.[118]

III. STATE COURTS' INTERPRETATIONS OF FAILURE "TO PLEAD OR OTHERWISE DEFEND" IN STATE RULES SIMILAR (OR IDENTICAL) TO RULE 55(A)

While many states have interpreted "otherwise defend" in state statutes that parallel Rule 55(a), the brief discussion below serves as only a sample. This sample highlights two different interpretations of *Bass* and its application of Rule 55(a)'s "otherwise defend" language.

A. Colorado

In reviewing the trial court's entry of default judgment against the defendant, the Colorado Court of Appeals in *Rombough v. Mitchell*

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109 86 F.3d 852, 854, 856, 858 (8th Cir. 1996).

110 *Id.* at 852–58.

111 *Id.* at 156 (citing United States v. Harre, 983 F.2d 128, 130 (8th Cir. 1993)).

112 *Harre*, 983 F.2d at 128.

113 *Ackra*, 86 F.3d at 856 (quoting *Harre*, 983 F.2d at 130).

114 *Id.*

115 *But see supra* note 52.

116 880 F.2d 1138, 1141–42 (9th Cir. 1989). *But see supra* Part II.A.3.

117 *Ringgold Corp.*, 880 F.2d at 1141.

118 *Id.* (analogizing to Brock v. Unique Racquetball & Health Clubs, Inc., 786 F.2d 61, 64 (2d Cir. 1986)).

turned to and followed the *Bass* approach.[119] Colorado's 55(a) default judgment rule is "materially identical" to the federal Rule 55(a).[120] Very much like the facts in many of the federal cases discussed in Part II, the facts in *Rombough* involved a defendant who "answered and actively litigated," but who did not appear at trial.[121] At trial, then, the court entered a default judgment against the defendant.[122] The Colorado Court of Appeals, however, disagreed with the decision.[123] Instead, the court reasoned that a defendant has placed its case at issue and not conceded liability if it has participated throughout the pretrial process and filed a responsive pleading.[124] As such, if the trial went on in the absence of the defendant, the court stated, the plaintiff should be required to present evidence supporting liability and damages, and "a judgment should be entered in plaintiff's favor only if the evidence supports it."[125]

The *Rombough* court illustrated the same reasoning by referencing the Colorado Supreme Court case, *Davis v. Klaes*, in which "the trial court heard evidence and entered judgment in the absence of a defendant who had failed to appear for trial."[126] Although the defendant in *Davis* failed to appear, the *Davis* court characterized the case as follows:

> The taking of evidence and entry of judgment on [the day of the trial] in the absence of one of the parties who knows his case is set for trial is not a proceeding under the default provisions of the rules, but is, in fact, a trial on the merits.[127]

Using the *Bass* approach to Rule 55(a) and also citing the reasoning discussed in *Davis*, the *Rombough* court held that because the trial court did not receive evidence of liability in the defendant's absence, the trial court must have entered default solely for the defendant's failure to appear.[128] And "[b]ecause the rules do not authorize entry of default in

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[119] 140 P.3d 202, 205 (Colo. App. 2006). ("Together these cases indicate that Colorado has adopted the approach of *Bass v. Hoagland*." (citing Bass v. Hoagland, 172 F.2d 205, 210 (5th Cir. 1949)).

[120] *Id.* at 204; *see also* COLO. R. CIV. P. 55(a) ("When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.").

[121] *Rombough*, 140 P.3d at 204.

[122] *Id.* at 203.

[123] *Id.* at 204.

[124] *Id.*

[125] *Id.* (quoting WRIGHT, MILLER & KANE, *supra* note 12, § 2682, at 18).

[126] *Id.* at 205 (analogizing to Davis v. Klaes, 346 P.2d 1018 (Colo. 1959)).

[127] *Davis*, 346 P.2d at 1019.

[128] *Rombough*, 140 P.3d at 205.

[that] circumstance,"[129] the *Rombough* court reversed the default judgment and remanded the case for trial.[130]

B. Wyoming

With a decision much more narrow than that of Colorado's *Rombough* court,[131] the Wyoming Supreme Court ruled that the particular facts in *Lawrence-Allison & Associates West, Inc. v. Archer* required the court to reverse the trial court's entry of default judgment against the defendant.[132] *Lawrence-Allison* is an interesting decision. Although the court determined the trial court entered the default (and then later default judgment) under 55(a) of the Wyoming Rules of Civil Procedure[133]—substantively identical to federal Rule 55(a)[134]—and although the court analyzed (thoroughly and uniquely) *Bass*,[135] it ultimately reversed the actions of the trial court based on the Wyoming Constitution.[136] Nevertheless, the *Lawrence-Allison* court's thoughts regarding the federal Rule 55(a) and *Bass* are detailed and interesting.

The *Lawrence-Allison* court opined that the Fifth Circuit in *Fehlhaber v. Fehlhaber* limited the *Bass* decision to the particular facts in *Bass*.[137] The *Lawrence-Allison* court also opined that *Fehlhaber* determined that *Bass* refused to enter default judgment not because of its interpretation of failure "to plead or otherwise defend" in federal Rule 55(a), but because of procedural defects that prevented adequate notice.[138] This interpretation does not appear justified. While *Fehlhaber* may have suggested that it was the "combination of . . . errors"[139] that caused the due process violation in *Bass*, *Fehlhaber* never analyzed Rule

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129 *Id.*

130 *Id.*

131 *See supra* Part III.A.

132 767 P.2d 989, 997–98 (Wyo. 1989).

133 *Id.* at 994. Indeed, the court concluded that "[t]he sole basis for entering default against [defendant] seems to have been the trial court's perception that [defendant] fired its attorney [the day before trial], and thereby failed to 'otherwise defend' under [Wyoming Rules of Civil Procedure] 55(a), when it appeared at trial without counsel." *Id.*

134 *Compare* WYO. R. CIV. P. 55(a) ("When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default."), *with* FED. R. CIV. P. 55(a) ("When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.").

135 *Lawrence-Allison*, 767 P.2d at 995.

136 *Id.* at 997–98.

137 *Id.* at 995 ("The *Fehlhaber* language arguably limits the due process implications of *Bass* to the facts in that case . . . ." (citing Fehlhaber v. Fehlhaber, 681 F.2d 1015, 1027 (5th Cir. 1982))).

138 *Id.*

139 *Fehlhaber*, 681 F.2d at 1027.

55(a)'s failure "to plead or otherwise defend" language.[140] As such, anything in *Fehlhaber* that could be applied to Rule 55(a) is mere dicta and should not limit *Bass's* precedent.

IV. THE BETTER INTERPRETATION OF RULE 55(A)

Three bases suggest that a narrow interpretation of failure "to plead or otherwise defend" in Rule 55(a) is the better approach: (1) the plain meaning of Rule 55(a); (2) the (better) case law analyzing Rule 55(a); and (3) the Federal Rules of Civil Procedure as a whole. This Part looks at each of these in turn.

A. The Plain Meaning

In its entirety, Rule 55(a) states, "Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default."[141] To state it more concisely (and pertinent to this Note), Rule 55(a) permits entry of default if the party fails to plead or otherwise defend.

Moore's Federal Practice—probably the most thorough analysis on Federal Civil Procedure available—states that "[t]he better view is that Rule 55(a)'s 'otherwise defend' language may not be extended to justify a default once there has been an initial responsive pleading or an initial action that constitutes a defense."[142] Importantly, Moore's reason for this stance is because "Rule 55(a) is phrased disjunctively, (plead *or* otherwise defend), showing an intent that either one or the other should be sufficient to avoid a Rule 55 default."[143] Based on this, Moore's argument is that "[t]he more expansive reading of 'otherwise defend' is not justified."[144]

As with any textual interpretation, looking back to where the text derives may prove helpful. Here, Equity Rule 16 is useful, if only to show that Rule 55's predecessor was also phrased disjunctively.[145] In relevant part, it states, "It shall be the duty of the defendant . . . to file his answer or other defense . . . ."[146] Equity Rule 16 gave the defendant the option to file its answer or other defense, either of which would prevent default judgment.

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140 *See id.* at 1018–32. Indeed, the opinion is devoid of any mention of "55(a)." *Id.*

141 FED. R. CIV. P. 55(a).

142 MOORE ET AL., *supra* note 1, § 55.11[2][b][iii].

143 *Id.*

144 *Id.*

145 *New Federal Equity Rules*, *supra* note 14, at 644.

146 *Id.*

The Ninth Circuit, while it has interpreted Rule 55(a) defaults broadly,[147] has read Rule 55(a) as disjunctive.[148] In *Rashidi*, a district court in the Ninth Circuit found a Rule 55(a) default not permissible when the defendants failed to plead but did otherwise defend.[149] While the *Rashidi* court found the Federal Rules of Civil Procedure ambiguous regarding Rule 55(a)'s pleading requirement[150] and admonished that it is better practice to file an answer, it found "little reason to require a long, burdensome and expensive investigation to file an answer when the contents of the answer may be entirely useless by the dispositive nature of the action on the motion."[151] Because the *Rashidi* court ultimately concluded that Rule 55(a) allows a party to avoid default if the party otherwise defends but does not plead—implicitly acknowledging the rule's disjunctive nature—it logically follows that it would conclude a party can avoid a Rule 55(a) default judgment if it pleads but fails to otherwise defend.

Rule 55(a)'s disjunctive "or," however, is not the only language within the rule that suggests a narrow reading was intended. The word "otherwise" is also telling.

Standard statutory interpretation mandates the assumption that every word in any statute has meaning and purpose—that every word in a statute has independent significance, and no word is tautological, meaningless, or redundant. Rule 55(a) could have simply stated that a default can be entered against a party that has "failed to plead or defend." Instead, Rule 55(a) includes "otherwise" in between "plead" and "defend."[152]

The Merriam-Webster Dictionary first defines "otherwise," when used as an adverb, as "in a different way."[153] If this definition were read into the rule's text, Rule 55(a) would look something like this: "The clerk may enter default against a party that has failed to plead or, in a different manner or way, defend." This signifies that a defendant's responsive pleading is merely another type of defense to a plaintiff's claim. That is, if a defendant does not plead—a type of defense—then it can "otherwise defend"—say, via motion—and not risk default under Rule 55(a). Surely, it would be quite silly to require a defendant to both defend (by pleading) *and* defend to avoid default.

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147 *See supra* Part II.B.6. *But see supra* Part II.A.3 (discussing the District Court for the District of Nevada's narrow interpretation of Rule 55(a), which was affirmed in an unpublished opinion).

148 *See supra* Part II.A.3.

149 Rashidi v. Albright, 818 F. Supp. 1354, 1355–57 (D. Nev. 1993).

150 *Id.* at 1356–57.

151 *Id.* at 1357.

152 FED. R. CIV. P. 55(a).

153 THE MERRIAM-WEBSTER DICTIONARY 511 (6th ed. 2004).

Courts are supposed to read any rule of civil procedure according to its "plain meaning," just like a statute.[154] Therefore, because here the plain meaning supports the narrow reading of Rule 55(a), the courts should apply it as such.

B. Case Law

Without doubt, the majority of federal circuits interpret broadly the "failed to plead or otherwise defend" language in Rule 55(a) and, therefore, permit entry of default unless the party both pleads *and* otherwise defends.[155] The minority of circuits' reasoning,[156] however, which does not allow entry of a Rule 55(a) default if the party *either* pleads or "otherwise defend[s]," is more logically sound, more just, and better reflects the underlying intent of default judgments.[157] That is, "the default judgment must normally be viewed as available only when the adversary process has been halted because of an essentially unresponsive party."[158] The minority approach also represents more accurately the change in court construction of defaults.[159] This change is the "modernization of federal procedure, namely, the abandonment or relaxation of restrictive rules which prevent the hearing of the cases on the merits."[160]

1. The Minority's Narrow Approach to Rule 55(a) Is More Logically Sound, Is More Just, and Better Reflects the Intent of Default Judgments

Similar to a baseball team's forfeit because it did not show up to compete,[161] a Rule 55(a) default because the defendant did not "'otherwise defend' presume[s] the absence of some affirmative action on the part of a defendant which would operate as a bar to the satisfaction of the moving party's claim."[162] As quoted above, a "default judgment must normally be viewed as available *only when* the adversary process

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154 Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 498 U.S. 533, 540 (1991) (quoting Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 123 (1989)); *see also* James J. Duane, *The Federal Rule of Civil Procedure that Was Changed by Accident: A Lesson in the Perils of Stylistic Revision*, 62 S.C. L. REV. 41, 54 (2010) (showing that courts apply the plain meaning of the Rules of Civil Procedure when they are "plain and unambiguous").

155 *See supra* note 35.

156 *See supra* note 34.

157 *See supra* notes 18–19 and accompanying text.

158 H. F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 432 F.2d 689, 691 (D.C. Cir. 1970).

159 *See supra* notes 20–24 and accompanying text.

160 *H. F. Livermore*, 432 F.2d at 691.

161 COMM'R OF BASEBALL, *supra* note 5, R. 4.17, at 72 ("A game shall be forfeited to the opposing team when a team is unable or refuses to place nine players on the field.").

162 Wickstrom v. Ebert, 101 F.R.D. 26, 32 (E.D. Wis. 1984).

has been halted [by] . . . an essentially unresponsive party."[163] (In this case, the unresponsive party is like the baseball team that does not show up to play.) As such, "the diligent party must be protected lest he be faced with interminable delay and continued uncertainty as to his rights."[164]

Conversely, when a party *is* responsive (e.g., it files a responsive pleading)—when the baseball team *does* show up to play—default judgment (at least a Rule 55(a) default judgment[165]) should be inappropriate. Otherwise, it would be like an umpire declaring one team the victor via forfeit even though both teams at least initially indicated that they were ready, willing, and able to play.

The Fifth Circuit,[166] a district court of the Seventh Circuit,[167] the Eleventh Circuit,[168] and arguably the Ninth Circuit[169] agree. These courts interpret "otherwise defend" to mean "some affirmative action on the part of a defendant which would operate as a bar to the satisfaction of the moving party's claim."[170] Of course, a defendant's responsive pleading is indeed an affirmative action. These courts, therefore, qualify responsive pleadings as a bar to the satisfaction of the plaintiff's claim.[171] To go back to the baseball analogy, these courts believe that both teams have showed up to play if each party affirmatively acts, which can be done by pleading or otherwise defending. As such, the umpire should not declare a forfeit, just as these courts would not issue a default judgment.

The Eleventh Circuit perhaps said it best: "Rule 55 applies to parties against whom affirmative relief is sought who fail to 'plead or otherwise defend.' Thus a court can enter a default judgment against a defendant who never appears or answers a complaint, for in such

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163 *H. F. Livermore*, 432 F.2d at 691 (emphasis added).

164 *Id.*

165 *See infra* Part IV.C.3. Default judgment based on a rule other than Rule 55(a) might still be appropriate.

166 Bass v. Hoagland, 172 F.2d 205, 209 (5th Cir. 1949).

167 *Wickstrom*, 101 F.R.D. at 33.

168 Solaroll Shade & Shutter Corp. v. Bio-Energy Sys., Inc., 803 F.2d 1130, 1134 (11th Cir. 1986).

169 Rashidi v. Albright, 818 F. Supp. 1354, 1356–57 (D. Nev. 1993) (agreeing with a narrow interpretation of failure "to plead or otherwise defend"). *But see* Ringgold Corp. v. Worrall, 880 F.2d 1138, 1141 (9th Cir. 1989) (affirming default judgment against defendants who did not attend pretrial conferences, did not participate in litigation, and did not attend the first day of trial).

170 *Wickstrom*, 101 F.R.D. at 32 (citing George & Anna Portes Cancer Prevention Ctr., Inc. v. Inexco Oil Co., 76 F.R.D. 216, 217 (W.D. La. 1977)).

171 *See, e.g.*, *Bass*, 172 F.2d at 210 ("Rule 55(a) authorizes the clerk to enter a default 'When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules.' This does not require that to escape default the defendant must not only file a sufficient answer to the merits, but must also have a lawyer or be present in court when the case is called for a trial.").

circumstances the case never has been placed at issue."[172] That is, the case is not placed at issue because the defendant did not contest the plaintiff's claims. Simply put, the defendant concedes liability.[173] However, "[i]f the defendant has answered the complaint but fails to appear at trial, issue has been joined, and the court cannot enter a default judgment."[174]

This approach, while possibly less efficient, is more just. And it is in line with judicial reasoning for default judgments in general, expressed over forty years ago: "[A] default judgment must normally be viewed as available only when the adversary process has been halted [by] . . . an essentially unresponsive party."[175] When a defendant affirmatively acts, it has placed the case in issue, and, therefore, the adversary process has not been halted.

Although the adversary process is not technically "halted" if the defendant has affirmatively acted, the plaintiff still should be protected against the defendant's "interminable delay," right?[176] Yes. And a narrow construction of "failed to plead or otherwise defend" does not eliminate this protection. As the Fifth Circuit explained:

> When [defendant] by his attorney filed a denial of the plaintiff's case neither the clerk nor the judge could enter a default against him. The burden of proof was put on the plaintiff in any trial. When neither [defendant] nor his attorney appeared at the trial, no default was generated; the case was not confessed. The *plaintiff might proceed*, but he would have to prove his case.[177]

The Eleventh Circuit explained it, too:

> If the defendant has answered the complaint but fails to appear at trial, issue has been joined, and the court cannot enter a default judgment. However, *the court can proceed with the trial.* If plaintiff proves its case, the court can enter judgment in its favor although the defendant never participated in the trial.[178]

Because the plaintiff can prove its case at trial despite the defendant's absence, the narrow construction of "failed to plead or

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[172] *Solaroll Shade*, 803 F.2d at 1134 (citation omitted).

[173] The Colorado Court of Appeals explains this logic in the converse: "A defendant who has participated throughout the pretrial process and has filed a responsive pleading, placing the case at issue, has not conceded liability." Rombough v. Mitchell, 140 P.3d 202, 204 (Colo. App. 2006) (quoting WRIGHT, MILLER & KANE, *supra* note 12, § 2682, at 18).

[174] *Solaroll Shade*, 803 F.2d at 1134.

[175] H. F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 432 F.2d 689, 691 (D.C. Cir. 1970).

[176] *Id.* ("[A] default judgment must normally be viewed as available only when the adversary process has been halted because of an essentially unresponsive party. In that instance, the diligent party *must be protected* lest he be faced with *interminable delay* and continued uncertainty as to his rights." (emphasis added)).

[177] Bass v. Hoagland, 172 F.2d 205, 210 (5th Cir. 1949) (emphasis added).

[178] *Solaroll Shade*, 803 F.2d at 1134 (emphasis added).

otherwise defend" (i.e., that the defendant cannot suffer default judgment if it has pled or otherwise defended) is preferable because it assures the plaintiff has evidence to support its claim, yet still protects the plaintiff from interminable delay.[179]

But would this lead to absurd results? Perhaps. For example, if a defendant has filed a responsive pleading but does not participate any further, how exactly would the court conduct a trial? Would the plaintiff *alone* be required to select a jury? Would the plaintiff *alone* be required to gather witnesses? And then once the jury and witnesses are present in court, would the plaintiff *alone* call each and every witness to the stand? This does not seem to parallel an umpire's declaring a forfeit even though both teams have showed up to play; this seems more akin to a referee's (yes, changing sports now) forcing a football team to play the second half even though the other team left the stadium at halftime.

The majority of circuits (i.e., the First,[180] Second,[181] Third,[182] Fourth,[183] Eighth,[184] and possibly Ninth[185]) ostensibly do not find the narrow approach to Rule 55(a) persuasive ("ostensibly" because these circuits do not actually address the foregoing logic). Instead, many of these circuits fail to address the minority's rationale, do little Rule 55(a) analysis, and instead rely on circuits that already had interpreted broadly Rule 55(a)'s failure "to plead or otherwise defend" language.[186] Sometimes this type of analysis (i.e., mere reliance on other courts' opinions) is acceptable. But here, not only has this issue split the circuits, the precedent relied upon by the majority is afflicted.[187] Other circuits—like the Fourth and Eighth—neither analyzed Rule 55(a) thoroughly nor even cited other circuits as persuasive authority.[188]

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179 WRIGHT, MILLER & KANE, *supra* note 12, § 2682, at 18 ("Although the Third Circuit has disagreed, the Bass [sic] court's conclusion seems preferable. . . . [I]f the trial proceeds in the absence of the defendant, the court should require plaintiff to present evidence supporting liability, as well as damages, and a judgment should be entered in plaintiff's favor *only if* the evidence supports it." (emphasis added) (footnote omitted)).

180 *See supra* Part II.B.1.

181 *See supra* Part II.B.2.

182 *See supra* Part II.B.3.

183 *See supra* Part II.B.4.

184 *See supra* Part II.B.5.

185 *See supra* Part II.B.6.

186 *See, e.g.*, City of N.Y. v. Mickalis Pawn Shop, L.L.C., 645 F.3d 114, 129–30 (2d Cir. 2011) (relying on the Second Circuit's broad interpretation of Rule 55(a) in Brock v. Unique Racquetball & Health Clubs, Inc., 786 F.2d 61, 64 (2d Cir. 1986), and the Third Circuit's similar interpretation in Hoxworth v. Blinder, Robinson & Co., Inc., 980 F.2d 912, 918 (3d Cir. 1992)); Ringgold Corp. v. Worrall, 880 F.2d 1138, 1141 (9th Cir. 1989) (relying on the Second Circuit's broad interpretation of Rule 55(a) in *Brock*).

187 *See supra* Parts II.B.2–3.

188 *See supra* Parts II.B.4–5.

The majority approach not only suffers from dubious reasoning but also fails to address the underlying intent of Rule 55(a). According to civil procedure experts[189] and some federal circuits,[190] the underlying intent of Rule 55(a) requires default judgment only when the defendant has conceded liability by never contesting the plaintiff's claim. When the defendant has responded to the plaintiff's claim, however, the defendant has *not* conceded liability. The majority approach fails to address this inconsistency.

Despite the minority's better reasoning—both in interpreting the text of Rule 55(a) and in reconciling default under Rule 55(a) with the important principle of deciding cases on the merits instead of by rigid procedural rules—the issue remains whether a plaintiff should be required to go through the heavy burden of preparing for and conducting a trial against a defendant who is no longer present. This Note does not go so far as to say that a plaintiff must always prove its case via trial even though the defendant is no longer available. Would such a requirement more nearly represent the truth behind the plaintiff's claim? Probably. Would such a requirement present the plaintiff unreasonable costs to its time and resources? Again, probably.

Tracking this scenario, then, there might be a case where a plaintiff does not have a valid claim (unbeknownst to the judge, of course) against the defendant, yet nevertheless wins by Rule 55(a) default judgment even though the defendant had already pled or otherwise defended. Perhaps in this case it is not appropriate to require the plaintiff to conduct a full-fledged trial. But if a defendant has indeed satisfied Rule 55(a) by either pleading or otherwise defending, the court should instead provide the plaintiff relief outside of Rule 55(a).

2. The Minority's Narrow Approach to Rule 55(a) Better Reflects the Change in Court Construction of Default Judgments

While procedural rules were at one time rigid and unyielding, court construction of the rules has—to an extent—softened in the interest of justice.[191] "The policy underlying the modernization of federal procedure, namely, the abandonment or relaxation of restrictive rules which prevent the hearing of cases on their merits, is central to this issue."[192] At least one federal court has remained "mindful of this policy in its

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189 *See supra* notes 29–30 and accompanying text.

190 *See supra* Part II.A.

191 WRIGHT, MILLER & KANE, *supra* note 12, § 2681, at 9.

192 H. F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 432 F.2d 689, 691 (D.C. Cir. 1970) (citing Thorpe v. Thorpe, 364 F.2d 692, 694 (D.C. Cir. 1966); Barber v. Turberville, 218 F.2d 34, 36 (D.C. Cir. 1954); Bridoux v. E. Air Lines, Inc., 214 F.2d 207, 210 (D.C. Cir. 1954)).

construction of the Rules in order to afford litigants a *fair opportunity* to have their disputes settled by references to the *merits*."[193]

This strong desire to decide cases on the merits is evidenced not only in judicial opinions like *H. F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*,[194] but also in several procedural mechanisms that are at a court's disposal.[195] For example, the "presumption for resolving disputes on the merits means that the court of appeals usually affords less deference to the decision of a district judge denying relief from a default than to one granting relief."[196] Also, "greater deference is given [to the] trial judge who finds opportunities for not entering a default, or for giving notice by broadly interpreting what constitutes an appearance."[197] Finally, "any doubts usually will be resolved in favor of the defaulting party."[198] As such, if there is any way for a court to provide appropriate relief outside of default judgment, it should do it. In that same vein, instead of entering default judgment under Rule 55, contravening the Rule's text, the court should decide the case either on the merits or by another rule of civil procedure that would allow the court to *properly* enter default judgment.

C. The Minority's Narrow Approach to Rule 55(a) Better Reflects the Federal Rules of Civil Procedure as a Whole

The narrow approach to Rule 55(a) better reflects the Federal Rules of Civil Procedure as a whole based on three observations. First, there are other rules of civil procedure that are more appropriate if the defendant has already pled or otherwise defended. Second, these "other rules" should be used instead of Rule 55(a) because there is a lower burden to show that default under Rule 55(a) is proper and that lower burden ought to be reserved for defendants who make absolutely no effort to defend their case. Third, the arguments made in favor of the broad reading of Rule 55(a) based on other rules of civil procedure are not entirely persuasive.

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193 *Id.* (emphasis added).

194 *Id.*

195 MOORE ET AL., *supra* note 1 ("[M]ost courts traditionally disfavor the entry of a default judgment. This is a reflection of the oft-stated preference for resolving disputes on the merits. Thus, a defaulting party receive [sic] several benefits from the lack of judicial favor of defaults." (footnote omitted) (citation omitted)).

196 *Id.*

197 *Id.* (citation omitted).

198 WRIGHT, MILLER & KANE, *supra* note 12, § 2681, at 10 (citing Davis v. Parkhill-Goodloe Co., 302 F.2d 489 (5th Cir. 1962); Gen. Tel. Corp. v. Gen. Tel. Answering Serv., 277 F.2d 919 (5th Cir. 1960); Tozer v. Charles A. Krause Milling Co., 189 F.2d 242 (3d Cir. 1951); Rasmussen v. W. E. Hutton & Co., 68 F.R.D. 231 (N.D. Ga. 1975); Sec. & Exch. Comm'n v. Vogel, 49 F.R.D. 297 (S.D.N.Y. 1969); Wallace v. De Werd, 47 F.R.D. 4 (D.V.I. 1969); Bavouset v. Shaw's of San Fransisco, 43 F.R.D. 296 (S.D. Tex. 1967)).

1. Rules Other than Rule 55(a) Under Which Entry of Default Judgment Is More Appropriate if the Defendant Has Already Pled

Although Rule 55(a) is one means to enter default judgment against a party, courts have at their disposal other rules of civil procedure that allow for entry of default judgment also.[199] The minority's narrow approach to Rule 55(a) gives deference to these other procedural mechanisms, which plainly provide for entry of default judgment in various appropriate situations or at a judge's discretion under the court's inherent power.[200] Indeed, entry of judgment based on a federal rule other than Rule 55(a) may be more appropriate in certain situations. Rule 37 is an example of this.[201]

Rule 37 allows a court to enter default judgment against a party who fails to comply with a court order.[202] Of course, a party seeking a Rule 37 sanction, such as entry of default against the other party, will not obtain it by mere request alone. Instead, two things must happen before a Rule 37 sanction is entered.[203] First, the party seeking the sanction must obtain a court order directing the other party to act.[204] The court will enter such an order only upon a party's motion to compel, which itself requires certification that the party has "in good faith conferred or attempted to confer" with the other party.[205] Second, the party must violate that order.[206]

One leading expert argues that an "[e]xpansive interpretation of Rule 55(a) undermines [these] carefully drafted sanction limits in Rule 37(b)."[207] That is, obtaining default judgment against the other party under Rule 55(a) relieves the party from being required to satisfy the Rule 37 two-step process mentioned above. *Home Port Rentals, Inc. v. Ruben* illustrates how an expansive reading of Rule 55(a) guts Rule 37(b).[208] As is evident in *Home Port Rentals*, Rule 37, which "has been

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199 *Id.* § 2682, at 18 ("It must be remembered that Rule 55(a) does not represent the only source of authority in the rules for the entry of a default that may lead to judgment.").

200 *See, e.g.*, FED. R. CIV. P. 5(a)(2); FED. R. CIV. P. 16(f)(1); FED. R. CIV. P. 37; FED. R. CIV. P. 41(b); *see also infra* Part IV.C.3.

201 FED. R. CIV. P. 37; *see also* MOORE ET AL., *supra* note 1, § 55.11[2][b][iii] ("Rule 37, which governs discovery sanctions, has been carefully drafted and provides a number of procedural requirements and safeguards that must be observed before a court may impose particularly extreme sanctions, such as a default sanction.").

202 FED. R. CIV. P. 37(b)(2)(A)(vi).

203 FED. R. CIV. P. 37.

204 FED. R. CIV. P. 37(a)(1).

205 *Id.*

206 FED. R. CIV. P. 37(b)(1), (2)(A)(vi).

207 MOORE ET AL., *supra* note 1, § 55.11[2][b][iii] n.35.

208 *Id.* ("[D]efault under FED. R. CIV. P. 55(a) for failure to participate in discovery was proper because '[t]wo separate provisions of the Federal Rules of Civil Procedure provide for the entry of default judgment. . . . The district court did not recite whether it

carefully drafted and provides a number of procedural requirements and safeguards that must be observed before a court may impose particularly extreme sanctions, such as a default sanction," is "rendered ineffective" in cases in which "a court imposes default as a discovery sanction under the more simple Rule 55 procedures."[209]

In addition to Rule 37, Rule 16 allows a court to impose sanctions, including default judgment, on a party who is dilatory or uncooperative with scheduling, conferences, or pretrial orders.[210] Although Rule 16 does not require the same two-step process found in Rule 37, it does require the *court's* issuance of the order, either *sua sponte* or in response to a party's motion.[211]

Finally, "[c]ourts have inherent equitable powers to . . . enter default judgments for . . . abusive litigation practices."[212] If a court finds that neither Rule 37 nor Rule 16 allow for entry of default after a party has pled, it should turn not to Rule 55(a) but, instead, to its inherent power to enter default judgment.

2. Why It Matters Which Rule Is Used to Enter Default Judgment

It is important that a default judgment entered against a party that has pled or otherwise defended arise under not Rule 55(a) but instead under Rule 37, Rule 16, or the court's inherent power to enter a default because Rule 55(a) has a lower procedural burden than these other procedural mechanisms. That is, Rule 55(a) requires the *clerk*—not the judge—to enter a party's default, based on affidavit alone, if that party failed to plead or otherwise defend.[213]

This stands in stark contrast to Rule 37, which requires multiple steps before the entry of default judgment.[214] First, the party must

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was issuing its default judgment pursuant to Rule 37 or Rule 55. . . . Thus, even if we assume that the district court lacked authority in this case to impose default judgment under Rule 37, its judgment nonetheless would be authorized under Rule 55.'" (all but first alteration in original) (quoting Home Port Rentals, Inc. v. Ruben, 957 F.2d 126, 133 (4th Cir. 1992)).

209 *Id.* § 55.11[2][b][iii].

210 FED. R. CIV. P. 16(f)(1).

211 *Id.*

212 TeleVideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 916 (9th Cir. 1987); *see also* Shepherd v. Am. Broad. Cos., 62 F.3d 1469, 1475 (D.C. Cir. 1995) ("The inherent power encompasses the power to sanction attorney or party misconduct, and includes the power to enter a default judgment.").

213 FED. R. CIV. P. 55(a).

214 FED. R. CIV. P. 37. It also stands in stark contrast to Rule 16. FED. R. CIV. P. 16. The ensuing argument that differentiates Rule 55 and Rule 37 also applies to Rule 16. The court's inherent power, unlike Rules 37 and 16, does not have specified procedural safeguards. *Compare* Chambers v. NASCO, Inc., 501 U.S. 32, 44–45, *with* FED. R. CIV. P. 55, *and* FED. R. CIV. P. 37. Because of the lack of specified procedural safeguards, it should be used by the court in rare circumstances. The rarity of the court using its inherent power

obtain a court order directing the other party to act, only after the first party in good faith has attempted to get from the second party what the first party needed without court action.[215] Second, the second party must violate that order.[216] Both of these Rule 37 determinations—whether to grant the original court order and whether the party violated it—are made by the *judge*, not the clerk.[217] This is a higher burden because the judge has discretion to grant or deny the party's motion and discretion to determine whether the party violated the order.

With a Rule 55(a) default, however, the clerk is not allowed discretion. Instead, the clerk—who is not a judge and who may or may not be an attorney—*must* enter the default if a party has failed to plead or otherwise defend.[218] In other words, if the party has never appeared, the clerk must enter default. But, if the party has appeared through a responsive pleading or other defense, should the clerk still make the decision of whether to enter a Rule 55(a) default? If federal judges do not agree on when a party has failed to plead or otherwise defend, is it reasonable to force a clerk to make that judgment? If instead all the clerk must do is determine whether the party has filed *anything* with the court, then the clerk has a bright line test: If the party has filed anything at any time, do not enter Rule 55(a) default. If the party has not filed anything at any time, enter a Rule 55(a) default.

Because default judgment entered against a defendant upsets the status quo by finding the defendant liable when the defendant did not argue the merits of the case, the procedural burden for this default ought to be very heavy. As such, rules with a burden greater than that of Rule 55(a), like those mentioned in the preceding section, ought to be used in Rule 55(a)'s stead. And if no other rule of civil procedure is appropriate, the court ought to use its inherent power.[219]

3. Other Rules of Civil Procedure That One Could Argue Support the Broad Interpretation of Rule 55(a)

One may argue that Rule 55(a) is simply the converse of Rule 41(b).[220] That is, just as Rule 41(b) allows a court to dismiss a plaintiff's case if, among other things, the plaintiff fails to prosecute, Rule 55(a)

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is a safeguard in itself. That is, because courts should not and do not use their inherent power *carte blanche*, courts in the future should not and will not, either.

215 FED. R. CIV. P. 37(a)(1).

216 FED. R. CIV. P. 37(b).

217 *Id.*

218 FED. R. CIV. P. 55(a).

219 Also, because courts use their inherent power only when absolutely necessary, default judgments against a defendant who has pled or otherwise defended will not be so freely entered.

220 FED. R. CIV. P. 41(b).

allows a court to enter default judgment against a defendant if the defendant fails to defend. This argument, while certainly logical, is not entirely compelling.

The argument is not entirely compelling because it does not look at the plaintiff's starting position as compared to the defendant's starting position. In other words, the argument does not account for the plaintiff's being the initiator of the case. It is hard to imagine that the plaintiff, as the initiator, would take the time, energy, and resources to sue the defendant but then fail to prosecute, unless the suit was frivolous to begin with. To be sure, the plaintiff is on the offense in its case. The plaintiff has started the ball rolling; the plaintiff is disrupting the status quo. The plaintiff *did* decide it was worth the time, energy, and resources to sue the defendant and, as such, will very rarely have a legitimate reason to fail to prosecute.

The defendant, however, did not decide to sue. The defendant did not decide it was worth the time, energy, and resources to bring suit. Indeed, the defendant surely would much prefer not to be in the litigation whatsoever. So what is the defendant to do? Well, it could either (1) respond to the suit with a pleading or other defense or (2) decide not to respond at all. If the former, then the defendant has certainly contested the plaintiff's claim of the defendant's liability. If the latter, then the defendant has not contested the claim, and default under Rule 55(a) would be proper.

So it may be just to take a plaintiff's case away from the plaintiff if, as the initiator, the plaintiff gives up on the case and thereby fails to prosecute. But it is not equally just to find a defendant, who at one point contested liability, liable simply because the defendant is no longer available (or at least it is not just to do so under Rule 55(a)). Unlike dismissal of a plaintiff's case, the entry of default against a defendant *does* upset the status quo.[221]

One could also argue that Rule 5(a)(2) supports the broad reading of Rule 55(a). In pertinent part, Rule 5(a)(2) provides that "[n]o service is required on a party who is in default for failing to appear."[222] The argument goes: If Rule 5(a)(2) specifies default "for failing to appear," then it must be possible to default for reasons *other than* failing to appear. Said differently, a party that has already appeared can still default—and this supports a broad reading of default under Rule 55(a).

Again, similar to the argument regarding Rule 41(b), this argument is logical. Nevertheless, it is still not quite right because "appearing"

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[221] *See supra* Part IV.B.1–2 (discussing other Federal Rules of Civil Procedure that can be used by the court as Rule 41(b)'s "complement"). Using Rule 55(a), but ignoring the dictates of its language, makes for bad law and unruly analysis.

[222] FED. R. CIV. P. 5(a)(2).

does not necessarily equal "pleading."[223] Indeed, appearance is much broader than pleading.[224] While every pleading is an appearance, not every appearance is a pleading.

Here is an example: According to some courts, mere "informal acts such as correspondence or telephone calls between counsel can constitute the requisite appearance."[225] Now, if the court clerk enters default against this party, one who has appeared only through his counsel's calling opposing counsel, that entry would be appropriate because the defendant neither pled nor otherwise defended. (Surely, a telephone call between counsel does not constitute pleading.) In this example, then, the narrow interpretation of Rule 55(a) would permit the clerk to enter default against this party even though he "appeared." While this party has appeared, he has not pled.

As this example demonstrates, because "appearance" is much broader than "pleading," the narrow reading of Rule 55(a) remains consistent with the language of Rule 5(a)(2). That is, a party may default for failing to *appear*, or a party may default even after it has *appeared*. But it does not necessarily follow that a party may default after it has *pled*.

CONCLUSION

The plain meaning of Rule 55(a), the (better) case law analyzing Rule 55(a), and the Federal Rules of Civil Procedure as a whole support the narrow interpretation of "failed to plead or otherwise defend" in Rule 55(a). While the broad interpretation of Rule 55(a) is more efficient—more efficient because the Rule 55(a) default threshold is lower than the threshold in other civil procedure rules that allow default—efficiency is not the Federal Rules' only concern. Indeed, Rule 1 provides that the federal rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and

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223 *See* STEVEN BAICKER-MCKEE, WILLIAM M. JANSSEN & JOHN B. CORR, A STUDENT'S GUIDE TO THE FEDERAL RULES OF CIVIL PROCEDURE 1077 (2011) ("A defendant 'appears' in the action by making *some* presentation or submission to the court (*e.g.*, serving a responsive pleading, filing an entry of appearance, serving a Rule 12 motion to dismiss, or having counsel attend a conference on the client's behalf)." (emphasis added) (citing Sun Bank of Ocala v. Pelican Homestead & Sav. Ass'n, 874 F.2d 274, 276 (5th Cir. 1989); Hudson v. North Carolina, 158 F.R.D. 78, 80 (E.D.N.C. 1994); Lutwin v. N.Y.C., 106 F.R.D. 502, 504 n.1 (S.D.N.Y. 1985))).

224 *Id.* ("Some courts have taken an even wider view, ruling that 'appearing' within the meaning of Rule 55(b) is not necessarily limited to a formal event in court." (footnote omitted) (citing New York v. Green, 420 F.3d 99, 105 (2d Cir. 2005); Silverman v. RTV Commc'ns Grp., Inc. 2002 WL 483421, at *3 (S.D.N.Y. 2002))).

225 *Id.*

proceeding."[226] Perhaps the majority approach places too much emphasis on "speedy" and "inexpensive" and not enough on "just."

If it is impossible and impractical to require a plaintiff to conduct a trial by itself (i.e., without a defendant),[227] a narrow and yet workable reading of Rule 55(a) could still require a court to look to other (more appropriate) rules (i.e., rules other than Rule 55(a)) of civil procedure when entering default against a defendant who has already pled. As this Note attempts to show, this narrow reading of Rule 55(a) would better reflect the intent of the rule, better reflect the current court construction of procedural rules, and better reflect the Federal Rules of Civil Procedure as a whole. While this narrow reading may not always allow the players to "play the game," it will at least ensure that the game is played by the (appropriate) *rules*.

Josiah A. Contarino

226 FED. R. CIV. P. 1.

227 As is indicated throughout this Note, however, there are at least some federal and state courts that do believe it possible to require a trial on the merits even if the defendant is nowhere to be found.

COMPLETE OR PARTIAL ACCOMMODATION: AN ANALYSIS OF THE FEDERAL CIRCUIT SPLIT OVER THE DUTY OF THE EMPLOYER TO REASONABLY ACCOMMODATE THE RELIGIOUS BELIEFS OF THE EMPLOYEE

INTRODUCTION

After a Chicago school district teacher quit her job in 2008 because the school district refused to accommodate her request to take time off in order to perform Hajj (a required pilgrimage to Mecca) per her Islamic beliefs, the federal government brought suit against the school district for violation of the Civil Rights Act of 1964.[1] Upon reaching a settlement between the school district and the teacher, the Department of Justice lauded the promises of the school district to ensure accommodation of religious beliefs among its employees.[2] Thomas Perez, Assistant Attorney General for the Civil Rights Division, asserted, "Employees should not have to choose between practicing their religion and their jobs."[3] This sentiment follows from Title VII of the Civil Rights Act,[4] which, along with its protections against racial, sexual, and national origin discrimination, shelters an employee's religious beliefs within the workplace.[5]

Americans value their freedom of religion, and this value is codified in the protections afforded by Title VII.[6] Americans also believe the inclusion of various religious beliefs within the workplace is actually beneficial to society.[7] Professor Keith S. Blair writes,

> Just as society benefits from the inclusion of diverse voices and thoughts, the workplace also benefits from diversity. That was recognized by the passage of Title VII. Although the main impetus of the Civil Rights Act was to stop discrimination, part of the push came

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1 Complaint at 1–3, United States v. Bd. of Educ., No. 1:10-cv-07900 (N.D. Ill. Dec. 13, 2010).

2 Press Release, Dep't of Justice, Civil Rights Div., Justice Department Settles Religious Discrimination Lawsuit Against Berkeley School District in Illinois (Oct. 13, 2011), *available at* http://www.justice.gov/opa/pr/2011/October/11-crt-1362.

3 *Id.*

4 *See* Civil Rights Act of 1964 §§ 701–716, 42 U.S.C. § 2000e-2 (2006).

5 *Id.* § 2000e-2(a).

6 *Id.* § 2000e; Keith S. Blair, *Better Disabled than Devout? Why Title VII Has Failed to Provide Adequate Accommodations Against Workplace Religious Discrimination*, 63 ARK. L. REV. 515, 516 (2010).

7 Blair, *supra* note 6, at 517.

> from people's realization that the inclusion of all members of society in the workplace benefits all society.[8]

Thus, the Title VII prohibition on religious discrimination deters certain discriminatory behavior while also fostering a particular societal benefit.

Recently, religious discrimination claims have been on a significant rise.[9] From 1997 to 2010, the number of complaints registered with the U.S. Equal Employment Opportunity Commission has risen from 1709 complaints to 3790 complaints.[10] Between 1997 and 2009, these claims rose eighty-two percent while race or color discrimination claims rose only sixteen percent and sex discrimination claims only fifteen percent.[11] Raymond F. Gregory writes that this rise in religious discrimination claims is due to several primary reasons: "(1) the desire of workers to practice and apply their religious beliefs at work, (2) the 'spread the faith' rationale of evangelical Christians, (3) the aging of the workforce, (4) the growth of a more diversified workforce, and (5) the expanded public role of religious experience."[12]

Current law against religious discrimination in the workplace bars discrimination on the basis of religion and requires that an employer reasonably accommodate the religious beliefs of an employee unless doing so would create an undue hardship on the employer.[13]

Recently, a division has arisen among the federal circuits as to what constitutes an appropriate accommodation.[14] There are currently two different tests for determining whether a reasonable accommodation has been offered by an employer.[15] As referred to in this Note, these two tests are the "complete accommodation test" and the "partial accommodation test."[16] The complete accommodation test ensures that the accommodation totally eliminates the conflict between the employee's religious beliefs and the employment requirements.[17] The partial accommodation test does not necessarily eliminate this conflict.[18] Rather,

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8 *Id.* at 517–18.

9 RAYMOND F. GREGORY, ENCOUNTERING RELIGION IN THE WORKPLACE: THE LEGAL RIGHTS AND RESPONSIBILITIES OF WORKERS AND EMPLOYERS 28 (2011).

10 *Religion-Based Charges: FY 1997–FY 2011*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/statistics/enforcement/religion.cfm (last visited Oct. 23, 2012).

11 Blair, *supra* note 6, at 518.

12 GREGORY, *supra* note 9.

13 Civil Rights Act of 1964 §§ 703(a), 709(c), 42 U.S.C. §§ 2000e-2(a), -8(c) (2006).

14 *See infra* Part II.

15 *See infra* Part II.A–B.

16 *See infra* Part II.

17 *See infra* Part II.A.

18 *See infra* Part II.B.

the test only demands that the accommodation be "reasonable" in light of the circumstances, even if this requires a compromise of the employee's religious beliefs.[19]

Many of the federal circuit courts hold to the complete accommodation test.[20] But in 2008, the Fourth and Eighth Circuits both embraced the partial accommodation test.[21] These two decisions mark a definitive split among the circuits over the protection afforded to employees to exercise their religious beliefs within the workplace.

Part I of this Note briefly explores the history of Title VII and the specific accommodation requirement found in § 701(j) of the Civil Rights Act. It also provides a synopsis of the only two Supreme Court decisions that have interpreted § 701(j).

Part II examines the circuit split over the complete and partial accommodation tests.[22] It summarizes the key cases in five of the United States Courts of Appeals that hold to the complete accommodation test. Then, it studies the Fourth and Eighth Circuits' decisions that adopted the partial accommodation test. It provides an account of the facts, as well as an overview of the arguments made in both cases.

Part III looks at the problems with the partial accommodation test. First, the test is flawed in its formation according to the legislative intent behind and statutory construction of § 701(j), as well as according to the precedent provided by the Supreme Court. Second, the test is unlawful in its implications by allowing the courts to unconstitutionally decide on the reasonableness of an employee's religious beliefs.

Finally, Part IV suggests that the Supreme Court should clarify which accommodation test (complete or partial) is correct in light of § 701(j). It provides several reasons why the Supreme Court should hear this issue, and it also suggests how the Court should decide.

I. HISTORY OF TITLE VII AND SUBSEQUENT SUPREME COURT DECISIONS

In 1963, President John F. Kennedy proposed legislation to prohibit discrimination in voting rights, schools, workplaces, and places of public accommodation.[23] The next year, Congress passed the Civil Rights Act of

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19 *See infra* Part II.B.

20 *See infra* Part II.A.

21 *See infra* Part II.B.

22 See *infra* note 68 and accompanying text for information regarding the status of these tests in the remaining circuits.

23 GREGORY, *supra* note 9, at 27.

1964.[24] Title VII of the Act provides protection for employees against discrimination by their employers.[25] The Act reads:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[26]

While the original wording of this portion of the Act clearly proscribed discrimination by an employer against an employee, it failed to give any instruction as to the employer's duty to accommodate the employee's religious beliefs.[27] Thus, an employer's only detailed duty under the original Act was to refrain from discriminating against an employee.[28]

The Act also established the U.S. Equal Employment Opportunity Commission ("EEOC").[29] The Act charged this administrative body with the responsibility to "administer the title and process claims made pursuant to its provisions."[30] In 1967 and in 1968, the EEOC produced two different sets of guidelines interpreting the duty of an employer to refrain from discriminating against an employee based on the employee's religious beliefs.[31] These two differing sets of guidelines demonstrate the ambiguity created by the Act regarding an employer's duty to accommodate the religious beliefs of an employee.[32]

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[24] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C. (2006)).

[25] *Id.* § 703(a), 78 Stat. at 255.

[26] *Id.*

[27] Janell M. Kurtz & Bradley J. Sleeper, *Religion vs. Work: Can Accommodation Fail to Accommodate?*, 23 MIDWEST L.J. 75, 77 (2009).

[28] § 703(a), 78 Stat. at 255.

[29] *Id.* § 705(a), 78 Stat. at 258.

[30] GREGORY, *supra* note 9.

[31] *Compare* 29 C.F.R. § 1605.1(a)(2) (1967) (requiring the employer to provide a reasonable accommodation for the religious practices of an employee unless doing so would create a "serious inconvenience to the conduct of the business"), *with* 29 C.F.R. § 1605.1(b) (1968) (requiring the employer to provide a reasonable accommodation for the religious practices of an employee so long as doing so would not create an "undue hardship" for the employer).

[32] Giles Roblyer, Case Note, *Half-Answered Prayers:* Sturgill v. United Parcel Service, 77 U. CIN. L. REV. 1683, 1685 (2009).

In 1970, the conflicting regulations came to a head in the case of *Dewey v. Reynolds Metals Co.*[33] In *Dewey*, the United States Court of Appeals for the Sixth Circuit held that the termination of an employee who refused to show up for his scheduled work shift on a Sunday did not violate Title VII.[34] The employee decided that working on Sundays was wrong, based on his religious beliefs.[35] He also believed that it was wrong to ask another employee to switch his Sunday shifts with him.[36] The court held, however, that under either set of "inconsistent regulations,"[37] the employer still acted within his rights under Title VII.[38] The Supreme Court granted certiorari on the employee's petition, but, because the Court was equally divided, it failed to clarify the issue in its judgment that affirmed the Sixth Circuit's decision.[39]

Seeking to clarify the issue left unsettled by *Dewey* as to what type of duty an employer had to accommodate an employee's religious beliefs,[40] Congress amended Title VII in 1972.[41] This amendment added § 701(j) to the Civil Rights Act and defined what constitutes "religion" for discriminatory purposes: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[42] Thus, the Title VII standard for determining whether an employer has discriminated against an employee based on the employee's religious beliefs hinges on whether the employer has provided a reasonable accommodation for the employee's religious "observance or practice."[43] If an employer does not provide a reasonable accommodation, its only defense against liability for discrimination is by proving that providing a reasonable accommodation would create an "undue hardship" on its business.[44]

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33 *See* 429 F.2d 324, 330 (6th Cir. 1970).

34 *Id.* at 328–30.

35 *Id.* at 329.

36 *Id.*

37 *Id.* at 330.

38 *Id.* at 330–31.

39 Dewey v. Reynolds Metals Co., 402 U.S. 689, 689 (1971) (per curiam) (affirming the decision of the lower court without opinion).

40 118 CONG. REC. 705, 705–06 (1972) (statement of Sen. Jennings Randolph).

41 Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. § 2000e(j) (2006)).

42 *Id.* sec. 2, § 701, 86 Stat. at 103.

43 *Id.*

44 *Id.*

In 1977, the Supreme Court affirmed this standard in its decision in *Trans World Airlines, Inc. v. Hardison*.[45] Larry Hardison, an employee of Trans World Airlines, Inc. ("TWA"), became a member of the Worldwide Church of God that taught an individual must observe the Sabbath by refraining from working from sunset on Friday until sunset on Saturday.[46] After rejecting all of Hardison's proposed accommodations, TWA eventually terminated Hardison when he refused to report to work on account of his religious beliefs.[47] The accommodations examined by the Court would have required TWA to shift another employee or supervisor to fill Hardison's role or to renege on its collective-bargaining contract seniority provisions by making someone with more seniority take Hardison's Saturday shift.[48] The Court held that making another employee cover his shift would have either caused TWA's business operations to suffer or forced TWA to pay premium overtime to another employee.[49] The Court concluded that both of these accommodations would have created an undue hardship on TWA.[50] Likewise, an accommodation that would have forced TWA to violate the seniority provisions of the union contract would also have created an undue hardship.[51] Finally, the Court discussed the standard for what constitutes an undue hardship, holding that an accommodation is an undue hardship when it requires the employer "to bear more than a *de minimis* cost in order" to accommodate the employee's religious beliefs.[52]

The Supreme Court revisited the issue of the extent of an employer's duty to accommodate in *Ansonia Board of Education v. Philbrook*.[53] Ronald Philbrook, a teacher for the Ansonia Board of Education, held religious beliefs requiring him to observe certain religious holy days.[54] But the school board had a policy that only allowed an employee to take off a certain amount of paid days for religious reasons.[55] Philbrook brought suit under Title VII after the school board rejected two of his proposed accommodations that would have allowed him to take time off work to observe his holy days without forgoing pay

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45 432 U.S. 63, 75 (1977).

46 *Id.* at 66–67.

47 *Id.* at 68–69.

48 *Id.* at 66–68.

49 *Id.* at 76–77.

50 *Id.* at 77.

51 *Id.* at 76–77. The Court stated that an employer's seniority system is not unlawful "even if the system has some discriminatory consequences." *Id.* at 82.

52 *Id.* at 84.

53 *See* 479 U.S. 60, 66 (1986).

54 *Id.* at 62.

55 *Id.* at 63–64.

for any additional days taken off for religious reasons.[56] The Court, however, held that the school board's policy of allowing Philbrook to take days off of work for religious observance (albeit without pay) constituted a reasonable accommodation.[57] The Court stated, "The provision of unpaid leave eliminates the conflict between employment requirements and religious practices by allowing the individual to observe fully religious holy days and requires him only to give up compensation for a day that he did not in fact work."[58] The Court also held that when there are multiple reasonable accommodations proposed by the employer and the employee, the employer is under no obligation to pick the one that is most favorable to the employee.[59] Rather, the employer may choose any of the proposals so long as it meets the criteria of reasonably accommodating the employee's religious beliefs.[60]

Hardison and *Philbrook* comprise the only two significant Supreme Court cases on the issue of an employer's duty to reasonably accommodate an employee's religious beliefs as required by § 701(j).[61] As discussed below, there is a split among the federal circuit courts on the issue of defining what constitutes an accommodation. While both sets of circuits rely on the precedent from *Hardison* and *Philbrook*, one set argues that an employer's accommodation must *completely* eliminate any conflict between the employee's religious beliefs and the employment requirements,[62] and the other set argues that the accommodation need only *partially* resolve the conflict depending on the reasonableness of the circumstances.[63]

II. THE CIRCUIT SPLIT

Since the Supreme Court's decisions in *Hardison* and *Philbrook*, the Second, Third, Sixth, Seventh, and Ninth Circuits have adopted the complete accommodation test.[64] But in the 2008 cases of *EEOC v. Firestone Fibers & Textiles Co.*[65] and *Sturgill v. United Parcel Service,*

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56 *Id.* at 64–65.

57 *Id.* at 70.

58 *Id.*

59 *Id.* at 68.

60 *Id.*

61 Roblyer, *supra* note 32, at 1687.

62 *See infra* Part II.A.

63 *See infra* Part II.B.

64 Baker v. Home Depot, 445 F.3d 541, 548 (2d Cir. 2006); Shelton v. Univ. of Med. & Dentistry of N.J., 223 F.3d 220, 225–26 (3d Cir. 2000); EEOC v. Ilona of Hungary, Inc., 108 F.3d 1569, 1576 (7th Cir. 1996); Opuku-Boateng v. California, 95 F.3d 1461, 1467 (9th Cir. 1996); EEOC v. Univ. of Detroit, 904 F.2d 331, 335 (6th Cir. 1990).

65 515 F.3d 307 (4th Cir. 2008).

Inc.,[66] the Fourth and Eighth Circuits, respectively, created a distinct split from their sister circuits by adopting the partial accommodation test that maintains that an accommodation for an employee's religious belief need only partially accommodate the belief so long as the accommodation is reasonable.[67] The remaining circuits have either not expressly adopted one of these tests or have provided conflicting decisions as to which approach they follow.[68] A brief overview of the various opinions among the circuits is helpful in understanding these two different tests.

A. Circuits Holding to the Complete Accommodation Test

In *Baker v. Home Depot*, the Second Circuit held that Home Depot's proposed solution to a conflict between its employee Bradley Baker's religious beliefs and his job requirements failed to accommodate the

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[66] 512 F.3d 1024 (8th Cir. 2008).

[67] *Firestone Fibers & Textiles Co.*, 515 F.3d at 313; *Sturgill*, 512 F.3d at 1033.

[68] The Tenth, D.C., and Federal Circuits have not adopted the complete accommodation test or partial accommodation test in any of their decisions. The First Circuit recently decided the case of *Sánchez-Rodríguez v. AT & T Mobility Puerto Rico, Inc.*, in which it provided a rather unclear statement of the appropriate test to use. 673 F.3d 1, 12 (1st Cir. 2012). While the court adopted the totality of the circumstances test used by the Eighth Circuit, *see infra* note 112 and accompanying text, the court only examined accommodations that completely resolved the conflict between the employee's religious beliefs and the employment requirements. *Sánchez-Rodríguez*, 673 F.3d at 5, 12.

The Fifth Circuit has produced two conflicting decisions. In *EEOC v. Universal Manufacturing Corp.*, the court held that a solution by the employer that eliminated only one of the two conflicts between the employee's religious beliefs and the employment requirements did not constitute a reasonable accommodation. 914 F.2d 71, 73 (5th Cir. 1990). However, in a 2001 decision that positively references the court's opinion in *Universal Manufacturing Corp.*, the court held that the solution offered by a medical center to one of its employees who had religious convictions against offering advice concerning homosexual sexual relationships was an accommodation when the solution "reduced" the "likelihood of encountering further conflicts." Bruff v. N. Miss. Health Servs., Inc., 244 F.3d 495, 497, 501 (5th Cir. 2001). Thus, it is unclear as to whether the Fifth Circuit still holds to the complete accommodation test that it seemed to embrace in *Universal Manufacturing Corp.*

Similarly, it is unclear which test the Eleventh Circuit follows. In a 2007 decision, the court stated that the standard for a reasonable accommodation is that it must "'eliminate[] the conflict between employment requirements and religious practices.'" Morrissette-Brown v. Mobile Infirmary Med. Ctr., 506 F.3d 1317, 1322 (11th Cir. 2007) (quoting Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 70 (1986)). However, the court held that allowing an employee to *attempt* to swap shifts with other employees on days that she could not work due to her religious beliefs sufficed as an accommodation. *Id.* at 1323. Although the court uses the language of the complete accommodation test, it is unclear whether it fully embraces the test. While the solution provided to the employee *could* have eliminated the conflict between her religious beliefs and her work requirements, the nature of swapping her shifts makes uncertain whether the conflict *would* necessarily be eliminated.

totality of Baker's religious beliefs when it addressed only one of his two religious concerns.[69] Baker's religious beliefs dictated that he must attend a church service on Sundays and that he must not work at all during the day on Sundays.[70] Home Depot offered to allow Baker to keep his job if he would work on Sunday afternoons or evenings so he could still attend his church service on Sunday mornings.[71] The court, however, reasoned that "the shift change offered to Baker was no accommodation at all because, although it would allow him to attend morning church services, it would not permit him to observe his religious requirement to abstain from work *totally* on Sundays."[72] Thus, the court found that Home Depot had not provided an accommodation, and it held for Baker.[73]

The Third Circuit also affirmed the rule that an accommodation must completely eliminate the conflict between the employee's religious beliefs and the employment requirements in the case of *Shelton v. University of Medicine & Dentistry of New Jersey*.[74] The hospital terminated Yvonne Shelton, a nurse, from her employment when she refused to accept the hospital's attempt to accommodate her religious beliefs.[75] When Shelton, because of her religious beliefs, failed to perform required tasks involving abortions, the hospital, instead of terminating her, offered her a position in another section of the hospital.[76] Shelton refused to accept the position based on her unconfirmed belief that her new job would require her to allow "extremely compromised" infants to die.[77] While Shelton argued that the accommodation must "resolve[] the religious conflict," the court held for the hospital because Shelton failed to prove that "she would face a religious conflict" in the new section.[78] Though the court does not expressly adopt the complete accommodation test, it implies that it is the appropriate test in its analysis of Shelton's claim.[79]

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69 *Baker*, 445 F.3d at 547–48.

70 *Id.* at 543–44.

71 *Id.* at 545.

72 *Id.* at 547–48.

73 *Id.*

74 223 F.3d 220, 226 (3d Cir. 2000).

75 *Id.* at 222–24.

76 *Id.* at 222–23.

77 *Id.* at 223.

78 *Id.* at 226.

79 *See id.* ("In sum, Shelton has not established she would face a religious conflict in the Newborn ICU. The Hospital's offer of a lateral transfer to that unit thus constituted a reasonable accommodation.").

In *EEOC v. University of Detroit*, the Sixth Circuit held for an employee whose employer did not offer a complete accommodation for his religious beliefs.[80] Part of the terms of his employment with the University of Detroit required Robert Roesser to either join a professors union or pay the union an amount equal to union dues.[81] While Roesser initially paid the union, he stopped doing so when he discovered that the union gave part of the money to organizations that campaigned for abortions, contrary to his religious beliefs that he neither support abortions nor associate with such activity.[82] The only solution provided by the union and the employer was that Roesser reduce his payments to the union by the percentage of the money that went to politics.[83] The court held that this reduced-fee proposal did not constitute an accommodation because it failed to resolve the issues between all of Roesser's religious beliefs and employment conflicts.[84] While the proposal may have solved the conflict regarding supporting abortions through union fees, it did not truly accommodate his religious beliefs because it failed to provide a solution that would also not require association with the organizations promoting abortion rights.[85]

In *EEOC v. Ilona of Hungary, Inc.*, the EEOC sued on behalf of two employees, Lyudmila Tomilina and Alina Glukhovsky, whose employer, Ilona of Hungary, Inc., terminated them after they failed to report to work so that they could observe Yom Kippur according to their religious beliefs.[86] The employer's only attempt to resolve the issue had been to offer the employees to take off on another day.[87] The Seventh Circuit held that such an accommodation was not reasonable because "it [did] not eliminate the conflict between the employment requirement and the religious practice."[88]

In *Opuku-Boateng v. California*, the Ninth Circuit adopted the theory that the accommodation must completely eliminate the conflict between the employee's religious beliefs and the employment requirements.[89] Kwasi Opuku-Boateng was a member of the Seventh-day Adventist Church whose religious beliefs forbade him from working from

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80 904 F.2d 331, 335 (6th Cir. 1990).

81 *Id.* at 332.

82 *Id.* at 332–33.

83 *Id.* at 333.

84 *Id.* at 334–35.

85 *Id.* at 334.

86 108 F.3d 1569, 1572 (7th Cir. 1996).

87 *Id.* at 1576.

88 *Id.*

89 95 F.3d 1461, 1467 (9th Cir. 1996).

sunset on Friday to sunset on Saturday.[90] When the state took a state department position appointment away from him because of his refusal to work during that time, Opuku-Boateng brought suit against the state employer.[91] In ruling for Opuku-Boateng, the court held that "[w]here the negotiations do not produce a proposal by the employer that would eliminate the religious conflict, the employer must either accept the employee's proposal or demonstrate that it would cause undue hardship were it to do so."[92]

These five cases represent the main consensus among the federal circuit courts regarding an employer's duty to completely accommodate the religious beliefs of an employee. But as described below, the recent 2008 cases decided by the Fourth and Eighth Circuits have created a clear split from the traditional approach adopted by these five circuits.

B. Circuits Holding to the Partial Accommodation Test

In *EEOC v. Firestone Fibers & Textiles Co.*, the Fourth Circuit held that Firestone's partial accommodation to an employee's religious beliefs satisfied Firestone's obligation under Title VII.[93] The employee, David Wise, was a member of the Living Church of God, and his religious beliefs prohibited him from working from sundown on Friday until sundown on Saturday, as well as on certain religious holidays.[94] But Firestone's work schedule would not permit Wise to permanently schedule off on those days.[95] Firestone, though, did allow an employee to have vacation days, floating holidays, and a limited number of days of unpaid leave, as well as allow an employee to make a limited number of shift swaps with other employees.[96] When Wise used up all of his yearly vacation days, floating holidays, and unpaid leave days, he refused to report to work during a particular religious holiday.[97] Firestone subsequently fired him from his employment.[98] The Fourth Circuit affirmed the district court's decision that Firestone had reasonably accommodated Wise's religious beliefs by allowing Wise to take off as many hours as he already had.[99]

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90 *Id.* at 1464.

91 *Id.* at 1466–67.

92 *Id.* at 1467, 1475 (citing EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 615 (9th Cir. 1988)).

93 515 F.3d 307, 319 (4th Cir. 2008).

94 *Id.* at 309.

95 *Id.* at 310.

96 *Id.*

97 *Id.* at 311.

98 *Id.*

99 *Id.* at 319.

In reaching its decision, the Fourth Circuit disagreed with the EEOC and Wise's argument that the employer's accommodation must "eliminate[] the conflict between the religious practice and the work requirement."[100] Instead, the court held that an employer need only give a "reasonable, though not necessarily a total, accommodation."[101] The court produced several arguments to support this interpretation of accommodation. First, the court made a textual argument based on the observation that the crafters of the legislation placed the word "reasonably" as a modifier to "accommodate" in the language of § 701(j) instead of using other qualifiers such as "totally" or "completely."[102] Second, the court looked at the Supreme Court's prior decision in *Hardison*.[103] Noting that the Supreme Court struggled to "locate the degree of accommodation required" under Title VII, the Fourth Circuit interpreted the Court's decision to require only reasonable accommodation versus total accommodation.[104]

Third, the court compared § 701(j)'s accommodation requirement to the Supreme Court's interpretation[105] of the similar requirement under the Americans with Disabilities Act ("ADA"), calling for "'reasonable accommodation' absent 'undue hardship'".[106] Relying on the Supreme Court's determination that "'reasonable' in the disability context incorporates considerations other than those involving the effectiveness of the accommodation as it relates to the employee's needs," the court argued that to "'reasonably accommodate' in the religious context incorporates more than just whether the conflict between the employee's beliefs and the employer's work requirements have been eliminated."[107] Thus, based on these reasons, the Fourth Circuit held that a partial accommodation by an employer to an employee's religious beliefs satisfies § 701(j) so long as the accommodation is reasonable.

In *Sturgill v. United Parcel Service, Inc.*, the Eighth Circuit examined the validity of a trial court jury instruction that stated an

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[100] *Id.* at 313 (internal quotation marks omitted).

[101] *Id.* at 315.

[102] *Id.* at 313 ("If Congress had wanted to require employers to provide complete accommodation absent undue hardship, it could easily have done so. For instance, Congress could have used the words 'totally' or 'completely,' instead of 'reasonably.' It even could have left out any qualifying adjective at all. Rather, Congress included the term reasonably, expressly declaring that an employer's obligation is to 'reasonably accommodate' absent undue hardship—not to totally do so.").

[103] *Id.* at 313.

[104] *Id.* at 313–14.

[105] *Id.* at 314.

[106] *Id.*

[107] *Id.*

employer's "accommodation is reasonable if it *eliminates* the conflict between [the employee's] religious beliefs and [the employer's] work requirements."[108] Todd Sturgill, a package car driver for United Parcel Service, Inc. ("UPS"), became a member of the Seventh-day Adventist Church and, because of his new religious beliefs, was unable to work from sundown on Friday to sundown on Saturday.[109] When UPS terminated Sturgill for refusing to deliver all of his packages one Friday evening because he could not do so before sundown, Sturgill sued UPS under Title VII for failing to provide him with an accommodation.[110] The Eighth Circuit held that the trial court's jury instruction that a reasonable accommodation must entirely eliminate the conflict between the employee's religious beliefs and the employment requirements was in error.[111] Instead of affirming the complete accommodation test, the court stated, "What is reasonable depends on the totality of the circumstances and therefore might, or might not, require elimination of a particular, fact-specific conflict."[112]

The court provided two different basis for its particular interpretation of accommodation. First, the court looked at the Supreme Court's decision in *Philbrook*.[113] The Eighth Circuit interpreted the Supreme Court's reasoning as holding that while an accommodation eliminating the conflict is reasonable, it does *not* follow that an accommodation *must* eliminate the conflict in order to be reasonable.[114] Just as *Philbrook* held that employees cannot always get their preferred accommodations because such a practice would frustrate the policy of encouraging "bilateral cooperation" between the employer and the employee, so also requiring that an accommodation always eliminate the conflict would frustrate this bilateral cooperation.[115]

Second, the Eighth Circuit relied on its own previous decisions and decisions from other circuits that it believed supported its interpretation of accommodation.[116] Thus, based on its analysis of *Philbrook* and other supportive precedent, the court stated,

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[108] 512 F.3d 1024, 1030 (8th Cir. 2008).

[109] *Id.* at 1027–28.

[110] *Id.* at 1027, 1029.

[111] *Id.* at 1030, 1033.

[112] *Id.* at 1030.

[113] *Id.* at 1030–31.

[114] *Id.* at 1031.

[115] *Id.*

[116] *Id.* at 1031–32. The Eighth Circuit makes a distinctly different analysis of the Third Circuit's reasoning in *Shelton v. University of Medicine & Dentistry of New Jersey*, 223 F.3d 220, 226 (3d Cir. 2000), than the analysis in this Note. *Compare Sturgill*, 512

> Bilateral cooperation under Title VII requires employers to make serious efforts to accommodate a conflict between work demands and an employee's sincere religious beliefs. But it also requires accommodation by the employee, and a reasonable jury may find in many circumstances that the employee must either compromise a religious observance or practice, or accept a less desirable job or less favorable working conditions.[117]

For these reasons, the Eighth Circuit held that the jury instruction requiring a complete accommodation of Sturgill's religious beliefs absent undue hardship was erroneous.[118]

The Fourth Circuit's decision in *Firestone* and the Eighth Circuit's decision in *Sturgill* represent a distinct rift between them and several other sister circuits in their interpretation of § 701(j)'s requirement that an employer reasonably accommodate the religious beliefs of an employee. Instead of hinging the employer's accommodation solely on whether it satisfies the employee's religious beliefs or concerns, the Fourth and Eighth Circuits have instituted a new test that may require employees to compromise their religious beliefs in order to keep their jobs if the employer and, ultimately, the court decide that the proposed accommodation is reasonable. In determining what is reasonable under this new test, it is necessary to look at *both* the religious beliefs of the employee *and* the needs of the employer.

III. PROBLEMS WITH THE PARTIAL ACCOMMODATION TEST

The test conceived by the Fourth and Eighth Circuits for determining what constitutes a reasonable accommodation creates two types of problems. The first problem regards the soundness of the formation of the new test. This problem questions, "Did the Fourth and Eighth Circuits properly extrapolate this test from Title VII and the Supreme Court's decisions in *Hardison* and *Philbrook*?" The second problem regards the effect of this test. It queries, "Are the implications of applying the partial accommodation test lawful?"

The answer to the questions posed by both of these problems is "no." First, the formation of the partial accommodation test is unsound because it is inconsistent with the Supreme Court's opinions in *Hardison* and *Philbrook*, the intent of the parties and the Court in *Philbrook*, and the legislative intent behind and statutory construction of § 701(j)'s definition of religion requiring reasonable accommodation absent undue

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F.3d at 1031, *with supra* note 68. Likewise, the Eighth Circuit relied on the unclear reasoning of the Fifth Circuit. *Sturgill*, 512 F.3d at 1031–32. *But see supra* note 68.

[117] *Sturgill*, 512 F.3d at 1033.

[118] *Id.*

hardship.[119] Second, the effect of applying this test is incompatible with the Supreme Court's decision in *United States v. Ballard*,[120] and it allows the courts to wander into a field proscribed by the Constitution's protection against the establishment of religion.[121]

A. Problems in Formation

1. Inconsistency with the Supreme Court's Opinions and the Intent in *Hardison* and *Philbrook*

Both the Fourth Circuit and the Eighth Circuit looked at the Supreme Court's decisions in *Hardison* and *Philbrook* in creating their partial accommodation tests. While the Fourth Circuit relied mainly on *Hardison* in its analysis in *Firestone*,[122] the Eighth Circuit relied on the *Philbrook* decision in *Sturgill*.[123] But both of these Supreme Court decisions support the complete accommodation test and not the partial accommodation test.

In *Hardison*, it is important to note that nowhere in its opinion does the Supreme Court say that an accommodation can be anything less than complete.[124] While the Fourth Circuit latches on to the fact that the Supreme Court says that it has "no guidance for determining the degree of accommodation that is required of an employer,"[125] this statement is a mere *inference* from which the Fourth Circuit builds its conclusory determination that "the degree of accommodation . . . [is] one of reasonable, not total, accommodation."[126] Not only does the Fourth Circuit rely on this inference, but the inference is *unsupported*. By reading on in the Supreme Court's opinion in *Hardison*, it seems more likely that the Court is pondering not how much accommodation should be given but, rather, the interplay between an employer's duty to reasonably accommodate and the undue-hardship clause.[127] The Court looks at the accommodations offered by the employer (all of which are total accommodations) and holds that these accommodations would create an undue hardship on the employer.[128] Thus, *Hardison* never

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[119] *See infra* Part III.A.

[120] 322 U.S. 78 (1944).

[121] *See* U.S. CONST. amend. I; *infra* Part III.B.

[122] EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 313–14 (4th Cir. 2008).

[123] *See supra* note 113 and accompanying text.

[124] *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

[125] *Firestone*, 515 F.3d at 313 (quoting *Hardison*, 432 U.S. at 74).

[126] *Id.* at 313–14.

[127] *See Hardison*, 432 U.S. at 75–77.

[128] *Id.* at 76–77. The three accommodations suggested by the employee were (1) to permit the employee to work a four-day week, (2) to fill the employee's shift with another

expressly supports a partial accommodation test. Rather, its analysis and discussion of the proposed accommodations in that case seem to support a test calling for complete accommodation.

If the Supreme Court's approval of the complete accommodation test is unclear in its decision in *Hardison*, it is much more evident in the *Philbrook* decision. Before delving into an analysis of the Court's opinion in this case, it is helpful to make two general observations. First, just as in *Hardison*, nowhere in the Supreme Court's opinion in *Philbrook* does the Court ever expressly support a partial accommodation test.[129] Second, the only accommodation discussed in *Philbrook* was a complete accommodation.[130]

While the Eighth Circuit tries to infer from the Supreme Court's discussion of the policy of encouraging "'bilateral cooperation'" between the employer and the employee that the duty to accommodate may sometimes require employees to compromise their religious beliefs,[131] such an extrapolation is contrary to the Supreme Court's opinion in *Philbrook*.[132] After its discussion of the policy of bilateral cooperation, the Supreme Court addresses whether the employer's policy is a reasonable accommodation.[133] The Supreme Court held that the accommodation "eliminate[d] the conflict between employment requirements and religious practices."[134] The Court held this accommodation also to be "a reasonable one."[135] This language suggests that there was an accommodation provided by the employer because the solution eliminated the conflict between the employee's religious beliefs and the employment requirements. Not only did the employer provide an accommodation, but the accommodation was reasonable. This appears to be the standard. Such a reading fails to support the Eighth Circuit's theory that the elimination of the conflict between the employee's religious beliefs and the employment requirements is not a prerequisite to an accommodation being reasonable.[136]

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employee, or (3) to swap the employee's shift for another's employee's shift or just for Sabbath days. *Id.* at 76.

[129] *See* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986).

[130] *Id.* at 70. The school board allowed Philbrook to take off of work for the remainder of the religious holidays not covered under his contract, albeit without pay. *Id.* This accommodation constitutes a complete accommodation because it allowed Philbrook to observe his religious beliefs while still letting him keep his employment.

[131] Sturgill v. United Parcel Serv., F.3d 1024, 1031 512 (8th Cir. 2008) (quoting *Philbrook*, 479 U.S. at 69).

[132] *Philbrook*, 479 U.S. at 70.

[133] *Id.* at 69–70.

[134] *Id.* at 70.

[135] *Id.*

[136] *Sturgill*, 512 F.3d at 1031.

While the understanding of the parties in a case as to a particular issue is not authoritative in case law, it can provide insight into interpreting what a court meant in its decision. Thus, it is helpful to look at the briefs and oral arguments of both parties in *Philbrook* to determine what constitutes a reasonable accommodation.[137] In their briefs, none of the parties argued for a test resembling the partial accommodation test created by the Fourth and Eighth Circuits.[138] In fact, the petitioner school board (the employer) stated that its solution to the problem posed by the employee's religious belief "does not hamper him in the exercise of his religious beliefs" and, thus, "fully discharges the [employer's] obligation to accommodate under Title VII."[139] Thus, the party with the most to gain by arguing for a partial accommodation test instead fit its case within the confines of a complete accommodation approach.

The transcript from the oral argument before the Supreme Court is particularly insightful in understanding the Supreme Court's view of accommodation based on the petitioner's own arguments. A relevant excerpt of the transcript is set as follows:

> [Unknown Justice]: Mr. Sullivan, how would you define what is a reasonable accommodation under Title VII?
>
> Mr. Sullivan [Counsel for Petitioner]: Your Honor, I would define a reasonable accommodation as one that resolves the conflict between the employee's religious needs, in this case in terms of religious observance, and his job requirements.
>
> And that is, I think, the crucial factor in this case. Because the employer has implemented an accommodation, which resolves the conflict between Philbrook's need to be on the job and his need for religious observance, a reasonable accommodation has been made.
>
> And the statute has been satisfied as a result.[140]

Once again, the emphasis is on a complete accommodation test for determining what constitutes a reasonable accommodation. A reasonable accommodation is one that "resolves the conflict between the employee's religious needs . . . and his job requirements."[141] That these statements

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[137] This Note focuses on the intent of the parties and Court in *Philbrook* rather than in *Hardison* because the *Philbrook* decision was the first (and last) Supreme Court case to interpret both the statute and the Supreme Court precedent regarding the statute. *See supra* note 61 and accompanying text.

[138] *See* Brief for the Petitioners, Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986) (No. 85-495), 1986 WL 728382; Brief for the Respondent Ronald Philbrook, *Philbrook*, 479 U.S. 60 (No. 85-495), 1985 WL 670267; Reply Brief for the Petitioners, *Philbrook*, 479 U.S. 60 (No. 85-495), 1985 WL 670270.

[139] Brief for the Petitioners, *supra* note 138, at *25.

[140] Transcript of Oral Argument, *Philbrook*, 479 U.S. 60 (No. 85-495), 1986 U.S. Trans. LEXIS 24 at *10–11.

[141] *Id.*

came from the employer in this dispute strengthens the conclusion that the Court and both parties thought a complete accommodation test was the standard when the Supreme Court made its decision in *Philbrook*.

Thus, a close reading and analysis of the understanding behind the Supreme Court's opinions in *Hardison* and *Philbrook* demonstrate that the Supreme Court assumed as the norm a complete accommodation test. Not only was partial accommodation not discussed, but the inferences made by the Fourth and Eighth Circuits are certainly unsupported as evidenced by a closer analysis of the Supreme Court opinions. Thus, the Fourth and Eighth Circuit's reliance on these cases for their partial accommodation test is unfounded.

2. Inconsistency with the Historical and Textual Analysis of § 701(j)

a. Legislative Intent and Statutory Construction

Like the Supreme Court decisions, the legislative record behind the passage of the 1972 amendment that produced § 701(j) fails to give one definitive statement explaining that the complete accommodation test is the only appropriate test for determining what constitutes an accommodation. Thus, an extrapolation of the partial accommodation test based on Congress's wording of the legislation is certainly *possible*. But by examining the congressional record and by making a logical assessment of the wording of the text in § 701(j), it is clear that the argument for complete accommodation is the *most plausible* explanation of the text.

The 1972 amendment establishing the duty of religious accommodation[142] was introduced in the U.S. Senate by Senator Jennings Randolph, a Seventh-day Baptist, who was motivated to protect fellow Sabbatarians within his denomination who believed they should not work from sundown on Friday to sundown on Saturday by ensuring that their employers provide them with a reasonable accommodation.[143] But because Congress recognized the need to also protect employers from always being forced to give an accommodation,

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[142] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103, 103 (1972) (codified as amended at 42 U.S.C. § 2000e(j) (2006)) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.").

[143] 118 CONG. REC. 705, 705 (1972) (statement of Sen. Jennings Randolph). While Senator Randolph had motivation to protect the religious beliefs of his fellow Sabbatarians, the broad language of the amendment, as well as the legislative intent behind the amendment, demonstrate that Congress designed the amendment to protect the religious beliefs of all individuals within the workplace. *See id.* at 705–06.

Congress qualified this duty by making an exception to providing an accommodation when doing so would create an undue hardship on the employer's business.[144] Thus, § 701(j) appears to provide two sets of protections. First, there is a protection for the *employee* that the employer must *reasonably accommodate* the employee's religious beliefs. Second, there is a protection for the *employer* that it need not accommodate if doing so would create an *undue hardship.*

The Fourth Circuit, picking up on these two distinct protections, nevertheless attempted to mix them. The court states,

> Although we hold the "reasonably accommodate" and "undue hardship" inquiries to be separate and distinct, this does not mean they are not interrelated. Indeed, there is much overlap between the two. For instance, an accommodation that results in undue hardship almost certainly would not be viewed as one that would be reasonable.[145]

Thus, the Fourth Circuit hinges one of its major arguments for the partial accommodation test on the theory that the term "reasonable" is meant to also protect the employer and not just the employee.

While this interpretation is certainly a possible inference from the wording of the statute, it is not the most logical. Giving the employer protection in the employee's only provision of protection (reasonable accommodation) is redundant when the employer already has its own provision of protection (undue hardship). If reasonableness is also the standard for protecting the employer, then it was unnecessary for Congress to include the "undue hardship" provision. But the existence of the "undue hardship" provision makes it far more likely that the protection of "reasonableness" belongs solely to the employee. This is the position taken by the Supreme Court in *Philbrook.* The Supreme Court used the term "reasonable" to determine whether the accommodation proposed by the employer subjected the employee to other discrimination.[146] If, indeed, reasonableness should only be defined in light of the employee's needs, then the Fourth Circuit's argument for partial accommodation is left without support.

This interpretation of the text of § 701(j) may cause some to ask, as did the Fourth Circuit,[147] "Why would Congress modify the term 'accommodation' with the word 'reasonable' if an accommodation is only meant to be a complete accommodation?" If the accommodation totally eliminates the conflict between the employee's religious beliefs and the employment requirements, then why should it also need to be

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[144] *Id.* at 706.

[145] EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 314 (4th Cir. 2008).

[146] Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 70–71 (1986).

[147] *Firestone*, 515 F.3d. at 313.

reasonable? The answer to these questions is that it is possible to have a complete accommodation that is, nonetheless, unreasonable.

For example, a full-time factory worker may have the religious belief that it is wrong for him to work on a Saturday. When the employee expresses his desire for an accommodation to his religious beliefs, his employer provides him with an accommodation plan where he is only ever scheduled to work on Mondays. While the accommodation is complete because it eliminates the conflict between the employee's religious beliefs (not working on Saturday) and the employment requirements (only working on Monday), it is certainly not reasonable for a full-time employee.[148] Both words in the phrase "reasonably accommodate" must be present in order to prevent an employer from unlawfully discriminating against an employee based on the employee's religious beliefs. Clearly, reasonableness is yet another protection for the employee under this interpretation of the statute.

Thus, while the legislative record and the statute itself do not expressly state the conclusion that an accommodation is meant to be complete and that the term "reasonable" is meant as a sole protection for the employee, the debate behind the amendment and an analysis of the amendment's textual construction support the complete accommodation test. The Fourth and Eighth Circuits' textual arguments in support of the partial accommodation test fail to be the most sound when put to the logical test. Therefore, the argument for partial accommodation fails, once again, on the basis of its formation.

b. Section 701(j) and the ADA

It is often helpful to study how other statutes have been interpreted when analyzing a statute with a similar language construction. In *Firestone*, the Fourth Circuit relied on the Supreme Court's interpretation of a similar provision in the ADA that prohibits employer discrimination against employees with disabilities.[149] The ADA language reads that an employer unlawfully discriminates against an employee with a disability if the employer does not make "reasonable

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[148] While § 703 generally proscribes discriminatory conduct by the employer, some of the circuits have held to this particular interpretation of the word "reasonable" when dealing with the employer's proffered accommodation to the employee. *See* Wright v. Runyon, 2 F.3d 214, 217–18 (7th Cir. 1993) (holding that an accommodation of a change in work positions was reasonable because the positions were "essentially equivalent," but noting that a reduction in pay, a loss of benefits, or a change from a skilled position to a non-skilled position could be unreasonable); Cook v. Lindsay Olive Growers, 911 F.2d 233, 241 (9th Cir. 1990) (holding that a transfer to a lower position was still a reasonable accommodation because the accommodation resulted in higher gross pay).

[149] *Firestone*, 515 F.3d at 314.

accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless . . . the accommodation would impose an undue hardship on the operation of the business."[150] In *U.S. Airways, Inc. v. Barnett*, the Supreme Court ruled that the word "reasonable" in this provision does not mean that the accommodation must be effective.[151] The Court stated, however, that an accommodation may be unreasonable if it adversely affects fellow employees.[152] Relying on this decision, the Fourth Circuit discounted the complete accommodation test.[153] The court inferred that the "term 'reasonably accommodate' in the religious context incorporates more than just whether the conflict between the employee's beliefs and the employer's work requirements have been eliminated."[154]

The Fourth Circuit is mistaken in believing that the Supreme Court's decision in *Barnett* eliminates the complete accommodation test. In fact, the very nature of what the ADA is trying to protect makes it impossible to believe that "reasonable accommodation" can mean a partial accommodation that does not entirely eliminate the conflict between the employee's inherent characteristics (religious or physical) and the demands of employment. It is not possible to partially accommodate all disabilities. For example, providing a blind worker with an employment task she could perform without her sight half of the time but would require full seeing capabilities for the other half of the time fails to accommodate the worker. An employer's offer would only constitute an accommodation if it entirely eliminated the conflict between the employee's blindness and the employer's requirements. The Supreme Court says the same in its decision in *Barnett*: "An *ineffective* 'modification' or 'adjustment' will not *accommodate* a disabled individual's limitations."[155] Essentially, the accommodation must be complete. The Court states, "It is the word 'accommodation,' not the word 'reasonable,' that conveys the need for effectiveness."[156] To be an

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150 Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(b)(5)(A) (2006).

151 535 U.S. 391, 400 (2002).

152 *Id.* at 400–01. This statement by the Supreme Court marks a difference in interpretation of the separate protections offered by the two provisions "reasonable accommodation" and "undue hardship" argued for in this Note. *See* discussion *supra* Part III.A.2.a. However, this interpretation is still viable for two reasons. First, the Supreme Court's interpretation is particular to the ADA. It is not binding on Title VII. Second, the Supreme Court's interpretation of the ADA provision seems inconsistent per the same textual analysis of Title VII's provisions made in this Note. *See* discussion *supra* Part III.A.2.a.

153 *Firestone*, 515 F.3d at 314.

154 *See id.*

155 535 U.S. at 400.

156 *Id.*

accommodation, the modification or adjustment offered by the employer must be effective (i.e. complete). After ensuring that the accommodation is effective, the analysis then shifts to whether the accommodation is reasonable.[157] Thus, the ADA and the Supreme Court's decision in *Barnett* actually support the requirement of a complete accommodation under § 701(j).

B. Problems in Effect: An Unlawful Violation of the First Amendment Protection Against Establishment of Religion

Not only is the partial accommodation test improperly formed, but it is also unlawful in its effect. By using the partial accommodation test, a court delves into an inquiry of the reasonableness of the employee's religious beliefs. As argued in this Section, this practice violates the constitutional protection of the Establishment Clause found in the First Amendment.[158]

1. *United States v. Ballard* and the Prohibition of a Judicial Determination on the Reasonableness of a Religious Belief

In *United States v. Ballard*, the Supreme Court held that a trier of fact cannot question the issue of whether an individual's religious beliefs are true.[159] Such an act, the Court held, is forbidden by the First Amendment.[160] The Court stated,

> [Man] was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused . . . might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position.[161]

The Court's ruling in *Ballard*, that a court must not delve into the reasonableness of a religious belief, has become an established protection in the Court's First Amendment jurisprudence.[162] To question the

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[157] *Id.* at 400–01.

[158] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .")

[159] 322 U.S. 78, 86 (1944).

[160] *Id.*

[161] *Id.* at 87.

[162] *See* Emp't Div. v. Smith, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."); Hobbie v. Unemp't Appeals Comm'n, 480 U.S. 136, 144 n.9 (1987) ("In applying the Free Exercise Clause,

reasonableness of an individual's religious beliefs is to wander outside of a court's constitutional sphere of power.

In *Thomas v. Review Board of the Indiana Employment Security Division*, the Supreme Court reaffirmed this principle.[163] Eddie Thomas's employer, a machinery plant, transferred him to a department where he discovered that he would have to help manufacture turrets for military tanks.[164] Because his personal religious beliefs as a Jehovah's Witness forbade him from working directly on weaponry, he felt forced to quit his job.[165] The Indiana Supreme Court then denied Thomas unemployment benefits because his asserted religious beliefs were more of a "personal philosophical choice rather than a religious choice."[166]

But the U.S. Supreme Court reversed the decision and held that the Indiana Supreme Court had improperly reached its conclusion by making a judgment on the reasonableness of Thomas's religious beliefs.[167] Noting that the lower court had looked at the consistency of Thomas's beliefs and how they matched up to those of a fellow Jehovah's Witness who worked at the plant, the Supreme Court held that "the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[168] Instead, the Supreme Court held that the "narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that [the employee] terminated his work because of an honest conviction that such work was forbidden by his religion."[169] The Court, thus, reaffirmed its decision in *Ballard* that a court cannot make a judgment determining the reasonableness of a religious belief.[170] The court may only make a judgment as to whether that belief is sincere.[171]

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courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs.").

[163] 450 U.S. 707, 714 (1981).

[164] *Id.* at 709.

[165] *Id.* at 710.

[166] Thomas v. Review Bd. of Ind. Emp't Sec. Div., 391 N.E.2d 1127, 1131, 1134 (Ind. 1979).

[167] *Thomas*, 450 U.S. at 715–16, 720.

[168] *Id.* at 714–15.

[169] *Id.* at 716.

[170] *Id.*

[171] *Id.* at 726.

2. *Ballard* and the Partial Accommodation Test

The Fourth and Eighth Circuit's partial accommodation test that is based on a standard of reasonableness determined from the circumstances violates the rule established in *Ballard* because the test allows a court to decide on the reasonableness of an employee's religious beliefs. While such a scenario is not as clear-cut as one where the court attempts to decide whether an individual's religious beliefs are true, the actions of the court in determining the reasonableness of a partial accommodation clearly violate the religious protections recognized by the Supreme Court in *Ballard*.

As mentioned above, the established rule from *Ballard* is that a court cannot make a decision as to whether an individual's religious beliefs are reasonable. If a court does make a decision on the reasonableness of an individual's religious beliefs, then it is in violation of the First Amendment. Under the partial accommodation test, an employee may have to compromise his religious beliefs in order to create a "reasonable" solution with his employer. Because the employee is being forced to compromise, he is coerced into accepting a practice of his religious beliefs that the court finds reasonable in light of his employment circumstances.

If an employee fails to accept what the court deems to be a reasonable accommodation, then the court holds him to be unreasonable and unworthy of protection under Title VII. But the employee's decision not to accept the proposed accommodation is based on his religious beliefs. The court, therefore, is actually saying the employee's religious beliefs are unreasonable.

Now, it is possible that one might object and say the court is not really making a decision as to the reasonableness of the employee's religious beliefs. Rather, it is only making a decision as to the reasonableness of the employee's willingness to work out a solution. But this is not the case. The employee is acting reasonably according to his religious beliefs. What the court is adjudicating then is the reasonableness of those religious beliefs that cause the employee to be willing or not willing to accept a particular accommodation.

An example is helpful in understanding the connection between the implementation of the partial accommodation test and a court's illegal stroll into the constitutionally forbidden realm of adjudicating on the reasonableness of an individual's religious beliefs. Suppose an employee has the religious conviction that she cannot work on Saturdays and Sundays. When she approaches her employer to seek an accommodation under Title VII, the employer, looking at what it considers a reasonable solution for both the business and the employee based on the employment circumstances, provides the employee with an

accommodation that she may have Saturdays off but not Sundays. The employee declines the accommodation and, after being terminated, brings suit under Title VII. The court, then, must make a determination on whether the proposed accommodation is reasonable. If the court agrees with the employer that the accommodation of having Saturdays but not Sundays off is reasonable, then it is effectively deciding that the employee is being unreasonable if she does not accept the accommodation. In reality, though, the court is actually making a judgment as to the reasonableness of the employee's religious beliefs. It is not the case that the employee is acting unreasonably. If her religious beliefs dictate that she must not work on Saturdays and Sundays, then she is acting logically according to those beliefs. In other words, she is acting *reasonably* according to her religious beliefs. Thus, the court is really making a judgment on the reasonableness of those beliefs. But such a determination is outside of the scope of a court to make. Doing so, according to *Ballard*, violates the First Amendment protections given to the employee.

Specifically, when a court is in the practice of deciding upon the reasonableness of an employee's religious beliefs, the court is, in effect, violating the Establishment Clause.[172] The Establishment Clause prohibits "forms of state intervention in religious affairs."[173] Yet, by determining the reasonableness of various religious beliefs, a court gives unconstitutional preferential treatment to adherents of some religions but not to adherents of other religions depending on which religious beliefs are more reasonable for accommodation purposes.[174]

Even assuming that the construction of the partial accommodation test by the Fourth and Eighth Circuits was proper, the implications of this test render it unconstitutional. In an attempt to provide employers with greater protection at the expense of employees' devotion to their religious beliefs, the Fourth and Eighth Circuits have opened the door for courts to make judgments on the reasonableness of employees' religious beliefs. The Supreme Court's First Amendment jurisprudence clearly proscribes such activity.

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[172] U.S. CONST. amend. I.

[173] Lee v. Weisman, 505 U.S. 577, 591 (1992) (citing Buckley v. Valeo, 424 U.S. 1, 92–93 & n.127 (1976) (per curiam)).

[174] *See* Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (holding that a government may not "prefer one religion over another"); United States v. Ballard, 322 U.S. 78, 87 (1944) ("The First Amendment does not select any one group or any one type of religion for preferred treatment.").

IV. HEALING THE SPLIT

A jurisdictional difference exists in the application of § 701(j) resulting from variant interpretations of the intent and wording of the statute. The extent of the rift between the circuits over the breadth of an accommodation under Title VII as a measure against religious discrimination renders the issue ripe for the review of the Supreme Court. If a case arises that addresses the issue of complete versus partial accommodation, the Supreme Court should grant certiorari for several reasons.

First, the partial accommodation test embraced by the Fourth and Eighth Circuits is at odds with the current EEOC guidelines regarding an employer's duty to accommodate the religious beliefs of an employee. The current EEOC Compliance Manual states,

> An accommodation is not "reasonable" if it merely lessens rather than eliminates the conflict between religion and work, provided eliminating the conflict would not impose an undue hardship. Eliminating the conflict between a work rule and an employee's religious belief, practice, or observance means accommodating the employee without unnecessarily disadvantaging the employee's terms, conditions, or privileges of employment.[175]

Realizing that the Fourth and Eighth Circuits have strayed from the approach that "a reasonable accommodation must eliminate the conflict between work and religion," the Commission holds that its own interpretation is "more straightforward and more in keeping with the purpose of Title VII's accommodation requirement."[176]

Affirmation by the Supreme Court of either test would create the necessary uniformity and certainty that is currently lacking in employment religious discrimination jurisprudence due to the circuit split and the EEOC guidelines. The rights of employees are either more or less protected depending on the state in which they bring suit, despite the fact that § 701(j) is part of a federal statute that applies equally across the states. Also, in circuits where there is no clear adoption of one test, the legal rights of employees are uncertain as a court could follow either the traditional or more recent interpretation of what constitutes a reasonable accommodation.

Second, the Supreme Court should decide on the constitutionality of the partial accommodation test because of the First Amendment concerns raised by allowing a court to force employees to compromise their religious beliefs if they want protection under § 701(j). In *Ballard*,

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[175] EEOC, NO. 915.003, DIRECTIVES TRANSMITTAL: EEOC COMPLIANCE MANUAL 51–52 (2008), *available at* http://www.eeoc.gov/policy/docs/religion.pdf.

[176] *Id.* at 52 n.130.

the Supreme Court noted that when courts adjudicate on the reasonableness of an individual's religious beliefs, "they enter a forbidden domain."[177] Yet this domain, fiercely guarded by the First Amendment, is invaded by the courts through the partial accommodation test because the test allows a court to decide what parts of an employee's religious beliefs are unreasonable and worthy of compromise.

Third, the Supreme Court should clarify this issue of law because the partial accommodation test marks a significant shift in protection under § 701(j). Under this test, the religious beliefs of an employee are more likely to be compromised than they were before.[178] Under the complete accommodation test, employees only have to choose whether to compromise their religious beliefs if a reasonable accommodation is not available because it would cause an undue hardship on the employer. Under the partial accommodation test, an employee may be forced to decide whether to compromise based on whether the employer and court think that an "accommodation" is "reasonable," regardless of whether a complete accommodation would create an undue hardship. The Supreme Court should decide whether a shift in the protection of the employer over the employee is actually in keeping with the intent behind Title VII.

In the event that the Supreme Court decides to review this particular issue, what should it do? First, it should specify what constitutes an accommodation under § 701(j). Must an accommodation completely eliminate the conflict between the employee's religious beliefs and the employment requirements, or need it only partially eliminate the conflict by providing room for "reasonably" compromising the employee's religious beliefs? The position taken in this Note is that requiring a complete accommodation is the appropriate standard for protecting against religious discrimination within the workplace.

Second, the Supreme Court should clarify which party the term "reasonably" protects under § 701(j). Does it solely protect the employee, or does it also cover the employer and potential third-party employees? As seen throughout this Note, the confusion over the application of the term "reasonably" has been a major contributor to the current circuit split.

Finally, the Supreme Court should reaffirm the protection of employees and their religious beliefs. There are currently two worldviews at clash over this issue. The first attempts to provide greater protection for the employer, even if this calls for violating the conscience of the employee. This worldview is best seen in the Eighth Circuit's

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[177] *Ballard*, 322 U.S. at 87.

[178] Sturgill v. United Parcel Serv., 512 F.3d 1024, 1033 (8th Cir. 2008).

decision in *Sturgill* where the court states that "a reasonable jury may find in many circumstances that the employee must either compromise a religious observance or practice, or accept a less desirable job or less favorable working conditions."[179] The second worldview is based on protecting the employee—a view embraced by the drafters of Title VII.[180] "The religious-discrimination provision of Title VII is an accommodation to the employee, not to the employer. The legislative history of Title VII shows that the drafters of the bill had the needs of the religious employee at the forefront of their efforts."[181]

The Fourth and Eighth Circuits' decisions in 2008 demonstrated the implications of the former worldview in their adoption of the partial accommodation test. The Supreme Court should subscribe to the view held by the drafters of Title VII that protects *both* the freedom of religion *and* the employee's right to work. One fundamental way of doing this is to hold that all accommodations of an employee's religious beliefs *must* eliminate the conflict between those beliefs and the employment requirements.

Andrew J. Hull

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[179] *Id.*

[180] Blair, *supra* note 6, at 518–19.

[181] *Id.* at 519.

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