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FOREWORD

Judge Andrew Jay Peck[*]

It has been almost seven years since the 2006 Amendments to the Federal Rules of Civil Procedure dealing with discovery of electronically stored information ("ESI") took effect; yet, the courts and our "customers," i.e., lawyers, businesses, and other litigants, continue to struggle with electronic discovery ("e-discovery").

When I first began speaking before bar associations and other groups about e-discovery in anticipation of the 2006 Amendments, I assumed everyone would figure out how to manage e-discovery by the end of 2007. For better or worse, however, I believe I will still be on the speaking circuit in this area even beyond my retirement from the bench in about four years. There are two basic reasons for this. First, even if the Rules stay the same,[1] technology continually changes, solving discovery concerns while raising new issues. For example, after the 2006

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[*] Magistrate Judge Andrew J. Peck was appointed United States Magistrate Judge for the Southern District of New York on February 27, 1995. Judge Peck is a frequent lecturer on issues relating to electronic discovery and is a member of the Sedona Conference Judicial Advisory Board. He was awarded the Champion of Technology Award for 2011 by Law Technology News.

Judge Peck's key e-discovery opinions: Da Silva Moore v. Publicis Groupe, 287 F.R.D. 182 (S.D.N.Y. 2012) (Peck, Mag. J.) (addressing predictive coding), *aff'd*, No. 11 Civ. 1279(ALC)(AJP), 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012); William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134 (S.D.N.Y. 2009) (Peck, Mag. J.) (discussing keyword search); *In re* NTL, Inc. Sec. Litig., 244 F.R.D. 179 (S.D.N.Y. 2007) (Peck, Mag. J.) (addressing spoliation and adverse inference instruction), *aff'd sub nom.* Gordon Partners v. Blumenthal, No. 02 Civ. 7377(LAK), 2007 WL 1518632 (S.D.N.Y. May 17, 2007); Anti-Monopoly, Inc. v. Hasbro, Inc., No. 94 Civ. 2120(LMM)(AJP), 1995 WL 649934 (S.D.N.Y. Nov. 3, 1995) (Peck, Mag. J.) (discussing the discoverability of electronically stored information).

[1] Proposed Rule amendments to further address electronic discovery and other discovery issues have just been published for public comment, with an earliest possible effective date of December 2015. *See* COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE (2013), *available at* http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf.

Amendments, some of the earliest judicial decisions dealt with whether "metadata" had to be produced in discovery; it is now clear that certain metadata must be produced.[2] Another early issue that arose was how to deal with backup tapes, but that is less likely to arise today where the backup function is provided by a "cloud" (which itself has raised new discovery issues).

Technology continues to generate more potential sources of discoverable ESI. E-mail still remains the principle focus of e-discovery, but more businesses are using instant messaging and communicating via Facebook and other social media outlets. Dropbox and other file sharing services also commonly are used. Some companies even have systems that e-mail a transcript of a voicemail message to the employee along with an audio file, thus preserving for discovery "candid" oral comments. While in the past (and still today) people have been more candid in e-mail than they would have been in a formal document, today they are even more candid in voicemail messages (e.g., Alec Baldwin's famous tirade to his daughter). Another major technological change is the use of Facebook, Twitter, and other social media which did not exist or were not as prevalent in 2006. To a certain extent, social media levels the playing field in "asymmetric" litigation, such as employment discrimination or personal injury cases, in which the defendant traditionally has most of the discoverable information and the plaintiff has little. Instead of hiring a private detective to prove that an allegedly injured plaintiff, who claims not to be able to get out of bed, is actually out skiing, a defendant now simply could discover that information from the plaintiff's Facebook page (although this has generated scores of federal and state court decisions, some of which are contradictory).

The second reason that we will need to continue to educate the bar (and the bench) is one of competence. While every litigator should be e-discovery competent—a subject addressed by Monica McCarroll's article—the sad fact is that many lawyers are not. Those of us within what is sometimes called the "Sedona Bubble" are just a small fraction of the bar. While Judge Morgan's and Ralph Losey's articles address the issue of predictive coding, the fact remains that far too many lawyers are content with poorly crafted keyword searches and the printing of e-mails

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[2] *Compare* Mich. First Credit Union v. Cumis Ins. Soc'y, Inc., No. 05-cv-74423, 2007 WL 4098213, at *3 (E.D. Mich Nov. 16, 2007) (holding that the defendant "shall not be required to produce its electronically stored documents in 'native format' or to produce metadata"), *and In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 1:05-md-01720(JG)(JO), 2007 WL 121426, at *5 (E.D.N.Y. Jan. 12, 2007) (exempting plaintiffs from re-producing ESI with metadata), *with* Aguilar v. Immigration & Customs Enforcement Div.of the U.S. Dep't of Homeland Sec., 255, F.R.D. 350, 355 (S.D.N.Y. 2008) (Maas, Mag. J.) (stating that metadata "is discoverable if it is relevant to the claim or defense of any party and is not privileged").

to paper. For example, two years ago I was asked to do a one hour e-discovery talk during the two-day annual Kentucky labor and employment law conference. At the speakers' dinner, I was introduced to one of the premier plaintiff's discrimination lawyers in the state. I asked him how he dealt with e-discovery, and was surprised when he said he did not; if he thought he needed e-mails in a case, he asked the other side to print them to paper. I suggested that if he requested them in electronic form, he could better search and organize them, but he responded that he saw no need to do so because he had a large conference table in his office and could sort them into piles. Needless to say, I changed my planned presentation to be more "E-Discovery 101" (or, as one booklet calls it, "E-Discovery for Dummies").

This is not just a "small town" problem. In the Southern District of New York, we have a pilot program for "complex" cases (patent, class actions, etc.) requiring counsel to complete a "Joint Electronic Discovery Submission" form. The form includes a representation of "Competence" that states: "Counsel certify that they are sufficiently knowledgeable in matters relating to their clients' technological systems to discuss competently issues relating to electronic discovery, or have involved someone competent to address these issues on their behalf."[3] I also use the form in other commercial cases that appear likely to involve extensive e-discovery. The first two forms submitted to me in late 2012, however, contained the certification of competence, but stated that the parties had conferred, cooperated, and agreed to produce emails by printing them to paper. In whatever jurisdiction you practice, checklists and guidelines like the SDNY form and the District of Kansas Guidelines discussed in Judge Waxse's article, encourage cooperation and provide useful guidance that can improve e-discovery competence.

The amount of digital information that is created everyday is staggering, and many companies preserve almost everything. The old ways of handling paper discovery are insufficient (and too costly) to handle today's vastly greater volumes of e-discovery. While new technologies and ESI sources have added to the volume and cost of discovery, technology also offers solutions. Perhaps the biggest change is the move from keywords to predictive coding, which is also known as technology assisted review ("TAR"), or computer assisted review ("CAR"). As noted in my *William A. Gross* decision (quoted in Monica McCarroll's article in this issue), if counsel use keywords, they must carefully design

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[3] JUDICIAL IMPROVEMENTS COMMITTEE, PILOT PROJECT REGARDING CASE MANAGEMENT TECHNIQUES FOR COMPLEX CIVIL CASES 18, 19 (2011), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/Tab%20VI%20Appendix%20F%20SDNY%20Pilot%20Project%20for%20Complex%20Litigation.pdf.

and test proposed keyword searches.[4] A search for "dog" will not retrieve ESI that refers to "hound" (whether of Baskervilles fame or otherwise). Keyword searches are literal and miss vast amounts of responsive ESI while also returning huge volumes of false positives (i.e., ESI containing the search term but not responsive to the document requests). Predictive coding allows better and cheaper searches.

I advocated for the use of predictive coding in appropriate cases in my article *Search, Forward*, published in the October 2011 issue of Law Technology News.[5] In early 2012, I wrote the first judicial decision approving the use of predictive coding in appropriate cases.[6] In the almost two years since my decision, other judges have approved the use of predictive coding, recognizing that it can improve the percentage of responsive documents produced while reducing the volume of non-responsive material that has to be reviewed, resulting in large cost savings. Based on his article, I am pleased to add Judge Morgan to the list of judges who have "approved" the use of predictive coding. It may be premature to say the law is clear based on only a dozen or so reported decisions, but in all the cases where the producing party sought to use predictive coding, the court allowed it to do so, subject to the requesting party's ability to challenge the results if it could show there were any deficiencies.[7] On the other hand, courts have denied applications by the requesting party to force the producing party to use predictive coding (perhaps because such motions were made after the producing party had spent large sums of money using keywords).[8] Both Ralph Losey's and Judge Morgan's articles contain informative discussions about predictive coding. I predict (pun intended) an increased use of predictive coding as more counsel and clients become comfortable with the process. After all, predictive coding software is derived from software we are all comfortable with—the spam filters in our email systems.

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[4] *William A. Gross Constr. Assocs.*, 256 F.R.D. at 136.

[5] Andrew Peck, *Search, Forward: Will Manual Document Review and Keyword Searches Be Replaced by Computer-Assisted Coding?*, L. TECH. NEWS, Oct. 2011, at 25, 29.

[6] Da Silva Moore v. Publicis Groupe, 287 F.R.D. 182, 183 n.1, 193 (S.D.N.Y. 2012) (Peck, Mag. J.), *aff'd*, No. 11 Civ. 1279(ALC)(AJP), 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012).

[7] *See, e.g.*, *In re* Actos (Pioglitazone) Prods. Liab. Litig., No. 6:11-md-2299, 2012 WL 7861249, at *1, *3–4 (W.D. La. July 27, 2012); EORHB, Inc. v. HOA Holdings LLC, No. 7409-VCL, 2013 WL 1960621 (Del. Ch. May 6, 2013); Order Approving the Use of Predictive Coding for Discovery, Global Aerospace Inc. v. Landow Aviation, L.P., No. CL 61040, 2012 WL 1431215 (Va. Cir. Ct. Apr. 23, 2012).

[8] *See, e.g.*, *In re* Biomet M2A Magnum Hip Implant Prods. Liab. Litig., No. 3:12-MD-2391, 2013 WL 1729682 (N.D. Ind. Apr. 18, 2013) (refusing to force the producing party to use predictive coding when it had already done a keyword search because the additional burden and expense outweighed the benefits); Kleen Prods. LLC v. Packaging Corp. of Am., No. 10 C 5711, 2012 WL 4498465, at *5, *20 (N.D. Ill. Sept. 28, 2012) (addressing and denying plaintiffs' motion to compel use of predictive coding).

One other new "tool" deserves emphasis: Federal Rule of Evidence 502(d). It amazes me how few lawyers utilize, or even are familiar with, that Rule. In virtually every production, no matter what search method is used or how carefully a manual privilege review is conducted, some privileged material will be inadvertently produced. A Rule 502(d) order is your "get out of jail free" card if that occurs. Rule 502(d) provides: "A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding."[9]

There can be no legitimate basis for a party (even with little ESI itself) to object to a Rule 502(d) order; in any event, the Court can enter a Rule 502(d) order over objection or even *sua sponte*. I have said at conferences, and I will reiterate here, it is almost malpractice not to seek a Rule 502(d) order.

Almost seven years after the December 2006 Rule Amendments, the biggest problem remains the unfortunate fact that only a minority of counsel is e-discovery competent, while the majority still struggle. The principles and information contained in the articles in this issue—which include discussions of competency, cooperation, transparency, and proportionality, and advocate for the use of predictive coding—will bring more lawyers into the "Sedona Bubble" of e-discovery competence.

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9 FED. R. EVID. 502(d).

PREDICTIVE CODING AND THE PROPORTIONALITY DOCTRINE: A MARRIAGE MADE IN BIG DATA

*Ralph C. Losey**

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INTRODUCTION

The search of electronic data to try to find evidence for use at trial has always been difficult and expensive. Over the past few years, the advent of *Big Data*, where both individuals and organizations retain vast amounts of complex electronic information, has significantly compounded these problems. The legal doctrine of proportionality responds to these problems by attempting to constrain the costs and burdens of discovery to what are reasonable. A balance is sought between the projected burdens and likely benefits of proposed discovery, considering the issues and value of the case. Several software programs on the market today have responded to the challenges of Big Data by implementing a form of artificial intelligence ("AI") known as *active machine learning* to help lawyers review electronic documents. This Article discusses these issues and shows that AI-enhanced document review directly supports the doctrine of proportionality. When used together, proportionality and predictive coding provide a viable, long-term solution to the problems and opportunities of the legal search of Big Data.

To demonstrate the combined effectiveness of proportionality and predictive coding, this Article is organized into four parts. Part I discusses how the rapid growth of electronic information drives the rising costs of civil litigation as discovery becomes increasingly expensive. This section also introduces proportionality and predictive coding as means of combating rising costs. Next, Part II explains how AI can be harnessed in document review, noting applicable case law and providing a detailed description of the predictive coding process. Then, Part III proceeds to consider the legal doctrine of proportionality—in other words, balancing the burden of e-discovery with its benefits—and considers relevant case law. Finally, Part IV concludes by demonstrating the close relationship between predictive coding and proportionality, observing that predictive coding allows one to fine-tune discovery in any case to the anticipated value of the suit against the projected costs of document review.

I. THE HIGH COSTS OF LITIGATION ARISE PRIMARILY FROM EXPLODING VOLUMES OF DIGITAL INFORMATION

The volume of electronically stored information ("ESI") subject to discovery in litigation is growing at an explosive rate.[1] Every five minutes, today's brave new, computational world is said to create the digital equivalent of all of the information stored in the Library of Congress.[2] Put another way, we now create as much information in two days as we have from the dawn of man through 2003.[3]

The mind-boggling increase in the quantity of information is only part of the story. Consider also the impact of the changing form of our information. For millennia, writings were on paper. For centuries, the legal profession depended upon writings, referred to in the law as

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[1] *See, e.g.*, Rowe Entm't, Inc. v. William Morris Agency, 205 F.R.D. 421, 429 (S.D.N.Y. 2002) (explaining that electronic data is so voluminous because, unlike paper documents, "the costs of storage are virtually nil[, and] [i]nformation is retained not because it is expected to be used, but because there is no compelling reason to discard it"); Kenneth Cukier, *Data, Data Everywhere*, ECONOMIST, Feb. 27, 2010, at 3, 3; Jason R. Baron & Ralph C. Losey, *E-Discovery: Did you Know?*, E-DISCOVERY TEAM (Feb. 4, 2010, 10:23 PM), http://e-discoveryteam.com/2010/02/04/baron-and-loseys-new-movie-e-discovery-did-you-know/ (providing video with graphic displays of data explosion and the law).

[2] DAVE EVANS & RICK HUTLEY, CISCO IBSG INNOVATIONS PRACTICE, THE EXPLOSION OF DATA: HOW TO MAKE BETTER BUSINESS DECISIONS BY TURNING "INFOLUTION" INTO KNOWLEDGE 1 (2010), *available at* http://www.cisco.com/web/about/ac79/docs/pov/Data_Explosion_IBSG.pdf.

[3] Marshall Kirkpatrick, *Google, Privacy and the New Explosion of Data*, TECHONOMY (Aug. 4, 2010, 8:57 PM), http://techonomy.typepad.com/blog/2010/08/google-privacy-and-the-new-explosion-of-data.html (reporting statistic from the speech of Eric Schmidt, former CEO of Google, at the Techonomy Conference in Lake Tahoe, CA).

documents, as the key evidence for resolving disputes in a fair and just manner.[4] Paper documents were well-known and mastered by every lawyer and judge who swore an oath to uphold the law. This all changed in a historical blink of the eye. In just one generation, documents have dematerialized and transformed into a dizzying array of ephemeral digital media, from email and texts, to Tweets and Facebook posts.

A. Paradigm Shift

Many see this transformation of writing as a much more profound cultural revolution than that precipitated by Gutenberg, which took centuries to play out, not decades.[5] Legal thought-leaders Jason R. Baron and George L. Paul predicted in 2007 that the legal profession must significantly change and adopt new strategies of practice to cope with this information revolution.[6]

Documents originally created on paper still exist in our society, but are rare.[7] Most of the paper documents we see are merely printouts of one dimension (the text) of the original electronic information. The law recognized this transformation, and the Federal Rules of Civil Procedure were amended in 2006 to include ESI as information that can be discovered and used as evidence in lawsuits.[8] ESI is not specifically defined in the rules. The Rules Committee Commentary explained why: "The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. Rule 34(a)(1) is expansive and includes any type of information that is stored electronically."[9]

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[4] *Cf.* RALPH C. LOSEY, ELECTRONIC DISCOVERY: NEW IDEAS, CASE LAW, TRENDS, AND PRACTICES 35–46 (2010) (discussing the comparative importance of paper and electronic records).

[5] George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH., no. 3, art. 10, Spring 2007, at 4–7, http://jolt.richmond.edu/v13i3/article10.pdf (explaining how writing co-evolved with civilization over the past fifty centuries or longer with a slow but steady increase in information as our writing technologies slowly improved, and pointing out that this all changed about twenty-five years ago when mankind invented a totally different form of electronic writing, free from physical confines, that triggered a Big-Bang-like explosion of a new universe of virtually unlimited information).

[6] *Id.* at 3; *see also* Jason R. Baron, *Law in the Age of Exabytes: Some Further Thoughts on 'Information Inflation' and Current Issues in E-Discovery Search*, 17 RICH. J.L. & TECH., no. 3, art. 9, Spring 2011, at 5, http://jolt.richmond.edu/v17i3/article9.pdf.

[7] *See* LOSEY, *supra* note 4, at 38; *see also* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 311 & n.5 (S.D.N.Y. 2003) (citing Wendy R. Liebowitz, *Digital Discovery Starts to Work*, NAT'L L.J., Nov. 4, 2002, at C3 (reporting that in 1999, 93% of all information generated was in digital form)).

[8] *See* FED. R. CIV. P. 34(a)(1)(A) & advisory committee's note to 2006 amendment.

[9] FED. R. CIV. P. 34 advisory committee's note to 2006 amendment.

Even without specific amendments to rules, all state and federal courts today treat ESI as potentially admissible evidence subject to discovery.[10] The first Sedona Principle is now commonplace: "Electronically stored information is potentially discoverable under Fed. R. Civ. P. 34 or its state equivalents. Organizations must properly preserve electronically stored information that can reasonably be anticipated to be relevant to litigation."[11]

B. Lawyers Overwhelmed by Rapid Advances in Technology

The legal profession has been severely stressed by the rapid, ever-accelerating advances in technology. The changes in writing and the resulting information explosion have been the key challenges.[12] ESI is not only changing and evolving into new forms every year, but, as mentioned, is now multiplying at an exponential rate that is almost beyond comprehension.[13]

Most lawyers are unfamiliar with ESI and the complex systems that store it. They prefer the familiar paper and alphabetical filing cabinets. They are paper lawyers living in a digital world. As a result, judges and juries today often do not see the key writings that they need to do justice. The fault lies with the lawyers who, in the U.S. system, are the ones charged with the duty of discovering the truth. They often fail in this duty, not for want of trying, but for the difficulty in finding the key documents. The evidence is lost in plain view, the signal is lost in the noise—hidden by too much data. The information explosion has made the traditional process of legal discovery "enormously expensive and burdensome," and many, including the venerable American College of Trial Lawyers, are implying that this is a crisis in our legal system that threatens our system of justice.[14]

The old methods of reviewing digital writings are too expensive. Few can afford the time and effort required to locate, review, and

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[10] *See, e.g.*, FED. R. CIV. P. 34; N.C. R. CIV. P. 34; VA. CODE ANN. § 8.01-412.12 (Supp. 2013).

[11] THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 11 (Jonathan M. Redgrave et al. eds., 2d ed. 2007), *available at* https://thesedonaconference.org/publication/The%20Sedona%20Principles.

[12] *See* Paul & Baron, *supra* note 5, at 1–2.

[13] *See supra* text accompanying notes 1–3.

[14] THE AM. COLL. OF TRIAL LAWYERS & THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 16 (2009) ("Although electronic discovery is becoming extraordinarily important in civil litigation, it is proving to be enormously expensive and burdensome.").

produce all relevant evidence using those old methods. The costs and burdens incurred in following old methods can easily exceed the value of an entire case.[15] There is a real danger that the resolution of disputes in a court of law based on both testimony and writings will be a luxury available only to the wealthiest parties. Justice Stephen Breyer made a similar statement in his Preface to an issue of the Sedona Conference Journal:

> [Articles in this Supplement] suggest that if participants in the legal system act cooperatively in the fact-finding process, more cases will be able to be resolved on their merits more efficiently, and this will help ensure that the courts are not open only to the wealthy. I believe this to be a laudable goal, and hope that readers of this Journal will consider the articles carefully in connection with their efforts to try cases.[16]

The law remains as dependent as ever upon documents to prove the truth, but the vast majority of lawyers are untrained and unprepared to handle the electronic documents upon which the world is now built.[17] In fact, most lawyers, even those who specialize in litigation, dislike e-discovery and try their best to avoid it.[18] Lawyers are trained and prepared instead to handle paper documents following systems developed in the twentieth century.

C. Failure of Our Law Schools and Law Firm Training

Even though many scholars, jurists, and practitioners recognize the problems created by the inability of lawyers to keep pace with technology, most law schools still only train students in paper evidence and discovery. Students graduate unprepared to handle ESI where the truth of past events is now stored.[19]

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[15] *See* Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 359–60 (D. Md. 2008).

[16] Justice Breyer, *Preface*, 10 SEDONA CONF. J., at i, i (2009 Supp.).

[17] LOSEY, *supra* note 4, at 355.

[18] *See* Ralph Losey, *Spilling the Beans on a Dirty Little Secret of Most Trial Lawyers*, E-DISCOVERY TEAM (Nov. 23, 2011, 8:54 PM), http://e-discoveryteam.com/2011/11/23/spilling-the-beans-on-a-dirty-little-secret-of-most-trial-lawyers/; Ralph Losey, *Tell Me Why?*, E-DISCOVERY TEAM (Dec. 6, 2011, 7:24 AM), http://e-discoveryteam.com/2011/12/06/tell-me-why/.

[19] LOSEY, *supra* note 4, at 328; William Hamilton, *The E-Discovery Crisis: An Immediate Challenge to Our Nation's Law Schools*, *in* ELECTRONIC DISCOVERY: NEW IDEAS, CASE LAW, TRENDS, AND PRACTICES 401, 402–04 (2010); Shannon Capone Kirk & Kristin G. Ali, *"Teach Your Children Well": A Case for Teaching E-Discovery in Law Schools*, *in* ELECTRONIC DISCOVERY: NEW IDEAS, CASE LAW, TRENDS, AND PRACTICES 394, 396 (2010); Judge Shira Scheindlin & Ralph Losey, *E-Discovery and Education*, *in* ELECTRONIC DISCOVERY: NEW IDEAS, CASE LAW, TRENDS AND PRACTICES 337, 343 (2010).

Novice lawyers are instead trained in law school, and as entry-level associates in most law firms, in paper-based legal search and review methods that are one-dimensional and linear in nature. They typically follow a sequential *Bates Stamp* organizational model created in the 1890s.[20] These linear systems, which were developed in the nineteenth and twentieth centuries for the discovery and production of documents, continue to be used today by most attorneys for both ESI and paper discovery.[21] Other experts and I have started training programs to address these problems that are related to, but still largely outside of, formal law school curriculum.[22]

D. Processes and Methods Designed for Search and Review of Paper Documents Do Not Work When Applied to High Volumes of ESI

The old linear review methods involved serial culling of documents down to a final production set. The process generally required multiple reviews of the same document for different purposes. It was inefficient. It was expensive. Moreover, the quality control of human eyes on paper did not work with high volumes of documents. This is shown by the latest scientific experiments where the agreement rate in identifying relevant documents among professional legal reviewers was found to be around 50%.[23]

This tradition of multiple manual reviews, with only limited computer assistance and typically on a linear-based review platform, still continues today. But it is too expensive and inefficient with high volumes of ESI. This will only get worse as the amount of information continues to grow exponentially. Jason Baron, who served from 2000 to 2013 as the Director of Litigation at the United States National Archives and Records Administration, which is in charge of all federal records

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[20] Ralph C. Losey, *Hash: The New Bates Stamp*, 12 J. TECH. L. & POL'Y 1, 4 (2007) ("A Bates machine uses a self-inking stamp and a mechanically advancing sequence of numbers. Each time the handle of the machine is pressed, a number is imprinted on the document below. With every press of the handle, the number advances sequentially and the next number is inked onto the document.").

[21] Consider the *D'Onofrio* saga, where Magistrate Judge John M. Facciola wrote four opinions describing the processes used in this case and many orders resolving discovery disputes, including an order requiring production of a sample of the 9,413 documents listed on the privilege log. D'Onofrio v. SFX Sports Grp., Inc., No. 1:06-cv-00687-JDB, 2010 WL 3324964 (D.D.C. Aug. 24, 2010); D'Onofrio v. SFX Sports Grp., Inc., 256 F.R.D. 277 (D.D.C. 2009); D'Onofrio v. SFX Sports Grp., Inc. 254 F.R.D. 129 (D.D.C. 2008); D'Onofrio v. SFX Sports Grp., Inc., 247 F.R.D. 43 (D.D.C. 2008).

[22] *See, e.g.*, GEORGETOWN UNIV. LAW CTR., THE EDISCOVERY TRAINING ACADEMY: THE INTERSECTION OF LAW AND IT (2013).

[23] GORDON V. CORMACK, MAURA R. GROSSMAN, BRUCE HEDIN & DOUGLAS W. OARD, OVERVIEW OF THE TREC 2010 LEGAL TRACK 30 (2012).

including White House email, explains this as a problem of scale.[24] He projects the number of White House emails will soon exceed one billion, if it has not done so already; moreover, he estimates it would cost over *$2 billion* to search that many emails.[25] That assumes a team of one hundred full-time lawyers working *over fifty-four years* at a very low billing rate of $100 per hour.[26] Although it also assumes computer-assisted review tools, they would follow the old paper-based linear review models.[27]

Moreover, too many mistakes are being made when these traditional linear review methods are applied to the astronomical volumes and new media of ESI.[28] For instance, in a large construction case in 2012 involving millions of documents reviewed for possible production, both sides inadvertently produced thousands of privileged documents.[29] They did so despite expenditures of tens of millions of dollars for traditional attorney review of each document before production.[30] The prevailing defendant in this case was awarded over $20 million in fees and costs.[31]

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[24] *See* Paul & Baron, *supra* note 5, at 2.

[25] *Id.* at 12–13.

[26] *Id.*

[27] *Id.*; Jason R. Baron, E-Discovery and the Problem of Asymmetric Knowledge, Address at the Ninth Annual Georgia Symposium on Ethics and Professionalism: Ethics and Professionalism in the Digital Age (Nov 7, 2008), *in* 60 MERCER L. REV. 863, 868–69 (2008).

[28] *See, e.g.*, Mt. Hawley Ins. Co. v. Felman Prod., Inc., 271 F.R.D. 125, 135–36 (S.D. W. Va. 2010) (addressing a serious mistake made that resulted in waiver of privilege in spite of sophisticated counsel with very elaborate processes and safeguards); Diabetes Ctrs. of Am., Inc. v. Healthpia Am., Inc., No. 4:06cv-03457, 2008 WL 336382, at *2, *4 (S.D. Tex. Feb. 5, 2008) (denying sanctions against either party when both made material mistakes producing discovery, such as relying on an unsupervised junior associate or responding with incomplete information); Danis v. USN Commc'ns, Inc., 53 Fed. R. Serv. 3d (West) 828, 876–77, 897 (N.D. Ill. 2000) (recommending a $10,000 fine against a CEO personally when the inexperienced general counsel he hired to supervise ESI preservation was grossly negligent).

[29] Tampa Bay Water v. HDR Eng'g, Inc., No. 8:08-CV-2446-T-27TBM, 2012 WL 5387830, at *1, *15, *21 (M.D. Fl. Nov. 2, 2012). The plaintiff alone inadvertently produced 23,000 privileged documents. *Id.* at *15. The prevailing defendant in this case was awarded over $20 million in fees and costs. *Id.* at *1. Of this sum, $3,100,000 was awarded as a cost for e-discovery vendor processing and hosting of 2.7 million documents for review. *Id.* at *21; *see also* Ralph Losey, *$3.1 Million e-Discovery Vendor Fee Was Reasonable in a $30 Million Case,* E-DISCOVERY TEAM (Aug., 4, 2013, 9:46 PM), http://e-discoveryteam.com/2013/08/04/3-1-million-e-discovery-vendor-fee-was-reasonable-in-a-30-million-case/#comment-60139.

[30] Losey, *supra* note 29 (estimating $4,590,000 ($1.70 per file) to have been spent by one defendant in *attorney fees* to review the documents).

[31] *Tampa Bay Water*, 2012 WL 5387830, at *22.

E. Cheap Lawyers Are Not the Answer

Some are looking for an answer to these expense issues by keeping the old processes, but outsourcing the work of manual review to less expensive contract lawyers.[32] They are called "contract lawyers" because the law firm that represents the client typically does not employ them.[33] Instead, they work for some other company under a contract to do review work. These contract lawyers may be located in India or other countries, or may be down the street from your office, or down the hall.[34] They are almost always paid far less than the first-year associates in most law firms, even less than paralegals or secretaries.[35]

Even assuming contract lawyers can adequately perform the task of the first-level relevance review, this is still just a stopgap measure based on old, linear paper-review methods. With ESI increasing so rapidly, outsourcing is futile as a long-term strategy. It merely attempts to tread water in the midst of a flood. An illustration of the futility of this outsourcing strategy is the attempt by the Department of Justice ("DOJ") to reduce the costs of a privilege review in the 2009 case *In re Fannie Mae Securities Litigation*.[36] Even though the DOJ used outside contract lawyers to do first-pass relevancy review to respond to a third party subpoena, the expenses still exceeded $6 million.[37] The district court's order denying the Government's motion for cost-shifting to the requesting party was upheld by the appellate court.[38]

F. The Answer Lies in Predictive Coding and Proportionality

The answer does not lie in modifying the system somewhat to employ cheap labor to do manual review. Not only are the growing volumes of data too high for this to work, but this kind of manual review by teams of contract lawyers is remarkably inaccurate. The inconsistency rate between reviewers is typically as high as 70%, which means that different reviewers looking at the same documents would only agree with each other on the relevance of those documents an

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[32] *See* Paul & Baron, *supra* note 5, at 3 & n.5.

[33] DEBORAH ARRON & DEBORAH GUYOL, THE COMPLETE GUIDE TO CONTRACT LAWYERING 7 (1999).

[34] Ralph Losey, *Perspective on Legal Search and Document Review*, E-DISCOVERY TEAM (Mar. 11, 2012, 4:51 PM), http://e-discoveryteam.com/2012/03/11/perspective-on-legal-search-and-document-review/.

[35] *See id.*

[36] *See In re* Fannie Mae Sec. Litig., 552 F.3d 814 (D.C. Cir. 2009).

[37] *Id.* at 817.

[38] *Id.* at 821, 824.

average of 30% of the time.[39] A recent study of a large contract review team project found an agreement rate of only 16%.[40]

The answer is a whole new system for e-discovery, a system based on the new doctrine of proportionality wedded to predictive coding, a new breakthrough, *disruptive technology*[41] for search and review. This Article will explain both the doctrine and technology, and show how their features reinforce each other to provide a viable solution to the problems of e-discovery. But first, here is more information on the problem from a recent study by the RAND Corporation.[42] The RAND Report concluded, consistent with this Article, that new predictive coding technologies, coupled with radical new legal methods, provide our best hope for the future.[43]

G. RAND Report on Litigation Expenses

The RAND Corporation completed a study in 2012 on the high costs of electronic discovery entitled, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery* ("RAND Report").[44] The RAND Report concluded that the primary problem in e-discovery is the high cost of document review.[45] Based on corporate

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[39] Ellen M. Voorhees, *Variations in Relevance Judgments and the Measurement of Retrieval Effectiveness*, 36 INFO. PROCESSING & MGMT. 697, 701 (2000) (reporting that two retired intelligence officers agreed on responsiveness on only 45% of the documents, and that when three subject matter experts were considered they agreed on only about 30% of the documents); *see also* WILLIAM WEBBER, RE-EXAMINING THE EFFECTIVENESS OF MANUAL REVIEW (2011); Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient than Exhaustive Manual Review*, 17 RICH. J.L. & TECH., no. 3, art. 11, Spring 2011, at 10–11, http://jolt.richmond.edu/v17i3/article11.pdf; William Webber, *How Accurate Can Manual Review Be?*, EVALUATING E-DISCOVERY (Dec. 18, 2011, 6:41 AM), http://blog.codalism.com/?p=1549.

[40] Herbert L. Roitblat, Anne Kershaw & Patrick Oot, *Document Categorization in Legal Electronic Discovery: Computer Classification vs. Manual Review*, 61 J. AM. SOC'Y FOR INFO. SCI. & TECH. 70, 74 (2010); *see also* Grossman & Cormack, *supra* note 39, at 13–14 (applying Roitblat, Kershaw & Oot to suggest inconsistencies of 84% and agreement rates of 16%).

[41] *See* Maura R. Grossman & Gordon V. Cormack, *The Grossman-Cormack Glossary of Technology-Assisted Review*, 7 FED. CTS. L. REV. 1, 6 (2013) [hereinafter *Grossman-Cormack Glossary*] (discussing how and why TAR is disruptive technology).

[42] The RAND Corporation is a well-known and prestigious non-profit institution. Its stated charitable purpose is to "improve policy and decisionmaking through research and analysis." *About RAND: History and Mission*, RAND CORP., http://www.rand.org/about/history.html (last updated Sept. 4, 2013).

[43] NICHOLAS M. PACE & LAURA ZAKARAS, RAND CORP., WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY 99–101 (2012) [hereinafter RAND REPORT].

[44] *Id.* at iii.

[45] *Id.* at 41–42.

surveys, the RAND Corporation found that document review constitutes 73% of the total cost of e-discovery.[46] For that reason, RAND focused its first e-discovery report on this topic, with side comments on the issue of preservation.[47]

The RAND Report not only analyzes the problem, it recommends a radical solution; namely, the adoption of new predictive-coding-type search and review methods.[48] The RAND Report also points out the resistance of the legal profession to taking the bold steps necessary to use such new methods:

> Despite the apparent promise of predictive coding and other computerized categorization techniques, however, the legal world has been reluctant to embrace the new technology. . . . [T]he key reason is the absence of widespread judicial approval of the methodology, specifically regarding any acknowledgment of the adequacy of the results in actual cases or whether the process was a reasonable way to prevent inadvertent privilege waiver. Without clear signs from the bench that the use of computer-categorized review tools should be considered in the same light as eyes-on review or keyword searching, litigants involved in large-scale reviews are unlikely to employ the technologies on a routine basis.
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> . . . .
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> The use of computerized categorization techniques, such as predictive coding, will likely become the norm for large-scale reviews in the future, given the likelihood of increasing societal acceptance of artificial intelligence technologies that might have seemed like

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[46] *Id.*

[47] JAMES N. DERTOUZOS, NICHOLAS M. PACE & ROBERT H. ANDERSON, RAND CORP., THE LEGAL AND ECONOMIC IMPLICATIONS OF ELECTRONIC DISCOVERY: OPTIONS FOR FUTURE RESEARCH (2008).

[48] As the RAND Report states:

> To truly open the doors to more-efficient ways of conducting large-scale reviews in the face of ever-increasing volumes of digital information, litigants that have complained in the past about the high costs of e-discovery will have to take some very bold steps.
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> . . . .
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> The most promising alternative available today for large-scale reviews is the use of predictive coding and other computerized categorization strategies that can rank electronic documents by the likelihood that they are relevant, responsive, or privileged. Eyes-on review is still required but only for a much smaller set of documents determined to be the most-likely candidates for production. Empirical research suggests that predictive coding is at least as accurate as humans in traditional large-scale review. Moreover, there is evidence that the number of hours of attorney time that would be required in a large-scale review could be reduced by as much as three-fourths, depending on the nature of the documents and other factors, which would make predictive coding one answer to the critical need of significantly reducing review costs.

RAND REPORT, *supra* note 43, at 83, 97.

> improbable science fiction only a few decades ago. The problem is that considerable sums of money are being spent unnecessarily today while attitudes slowly change over time. New court rules might move the process forward, but the best catalyst for more-widespread use of predictive coding would be well-publicized instances of successful implementation in cases in which the process has received close judicial scrutiny. It will be up to forward-thinking litigants to make that happen.[49]

Since the RAND Report was issued in 2012, several courts have approved the use of predictive coding, which this Article will discuss, and this resistance factor has been greatly reduced. But the Report discusses other resistance factors as well, including an ethical issue that is rarely discussed:

> Another barrier to the widespread use of predictive coding could well be resistance to the idea of outside counsel motivated not so much by accuracy issues as by the potential loss of a historical revenue stream. Some interviewees reported grumblings from outside counsel when their companies decided to directly handle a fraction of the overall review process or to markedly reduce what was shipped out for review through the use of additional data processing.[50]

Another resistance factor implied by the RAND Report that remains a significant problem is the high prices charged by some vendors for the predictive coding features of their review software.[51] For this reason, predictive coding software use is typically limited to large cases. As the cost of the software inevitably comes down in the future, the use is likely to expand to medium and even small size cases where at least 25,000 to 50,000 documents have to be reviewed for possible relevance.[52]

H. Two-Fold Solution

The RAND Report correctly concludes that the legal profession must now take bold steps to change our current system of discovery. The

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[49] *Id.* at 98–99.

[50] *Id.* at 76.

[51] The RAND Report explains that ESI may be cost-prohibitive in smaller cases:

> Moreover, computer applications for conducting review are unlikely to be economically viable options when dealing with smaller document sets, in which any savings in attorney hours might be overwhelmed by vendor costs and machine-training requirements. Existing approaches, such as deduplication, cluster analysis, and email threading, may provide a more practical answer in these situations.

Id. at 98.

[52] *Cf.* Order at 2, 4, Northstar Marine, Inc. v. Huffman, CA 13-00037-WS-C (S.D. Ala. Aug. 27, 2013), ECF No. 28 (enforcing the parties' agreement to use predictive coding software and rejecting plaintiff's contention that it was "having difficulty locating an inexpensive provider of electronic search technology," which demonstrated a lack of "due diligence" on the part of plaintiff's counsel).

existing linear, confrontative,[53] one-dimensional, largely manual, costly, Bates Stamp approach to discovery must be replaced with a cooperative, iterative, largely automated, predictive-coding-based, proportionally cost-controlled, hash-value approach.[54]

Two ways to do this have been developing in the law for the past few years. The first is legal, involving amendments to rules[55] and development of a new body of law for e-discovery, and the second is technological-scientific. The legal approach has focused on the doctrine of proportionality,[56] combined with a new appreciation for legal ethics,[57] and the duty of attorneys to cooperate in e-discovery.[58] The technical

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[53] Ken Withers, *When E-Mail Explodes*, SAN DIEGO LAW., Nov.–Dec. 2008, at 36, 36–38 (discussing confrontation and civility in e-discovery).

[54] *See* Losey, *supra* note 20, at 3, for more on hash values and e-discovery.

[55] The 2006 Amendments to the Federal Rules of Civil Procedure modified Rules 16, 26, 33, 34, 37, and 45, as well as Form 35, to include electronic discovery. Amendments to Federal Rules of Civil Procedure, 547 U.S. 1233 (2006). In particular, see FED. R. CIV. P. 16(b); 26(a)(1)(B); 26(b)(2)(B); 26(b)(5)(B); 26(f); 33(d); 34(a); 34(b); 37(f); 45(a)(1)(C). At the time of this writing, additional rule amendments are under consideration and in the final stages of public review. *See* ADVISORY COMMITTEE ON CIVIL RULES (2013), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2013-04.pdf. The adoption of these new rules sometime in 2014 appears probable, although, some modifications to the final language may be made. These rules will embody and strengthen the proportionality doctrine, especially as it pertains to sanctions. *See* Sekisui Am. Corp. v. Hart, No. 12 Civ. 3479 (SAS)(FM), 2013 WL 2951924, at *3 & n.3 (S.D.N.Y. June 10, 2013) (explaining pending rule revisions' impact on sanctions law); *see also* FED. R. EVID. 502.

[56] THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COMMENTARY ON PROPORTIONALITY IN ELECTRONIC DISCOVERY 3 (Conor R. Crowley et al. eds., 2013) [hereinafter SEDONA, COMMENTARY ON PROPORTIONALITY (2013)], *available at* https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Commentary%20on%20Proportionality. Moreover, consider the principles developed by a Seventh Circuit committee:

> Principle 1.03 (Discovery Proportionality)[:] The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.

SEVENTH CIRCUIT ELEC. DISCOVERY COMM., SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM: INTERIM REPORT ON PHASE THREE 6 (2013).

[57] *See* Memorandum Opinion and Order, Kleen Prods. LLC v. Packaging Corp. of Am., No. 1:10-cv-05711 (N.D. Ill. Sept. 28, 2012), ECF No. 412; Ralph Losey, *Attorneys Admonished by Judge Nolan Not to "Confuse Advocacy with Adversarial Conduct" and Instructed on the Proportionality Doctrine*, E-DISCOVERY TEAM (Oct. 7, 2012, 4:40 PM), http://e-discoveryteam.com/2012/10/07/attorneys-admonished-by-judge-nolan-not-to-confuse-advocacy-with-adversarial-conduct-and-instructed-on-the-proportionality-doctrine/; *see also* MODEL CODE OF PROF'L CONDUCT R. 3.2–3.4 (2013).

[58] The lead article and summary on cooperation explains as follows:

> Lawyers have twin duties of loyalty: While they are retained to be zealous advocates for their clients, they bear a professional obligation to conduct

approach has been oriented toward software and specialist experts, and recognizes the growing importance of e-discovery vendors. The technical approach has recently culminated in the creation of electronic document review software that uses artificial intelligence to find the documents needed from Big Data in a very fast, efficient, and effective manner. This new technology is next described.

II. THE USE OF ARTIFICIAL INTELLIGENCE IN DOCUMENT REVIEW

Predictive coding uses a type of AI programing that allows the computer, a/k/a the *machine*, to learn from attorney instruction. This is called active machine learning, which is one application of AI.[59]

> discovery in a diligent and candid manner. Their combined duty is to strive in the best interests of their clients to achieve the best results at a reasonable cost, with integrity and candor as officers of the court. Cooperation does not conflict with the advancement of their clients' interests—it enhances it. Only when lawyers confuse *advocacy* with *adversarial conduct* are these twin duties in conflict.

The Sedona Conference, *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331, 331 (2009 Supp.).

The following cases also adopted the Cooperation Proclamation (or espoused similar principles). Capitol Records, Inc. v. MP3Tunes, LLC, 261 F.R.D. 44, 47–48 (S.D.N.Y. 2009); *In re* Direct Sw., Inc., Fair Labor Standards Act (FLSA) Litig., No. 2:08-cv-01984-MLCF-SS, 2009 WL 2461716, at *1 (E.D. La. Aug. 7, 2009); Wells Fargo Bank, N.A. v. LaSalle Bank Nat'l. Ass'n, No. 3:07-cv-449, 2009 WL 2243854, at *2 (S.D. Ohio July 24, 2009); Dunkin' Donuts Franchised Rests. v. Grand Cent. Donuts, Inc., No. CV 2007-4027(ENV)(MDG), 2009 WL 1750348, at *4 (E.D.N.Y. June 19, 2009); Ford Motor Co. v. Edgewood Props., Inc., 257 F.R.D. 418, 424, 426 (D.N.J. 2009); Newman v. Borders, Inc., 257 F.R.D. 1, 3 n.3 (D.D.C. 2009); Gipson v. Sw. Bell. Tel. Co., No. 2:08-cv-2017-EFM-DJW, 2009 WL 790203, at *20–21 (D. Kan. Mar. 24, 2009); William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 136 (S.D.N.Y. 2009); S.E.C. v. Collins & Aikman Corp., 256 F.R.D. 403, 415 (S.D.N.Y. 2009); Covad Commc'ns Co. v. Revonet, Inc., 254 F.R.D. 147, 149, 151 (D.D.C. 2008); Aguilar v. Immigration & Customs Enforcement, 255 F.R.D. 350, 359, 364 (S.D.N.Y. 2008); Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 363–65 (D. Md. 2008); *see also* David J. Waxse, *Cooperation—What Is It and Why Do It?*, 18 RICH. J.L. & TECH., no. 3, art. 8, Spring 2012, at 5–6, http://jolt.richmond.edu/v18i3/article8.pdf. *But see* Bill E. Boie, *The Non-Cooperation Proclamation*, E-DISCOVERY TEAM (Oct. 25, 2009, 6:26 PM), http://e-discoveryteam.com/2009/10/25/the-non-cooperation-proclamation/.

Finally, consider a Seventh Circuit Committee's conclusion on this point: "An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions." SEVENTH CIRCUIT ELEC. DISCOVERY COMM., *supra* note 56, at 6.

[59] *See* Andrew Peck, *Search, Forward: Will Manual Document Review and Keyword Searches Be Replaced by Computer-Assisted Coding?*, L. TECH. NEWS, Oct. 2011, at 25, 29.

A. Active Machine Learning Explained

In active machine learning, the machine learns in an interactive process with a human, preferably an attorney with special subject matter expertise[60] on the issues in the case. The machine learns from the subject matter expert ("SME") how documents in a particular case should be classified, such as relevant or irrelevant, privileged or nonprivileged. The machine extrapolates the input provided by the SME on a small subset of documents to (1) classify the complete collection, and (2) rank the probability of each document fitting into the classification.

In active machine learning, the SME's thinking and analysis is transferred to the computer where it is improved and enhanced through AI by the computer's own analysis of the documents.[61] The machine learning happens in a series of iterative steps where the SME confirms some of the computer's correct classifications and rankings and corrects some of its initial mistakes.[62] The human SME's intent is clarified and applied through the classification of repeated selections of new document subsets. The computer analysis includes not only the content of the documents but also the metadata.[63] The documents can be selected in

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[60] Subject matter experts, known under the well-known acronym, "SME," are always preferred for any machine instruction based on another well-known principle and acronym, "GIGO," garbage in garbage out. *See* Ralph Losey, *Three-Cylinder Multimodal Approach to Predictive Coding*, E-DISCOVERY TEAM (Mar. 24, 2013, 9:04 PM), http://e-discoveryteam.com/2013/03/24/three-cylinder-multimodal-approach-to-predictive-coding/; *see also* Da Silva Moore v. Publicis Groupe, 287 F.R.D. 182, 183–84, 192 & n.14 (S.D.N.Y. 2012) (Peck., Mag. J.), *aff'd*, No. 11 Civ. 1279(ALC)(AJP), 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012).

[61] For insights into the mathematics behind machine learning and document classification, see JASON R. BARON & JESSE B. FREEMAN, COOPERATION, TRANSPARENCY, AND THE RISE OF SUPPORT VECTOR MACHINES IN E-DISCOVERY: ISSUES RAISED BY THE NEED TO CLASSIFY DOCUMENTS AS EITHER RESPONSIVE OR NONRESPONSIVE (2013), *available at* http://www.umiacs.umd.edu/~oard/desi5/additional/Baron-Jason-final.pdf.

[62] For a detailed, eighty-two page narrative description of an active-machine-learning-review project of 699,082 documents that was completed after five iterative steps, see RALPH C. LOSEY, PREDICTIVE CODING NARRATIVE: SEARCHING FOR RELEVANCE IN THE ASHES OF ENRON (2012), *available at* http://ralphlosey.files.wordpress.com/2013/04/predictive-coding-narrative_corrrected_3-21-13.pdf. For a description of the same search project that used slightly different search methods taking fifty iterations to complete in about the same time (52 hours), see Ralph Losey, *Borg Challenge: The Complete Report*, E-DISCOVERY TEAM (Apr. 18, 2013, 7:02 PM) [hereinafter Losey, *Borg Challenge*], http://e-discoveryteam.com/2013/04/18/borg-challenge-the-complete-report/. The latter source reports on my experimental review of 699,082 Enron documents using a semi-automated monomodal methodology, and is a five-part written and video series comparing two different kinds of predictive coding search methods.

[63] Douglas W. Oard & William Webber, *Information Retrieval for E-Discovery*, 7 FOUND. & TRENDS IN INFO. RETRIEVAL 99, § 3.3, at 129–35 (2013). This article is discussed and quoted at length in Ralph Losey, *The Many Types of Legal Search Software in the CAR*

three ways: (1) by the computer, (2) by the SME based on his or her judgmental sampling, and (3) by random chance.

1. Machine-Selected Sampling: In this key AI-based method, the computer selects documents for its own training. The selection is made from documents that the software classifier is uncertain of the correct classification. This typically involves documents ranked in the 40% to 60% probable relevant range.
2. Judgmental Sampling: This method includes in the training all other relevant documents that the skilled reviewer can find using a variety of search techniques. That may include some linear review of selected custodians or dates, parametric Boolean keyword searches, similarity searches of all kinds, concept searches, as well as several unique predictive coding probability searches. I call that a *multimodal approach*. The judgmental sampling will typically also include irrelevant documents.
3. Random Sampling: Some reasonable percentage of the documents presented for human review is selected at random. This helps maximize recall and premature focus on the relevant documents initially retrieved.[64]

Although documents can be selected for active machine learning in these three ways, some predictive coding review methods rely on some of the methods more than others, and some only use one or two of the methods and not all three.[65] Other experts in the field[66] and I[67] promote the use of all three but with only minimal reliance on the use of random chance for selection of training documents.

Information retrieval scientists Doug Oard and William Webber call this iterative process of machine learning, "Learning From Examples," and note that it requires both positive and negative input; in other

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Market Today, E-DISCOVERY TEAM (Mar. 3, 2013, 8:39 PM), http://e-discoveryteam.com/2013/03/03/the-many-types-of-legal-search-software-in-the-car-market-today/.

[64] *See* CHRISTOPHER D. MANNING ET AL., INTRODUCTION TO INFORMATION RETRIEVAL, § 15.3, at 307–13 (2008) (examining the choice between the methods of classification); Oard & Webber, *supra* note 63, § 3.5, at 137 (discussing classification in e-discovery).

[65] *See* Losey, *supra* note 60.

[66] Jeremy Pickens, *Predictive Ranking: Technology Assisted Review Designed for the Real World*, E-DISCOVERY SEARCH BLOG (Feb. 1, 2013), http://www.catalystsecure.com/blog/2013/02/predictive-ranking-technology-assisted-review-designed-for-the-real-world/; J. William Speros, *Predictive Coding's Erroneous Zones Are Emerging Junk Science*, E-DISCOVERY TEAM (Apr. 28, 2013, 8:43 PM), http://e-discoveryteam.com/2013/04/28/predictive-codings-erroneous-zones-are-emerging-junk-science/.

[67] Losey, *supra* note 60 ("The exact mixture of the three types of [predictive coding search engine] cylinders—random, analytic, and judgmental—is where the *art of predictive coding search* comes in.").

words, examples of both relevant and irrelevant documents are required for proper training.[68] This kind of AI-enhanced legal review is typically described today in legal literature by the term *predictive coding*.[69] This is because the computer predicts how an entire body of documents should be coded (classified) based on how the lawyer has coded the smaller training sets.[70] The prediction places a probability ranking on each document, typically ranging from 0% to 100% probability. Thus, in a relevancy classification, each and every document in the entire dataset (the *corpus*) is ranked with a percentage of likely relevance and irrelevance. For example, a document could be ranked as 90% probable relevant and 90% probable irrelevant. They are not always ranked exactly synonymously as you might expect. In other words, a document could be ranked 90% probable relevant and 80% probable irrelevant. Typically, when searching for relevant documents, the focus is on relevancy ranking, and the counter-ranking on irrelevance prediction is given less weight.

If the predictive coding software ranks a document as having more than a 50% chance of probable relevance, then the software is predicting that it should be coded as relevant. For instance, in a million-document corpus, the software could, typically after several rounds of machine training, rank 100,000 documents as having a 50% or higher likelihood of relevance. You can then evaluate the ranking breakdown into any

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[68] *See* Oard & Webber, *supra* note 63, § 3.4.2, at 136–37.

[69] These two terms, *predictive coding* and *machine learning*, will be used interchangeably in this article, along with the term *artificial intelligence* or *AI*, to refer to the same use of active machine learning. Note that there is a different type of *inactive* or *automatic machine learning* that is not intended to be included in this discussion. *See* Peck, *supra* note 59, at 26, 29.

[70] The RAND Report contains a helpful description of predictive coding:

> Predictive coding, sometimes referred to as *suggestive coding*, is a process by which the computer does the heavy lifting in deciding whether documents are relevant, responsive, or privileged. This process is not to be confused with keyword-based Boolean searches or the similarity-detection technologies described in Chapter Four. Near-duplication techniques, clustering, and email threading can help provide organizational structure to the corpus of documents requiring review but do not reduce the document set that has to be reviewed by attorneys for specific aspects, such as responsiveness or privilege. Predictive coding, on the other hand, takes the very substantial next step of automatically assigning a rating (or *proximity score*) to each document to reflect how close it is to the concepts and terms found in examples of documents attorneys have already determined to be relevant, responsive, or privileged. This assignment becomes increasingly accurate as the software continues to learn from human reviewers about what is, and what is not, of interest. This score and the self-learning function are the two key characteristics that set predictive coding apart from less robust analytical techniques.

RAND REPORT, *supra* note 43, at 59.

range you want. For instance, you could see that 75,000 of those 100,000 probable relevant documents were ranked as 90% or higher probable relevant. Documents in the 40% to 50% probable relevant range are ones where the algorithmic classifier is uncertain. Typically when the software itself selects documents for its own training, it selects documents that are within this uncertainty range.

As will be shown, this ranking feature is key to the use of the legal doctrine of proportionality. The ability to rank all documents in a corpus on probable relevance is a new feature that no other legal search software has previously provided.[71]

Predictive coding is one of several types of Technology Assisted Review ("TAR"), also known as Computer Assisted Review ("CAR"), in the market today. TAR is formally defined in the Grossman-Cormack Glossary of Technology-Assisted Review ("Grossman-Cormack Glossary") as follows:

> A process for Prioritizing or Coding a Collection of Documents using a computerized system that harnesses human judgments of one or more Subject Matter Expert(s) on a smaller set of Documents and then extrapolates those judgments to the remaining Document Collection. Some TAR methods use Machine Learning Algorithms to distinguish Relevant from Non-Relevant Documents, based on Training Examples Coded as Relevant or Non-Relevant by the Subject Matter Experts(s) [sic], while other TAR methods derive systematic Rules that emulate the expert(s)' decision-making process. TAR processes generally incorporate Statistical Models and/or Sampling techniques to guide the process and to measure overall system effectiveness.[72]

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[71] Although many pre-predictive coding software programs would purport to rank documents, the ranking was not very reliable and did not include probabilities. Instead, it was merely indicative of the number of keywords in a search that were found in a document. The documents, then, were displayed in descending order of hit counts. This was useful to some extent, but it typically just showed the larger documents on top, as they usually had the higher hit counts. Also, this would only sometimes have any correlation with actual relevance. Although some software corrected for document size, the ranking still was just based on keyword hit counts, and this was often unreliable. Moreover, even with predictive coding software today, there seems to be a wide variance in the quality of ranking functions, and only a few programs now on the market do it well. Even with good AI-enhanced software, the ranking functions are very sensitive to the quality of the input, and knowledgeable SME input is required. Even then, it is not an exact measure of relevancy weight. Testing and quality controls should always be applied to know when and to what degree the ranking strata are reliable. Ralph Losey, Relevancy Ranking is the Key Feature of Predictive Coding Software, E-DISCOVERY TEAM (Aug. 25, 2013, 8:54 PM), http://e-discoveryteam.com/2013/08/25/relevancy-ranking-is-the-key-feature-of-predictive-coding-software/.

[72] *Grossman-Cormack Glossary*, *supra* note 41, at 32 (defining TAR).

As the definition indicates, some TAR methods use pattern recognition algorithms to harness the judgment of lawyers, and others do not. They instead use what are known as "rule-based" methods that rely on teams of human linguistic experts to design complex rules. Such rule-based work is labor-intensive and thus expensive.[73] Rule-based TARs are not a form of AI and are not included in this article as a type of active machine learning.[74] Still, the rule-based methods can also rank all documents in a corpus and can be effective. Thus, they can also be useful in proportionality-based document reviews, especially where the attorneys are not capable of performing machine-based active learning or otherwise prefer to delegate and depend on outside experts.

B. Predictive Coding Case Law

The RAND Report concluded that the "key reason" for the slow adoption of predictive coding by the legal profession was "the absence of widespread judicial approval of the methodology."[75] Since then, several reported[76] decisions have come out with just the kind of judicial approval that the RAND Report said the profession needed. It all started with the opinion on February 24, 2012, by the leading judicial scholar on predictive coding, United States Magistrate Judge Andrew J. Peck of the Southern District of New York, in *Da Silva Moore v. Publicis Groupe*.[77] Judge Peck's opinion was discussed in the Report, but it was not affirmed and approved by the district court judge until after the Report's publication.[78]

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[73] *See, e.g.*, Gabriel Techs. Corp. v. Qualcomm Inc., No. 08cv1992 AJB (MDD), 2013 WL 410103, at *10 (S.D. Cal. Feb. 1, 2013) (noting expenditure by parties of $2,829,349.10 for first-pass classification using rule-based technology to classify one million documents).

[74] *See Grossman-Cormack Glossary*, *supra* note 41, at 8 (defining *Active Learning* as "[a]n Iterative Training regimen in which the Training Set is repeatedly augmented by additional Documents chosen by the Machine Learning Algorithm, and coded by one or more Subject Matter Expert(s)"); *id.* at 28 (defining *Rule Base* as "[a] set of Rules created by an expert to emulate the human decision-making process for the purposes of Classifying Documents in the context of Electronic Discovery").

[75] RAND REPORT, *supra* note 43, at 98.

[76] I am sure there are many more unreported decisions, as I have been personally involved in at least one—a large arbitration proceeding.

[77] 287 F.R.D. 182 (S.D.N.Y. 2012) (approving use of predictive coding and listing justifications), *aff'd*, No. 11 Civ. 1279(ALC)(AJP), 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012).

[78] *Da Silva Moore*, 2012 WL 1446534, at *3 (affirming *Da Silva Moore*, 287 F.R.D. 182); RAND REPORT, *supra* note 43, at 78–80 (discussing *Da Silva Moore*); Press Release, RAND Corp., Predictive Coding Could Reduce E-Discovery Costs, but More Guidance Needed on Data Preservation (Apr. 11, 2012), *available at* http://www.rand.org/news/press/2012/04/11.html (announcing the release of the RAND Report). Interestingly, the final effect of this opinion was delayed for a year pending the plaintiffs' attempt to disqualify

Multiple other decisions and widely published hearings came in quick order after that.[79] One judge went so far as to *sua sponte* order both sides to use predictive coding and share the same vendor to save costs.[80] Others have considered the possible use of predictive coding technologies to make review less burdensome as a factor in rejecting protective orders.[81]

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presiding Magistrate Judge Andrew Peck. *See* Da Silva Moore v. Publicis Groupe, 868 F. Supp. 2d 137, 140 (S.D.N.Y. 2012) (denying plaintiffs' motion for recusal), *cert. denied*, No. 13-51, 2013 WL 3489452 (U.S. Oct. 7, 2013); *see also* Motion Order, Da Silva Moore v. Publicis Groupe (*In re* Da Silva Moore), No. 12-05020, (2d Cir. Apr. 10, 2013), ECF No. 16 (denying petition to compel recusal of Judge Peck). Both Magistrate Judge Peck and the Second Circuit Court of Appeals rejected plaintiffs' arguments that voicing public support for ESI or appearing on a CLE panel with a lawyer constituted grounds for recusal or disqualification from this case. *See Da Silva Moore*, 868 F. Supp. 2d at 164; *In re Da Silva Moore*, No. 12-05020.

[79] *See* Gordon v. Kaleida Health, No. 08-CV-378S(F), 2013 WL 2250579, at *1 (W.D.N.Y. May 21, 2013) (referencing a judge's suggestion that the parties use predictive coding based on Judge Peck's opinion in *Da Silva Moore* and the parties' disagreement over methodology); *In re* Biomet M2A Magnum Hip Implant Prods. Liab. Litig., No. 3:12-MD-2391, 2013 WL 1729682, at *1, *3 (N.D. Ind. Apr. 18, 2013) (approving a multimodal predictive coding approach); Kleen Prods. LLC v. Packaging Corp. of Am., No. 10 C 05711, 2012 WL 4498465, at *5 (N.D. Ill. Sept. 28, 2012) (referencing a multi-day evidentiary hearing on plaintiffs' motion to compel use of predictive coding); *In re* Actos (Pioglitazone) Prods. Liab. Litig., No. 6:11-md-2299, 2012 WL 7861249, at *1, *3–4 (W.D. La. July 27, 2012) (approving the use of predictive coding); Order Approving the Use of Predictive Coding for Discovery, Global Aerospace Inc. v. Landow Aviation, L.P., No. CL 61040, 2012 WL 1431215 (Va. Cir. Ct. Apr. 23, 2012).

[80] *See* Order Granting Partial Summary Judgment, EORHB, Inc. v. HOA Holdings LLC, No. 7409-VCL, 2012 WL 4896670 (Del. Ch. Oct. 15, 2012). Seven months later the judge backed off that order somewhat when the plaintiff showed good cause for not using predictive coding and sharing a vendor, but defendants complied and used predictive coding for their review:

> [F]or good cause shown, it is hereby ORDERED that: (i) Defendants may retain ediscovery vendor Kroll OnTrack and employ Kroll OnTrack and its computer assisted review tools to conduct document review; (ii) Plaintiffs and Defendants shall not be required to retain a single discovery vendor to be used by both sides; and (iii) Plaintiffs may conduct document review using traditional methods.

EORHB, Inc. v. HOA Holdings LLC, No. 7409-VCL, 2013 WL 1960621 (Del. Ch. May 6, 2013). The Court's good-cause analysis was primarily driven by an agreement among the parties that the cost of using predictive coding in this case would be outweighed by an expected low volume of relevant documents subject to discovery from the plaintiff. *Id.*

[81] *See* Chevron Corp. v. Donziger, No. 11 Civ. 0691(LAK), 2013 WL 1087236, at *32 & n.255 (S.D.N.Y. Mar. 15, 2013) (noting the potential effectiveness of predictive coding in reducing the burden of discovery); Harris v. Subcontracting Concepts, LLC, Civ. No. 1:12-MC-82 (DNH/RFT), 2013 WL 951336, at *5 (N.D.N.Y. Mar. 11, 2013) (stating that predictive coding and other technologies reduce the cost and time of producing large numbers of documents).

Most commentators agree that the main case in this area remains the first: *Da Silva Moore*.[82] The explanations, legal analysis, and detailed protocols provided in the opinion,[83] coupled with Judge Peck's reputation in the field, are a strong influence on other judges hearing the issue for the first time.[84] Here are a few illustrative excerpts from Judge Peck's opinion:

> In this case, the Court determined that the use of predictive coding was appropriate considering: (1) the parties' agreement, (2) the vast amount of ESI to be reviewed (over three million documents), (3) the superiority of computer-assisted review to the available alternatives (*i.e.*, linear manual review or keyword searches), (4) the need for cost effectiveness and proportionality . . . , and (5) the transparent process proposed by [Defendant].
>
> This Court was one of the early signatories to The Sedona Conference Cooperation Proclamation, and has stated that "the best solution in the entire area of electronic discovery is cooperation among counsel. . . ." An important aspect of cooperation is transparency in the discovery process. [Defendant's] transparency in its proposed ESI search protocol made it easier for the Court to approve the use of predictive coding. . . . [Defendant] confirmed that "[a]ll of the documents that are reviewed as a function of the seed set, whether [they] are ultimately coded relevant or irrelevant, aside from privilege, will be turned over to" plaintiffs. . . . ["]If necessary, counsel will meet and confer to attempt to resolve any disagreements regarding the coding applied to the documents in the seed set."[] While not all experienced ESI counsel believe it necessary to be as transparent as [Defendant] was willing to be, such transparency allows the opposing counsel (and the Court) to be more comfortable with computer-assisted review, reducing fears about the so-called "black box" of the technology. This Court highly recommends that counsel in future cases be willing to at least discuss, if not agree to, such transparency in the computer-assisted review process.[85]

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[82] *See, e.g.*, Jacob Tingen, *Technologies-That-Must-Not-Be-Named: Understanding and Implementing Advanced Search Technologies in E-Discovery*, 19 RICH. J.L. & TECH., no. 1, art. 2, Fall 2012, at 11, 13, http://jolt.richmond.edu/v19i1/article2.pdf.

[83] An appendix to the February 24, 2012, *Da Silva Moore* opinion sets forth a detailed protocol that included (1) provisions for seed sets of documents generated through a combination of sampling methods, (2) up to seven iterative rounds of "training" the system, (3) a commitment by counsel to share both responsive and nonresponsive documents, and (4) sampling at the end of the initial training to function as a quality assurance check on excluded or irrelevant documents. *Da Silva Moore*, 287 F.R.D. app. at 199–202.

[84] *Da Silva Moore* is still an active case and my law firm is lead counsel for the defense on these issues; therefore, I do not comment on the case itself, but only provide these quotes.

[85] *Da Silva Moore*, 287 F.R.D. at 192 (fourth and fifth alterations in original) (footnote omitted) (citations omitted).

Many articles have been written subsequent to *Da Silva Moore* detailing the legal and scientific support now available for the use of predictive coding in legal search projects.[86] Judge Shira A. Scheindlin, who is perhaps the most influential judge in the e-discovery area as the author of the *Zubulake* opinions, a group of influential e-discovery cases,[87] has also joined in to approve and encourage the use of predictive coding.[88] Although the issue was not directly before her, her words in dicta are still influential:

> There are emerging best practices for dealing with these shortcomings [referring to keyword search] and they are explained in detail elsewhere. There is a "need for careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms or 'keywords' to be used to produce emails or other electronically stored information." And beyond the use of keyword search, parties can (and frequently should) rely on latent semantic indexing, statistical probability models, and machine learning tools to find responsive documents. Through iterative learning, these methods (known as "computer-assisted" or "predictive" coding) allow humans to teach computers what documents are and are not responsive to a particular FOIA or discovery request and they can significantly increase the effectiveness and efficiency of searches. In short, a review of the literature makes it abundantly clear that a court cannot simply trust the defendant agencies' unsupported assertions that their lay custodians have designed and conducted a reasonable search.[89]

The main issue of debate currently focuses on the degree of disclosure that a court should require for use of the new technology, an issue Judge Peck specifically referenced in the earlier-quoted paragraph

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[86] *See* RAND REPORT, *supra* note 43; *see also* Nicholas Barry, Note, *Man Versus Machine Review: The Showdown Between Hordes of Discovery Lawyers and a Computer-Utilizing Predictive-Coding Technology*, 15 VAND. J. ENT. & TECH. L. 343 (2013); Elle Byram, *The Collision of the Courts and Predictive Coding: Defining Best Practices and Guidelines in Predictive Coding for Electronic Discovery*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 675 (2013); Charles Yablon & Nick Landsman-Roos, *Predictive Coding: Emerging Questions and Concerns*, 64 S.C. L. REV. 633 (2013).

[87] Zubulake v. UBS Warburg LLC, 229 F.R.D. 422 (S.D.N.Y. 2004); Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003); Zubulake v. UBS Warburg LLC, 216 F.R.D. 280 (S.D.N.Y. 2003); Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003); *see also* Elaine Ki Jin Kim, Comment, *The New Electronic Discovery Rules: A Place for Employee Privacy?*, 115 YALE L.J. 1481, 1484 (2006) (stating that "*Zubulake* has had an impact far beyond the Southern District of New York" and that it is "influencing courts in other jurisdictions").

[88] *See* Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency, 877 F. Supp. 2d 87, 109 (S.D.N.Y. 2012).

[89] *Id.* at 109–10 (footnotes omitted).

of his *Da Silva Moore* opinion.[90] Some argue for complete transparency and full disclosure as required in *Da Silva Moore*,[91] but others assert that no disclosure should be required and that everything should be protected as work product.[92]

I have taken a compromise position on the issue of disclosure in the past, arguing that keywords and search methods should be disclosed, but not the actual irrelevant documents, even if they were used as training documents.[93] I later revised my position on this issue somewhat to allow for limited disclosure of irrelevant documents when the SME considers them to be borderline-type documents.[94] Analysis of my Enron review experiment showed that inconsistencies by a single SME of these types of borderline documents occur at least 23% of the time, whereas inconsistencies in coding of all other irrelevant documents are extremely rare.[95]

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[90] *See Da Silva Moore*, 287 F.R.D. at 192. For articles engaging in the debate, see Ronni Solomon, *Are Corporations Ready To Be Transparent and Share Irrelevant Documents with Opposing Counsel To Obtain Substantial Cost Savings Through the Use of Predictive Coding?*, METRO. CORP. COUNS., Nov. 2012, at 26; WILLIAM P. BUTTERFIELD, CONOR R. CROWLEY & JEANNINE KENNEY, REALITY BITES: WHY TAR'S PROMISES HAVE YET TO BE FULFILLED 8 (2013), *available at* http://www.umiacs.umd.edu/~oard/desi5/additional/Butterfield.pdf.

[91] BARON & FREEMAN, *supra* note 61, at 16.

[92] *See, e.g.*, Transcript of Discovery Dispute Hearing at 16, Robocast Inc. v. Apple Inc., No. 1:11-cv-00235-RGA (D. Del. Dec. 5, 2012), ECF No. 99; *Waiving Work Product with Predictive Coding*, ESIBYTES PODCAST (Sept. 17, 2012), http://www.esibytes.com/waiving-work-product-with-predictive-coding/ (recording of Karl Schieneman's interview of attorney Jeff Fowler). In *Robocast*, Judge Richard G. Andrews recognized that there was no more reason to require disclosure where documents were excluded by predictive coding than there would be to require disclosure of a sample of documents deemed nonresponsive as a result of linear review: "[W]hy isn't that something—you know, you answered their discovery however you answered it—why isn't it something where they answer your discovery however they choose to answer it, complying with their professional obligations? How do you get to be involved in the seed batch?" Transcript of Discovery Dispute Hearing, *Robocast*, *supra* at 16. The anti-disclosure arguments in predictive coding are an extension of an earlier argument opposing the disclosure of search terms in keyword searches. *See* David J. Kessler, Robert D. Owen & Emily Johnston, *Search Terms Are More Than Mere Words*, N.Y. L.J. (Mar. 21, 2011).

[93] Ralph Losey, *Keywords and Search Methods Should Be Disclosed, But Not Irrelevant Documents*, E-DISCOVERY TEAM (May 26, 2013, 4:44 PM), http://e-discoveryteam.com/2013/05/26/keywords-and-search-methods-should-be-disclosed-but-not-irrelevant-documents/.

[94] Ralph Losey, *A Modest Contribution to the Science of Search: Report and Analysis of Inconsistent Classifications in Two Predictive Coding Reviews of 699,082 Enron Documents*, E-DISCOVERY TEAM (June 11, 2013, 9:13 AM), http://e-discoveryteam.com/2013/06/11/a-modest-contribution-to-the-science-of-search-report-and-analysis-of-inconsistent-classifications-in-two-predictive-coding-reviews-of-699082-enron-documents/.

[95] Indeed, I provided a more detailed explanation:

The studies on inconsistent SME document classifications suggest that machine training can be made more reliable if clarifications are obtained on these borderline documents before machine training, analysis, and ranking are concluded.[96] This can be done by dialogue with opposing counsel where the types of documents under consideration are discussed without actually revealing the documents themselves.[97] Alternatively, limited disclosure can be made of the documents under special confidentiality restrictions or by in-camera submissions to the presiding judge.[98] This compromise position should address the legitimate confidentiality concerns of producing parties and still provide assurances to the requesting party that the AI has been properly trained to find the documents.

> The *inconsistencies* (opposite of *Jaccard* index) shown in this study of determinations of relevance, and excluding the classifications of irrelevant, were relatively small—23%, as compared to 55%, 70% and 84% in prior studies. Moreover, as mentioned, they were all derived from grey area or borderline type documents, where relevancy was a matter of interpretation. In the author's experience documents such as this tend to have low probative value. If they were significant to litigation discovery, then they usually would not be of a grey area, subjective type. They would instead be obviously relevance [sic]. I say *usually* because the author has seen rare exceptions, typically in situations where one borderline document leads to other documents with strong probative value. Still, this is unusual. In most situations the omission of borderline ambiguous documents, and others like them, would have little or no impact on the case.
>
> These observations, especially the high consistency of irrelevance classifications (98%+), support the strict limitation of disclosure of irrelevant documents as part of a cooperative litigation discovery process. Instead, only documents that a reviewer knows are of a grey area type or likely to be subject to debate should be disclosed. (The SME in this study was personally aware of the ambiguous type grey area documents when originally classifying these documents. They were obvious because it was difficult to decide if they were within the border of relevance, or not. The ambiguity would trigger an internal debate where a close question decision would ultimately be made.)
>
> Even when limiting disclosure of irrelevant documents to those that are known to be borderline, disclosure of the actual documents themselves may frequently not be necessary. A summary of the documents with explanation of the rationale as to the ultimate determination of irrelevance should often suffice. The disclosure of a description of the borderline documents will at least begin a relevancy dialogue with the requesting party. Only if the abstract debate fails to reach agreement would disclosure of the actual documents be required.

Id.

[96] *See, e.g.*, JIANLIN CHENG ET AL., SOFT LABELING FOR MULTI-PASS DOCUMENT REVIEW 10 (2013), *available at* http://www.umiacs.umd.edu/~oard/desi5/research/Cheng-final.pdf.

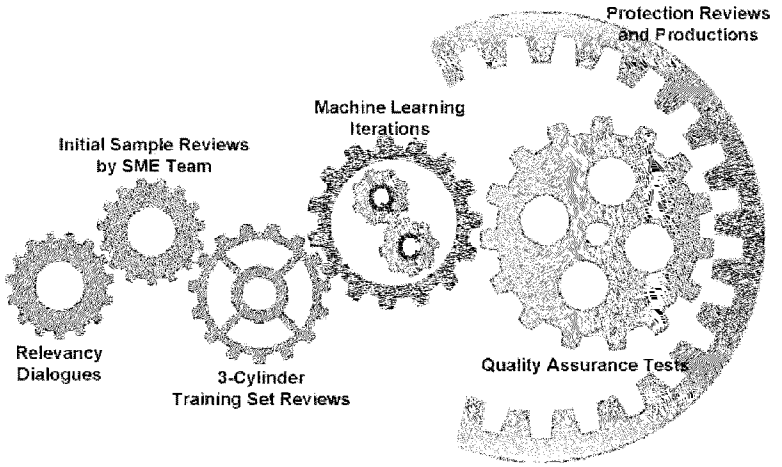
[97] Losey, *supra* note 94.

[98] *Id.*

C. Six-Step and Eight-Step Predictive Coding Work Flows

Relevancy dialogues between the legal counsel for the requesting and responding parties are needed not only during the review itself for clarification of borderline documents, but also at the beginning of the review to clarify the basic *information need* to be fulfilled by the predictive coding search. The use of written requests for production with category lists is more of a starting point in a cooperative process, rather than the final word on the documents requested. That is why all of my models for predictive-coding-based document search begin with communications among all of the parties. The first model I use to describe the predictive coding process divides the work flow into six steps and is illustrated by the diagram below.

Diagram 1: Six-Step Predictive Coding Work Flow[99]



The first step is *Relevancy Dialogues* with opposing counsel. This is based on a cooperative approach to discovery required by both the rules of procedure and the rules of ethics.[100] The primary goal of these dialogues for predictive coding purposes is to clarify the e-discovery requests and reach agreement on the scope of relevancy and production. Searches depend upon the clarity of your information need.[101] Additional

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[99] Copyright © Ralph Losey. The gears in the diagram indicate the interlocking nature of the ESI production processes used with predictive coding. In the next section the same process will be described in slightly greater detail using eight steps.

[100] *See* sources cited *supra* notes 55, 57–58.

[101] STEFAN BÜTTCHER, CHARLES L. A. CLARKE & GORDON V. CORMACK, INFORMATION RETRIEVAL: IMPLEMENTING AND EVALUATING SEARCH ENGINES § 1.2.1, at 5 (2010).

conferences to make disclosures designed to protect clients' interests are also sometimes needed for appropriate training and quality controls.

The additional disclosures will typically require some sharing of some of the ESI search techniques actually used, which is traditionally protected as work product. The disclosures may also sometimes include limited disclosure of some of the seed set documents used, both relevant and irrelevant.[102] Nothing in the rules requires disclosure of irrelevant ESI,[103] but if adequate privacy protections are provided, it may be in the best interests of all parties to do so. Such discretionary disclosures may be advantageous both for risk mitigation and efficiency (cost savings). If an agreement on search protocol is reached by the parties or imposed by the court, the parties are better protected from the risk of expensive motion practice and repetitions of discovery search and production.

Step two is *Initial Sample Reviews by the SME Team*. The use of SMEs is a critical aspect of predictive coding review. The samples reviewed are both random samples and judgmental samples. Judgmental samples use all of the various pre-predictive coding legal search methods, including parametric Boolean keyword searches, similarity searches, concept searches, and even strategic linear reviews of the documents of select custodians and date ranges. The random samples broaden the search and also make possible various types of random-sample-based statistical analysis. For instance, the random sample can provide a baseline of calculation of the prevalence of relevant documents in the corpus. This is very helpful for quality control purposes. The review by the SMEs of random and judgmental samples provides the first machine training input for the predictive coding software. The first round of machine training is also sometimes called the initial *Seed Set Build*.[104]

At the commencement of the project, but using different documents selected by random sample, good predictive coding software will also create what is called a *control set*. The SMEs code documents in both the first training set and the control set, and they may be unaware which of the documents selected by random for them to code are designated for

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[102] *See* Oard & Webber, *supra* note 63, § 4.2.1, at 160–61.

[103] *See* FED. R. CIV. P. 26(b)(1) (limiting all discovery, electronic and otherwise, to relevant information).

[104] *Grossman-Cormack Glossary*, *supra* note 41, at 29 (defining *Seed Set* as "[t]he initial Training Set provided to the learning Algorithm in an Active Learning process. The Documents in the Seed Set may be selected based on Random Sampling or Judgmental Sampling. Some commentators use the term more restrictively to refer only to Documents chosen using Judgmental Sampling. Other commentators use the term generally to mean any Training Set, including the final Training Set in Iterative Training, or the only Training Set in non-Iterative Training.").

the control set as opposed to the initial training set. Typically, both the control and random documents used in the seed set are part of the first random sample. The control set is used solely for testing the SMEs' work during the iterative training process. It is not used for training. The control set documents test for SME consistency and for overall training effectiveness. The documents marked by the SMEs for the control set cannot also be used for training as this can introduce bias into the testing.

The next step, *Three-Cylinder Training Set Reviews*, continues the machine training in an iterative process. In an active-learning type of predictive coding, the machine selects documents for which it would like input. Typically that is a selection of documents whose classification is uncertain. As mentioned, two other document selection methods are also used—SME judgmental sampling and random sampling.

Machine Learning Iterations, the fourth step, is where the software takes the input provided by the SME team and extrapolates and applies those classifications to the entire collection of documents. The predictive coding software then ranks all documents in the collection from 100% probable relevant to 0% probable relevant. This key predictive coding step is repeated as needed for quality control purposes. These iterations continue until the training is complete within the proportional constraints of the case. At that point, the SME in charge of the search may declare the search complete and ready for the next quality assurance test.

In the fifth step, *Quality Assurance Tests* are based primarily on random sampling to verify the effectiveness of the final rankings. They are used to verify the reasonableness, or unreasonableness, of the search and the predictive coding parameters developed. If the tests are not passed, the review is reactivated for additional rounds of SME review and machine learning iterations. If the review passes the tests, then the first-pass relevancy review is complete, and the project moves to the next and final step.[105]

Protection Reviews and Productions is the last step. It comes only after the Quality Assurance Tests have been satisfied. Predictive coding

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[105] For more on sampling and its use in both quality control and quality assurance, see Ralph Losey, *Review Quality Controls*, ELECTRONIC DISCOVERY BEST PRACTICES, http://www.edbp.com/search-review/review-quality-controls/ (last visited Oct. 30, 2013); see also MANFRED GABRIEL, KPMG, QUALITY CONTROL FOR PREDICTIVE CODING IN EDISCOVERY (2013), *available at* http://www.kpmg.com/US/en/IssuesAndInsights/ArticlesPublications/Documents/quality-control-predictive-coding-ediscovery.pdf; CHRIS PASKACH ET AL., KPMG, THE CASE FOR STATISTICAL SAMPLING IN E-DISCOVERY (2012), *available at* http://www.kpmg.com/us/en/IssuesAndInsights/ArticlesPublications/Documents/case-for-statistical-sampling-e-discovery.pdf.

in this step is used to make efficient assignments to manual reviewers. They do the final reviews of the documents before production. They only review the documents that were coded relevant by the SME team in the prior steps. In this last step, SMEs are not required unless there are issues regarding any of their first-pass relevancy determinations. For instance, a SME would want to double-check any proposed promotion of a document from merely relevant to *Hot*. The SMEs would also want to double-check in some manner the proposed demotion to irrelevant of any documents predicted relevant. This final review step is done by attorneys knowledgeable about privilege and confidentiality issues in the case. In large projects, this final review is typically done by outside contract review attorneys.

In this final step, the predicted relevant coding is confirmed, confidentiality redactions are made on the documents as needed, and privileged documents are identified and removed from production for logging. The documents culled by predictive coding, or other search methods, are culled out and not subject to expensive final manual review. So too are documents culled out that are predicted relevant but ranked below the budgeted amount under a *Bottom Line Driven Proportional Strategy* that will be discussed at the conclusion of this Article.[106] The last steps in *Final Review* are to spot-check the final production media before delivery.

The next chart is an eight-step summary of how to use predictive coding. It is still somewhat simplified, but it provides more detail than the prior six-step model. The circular flow depicts the iterative steps specific to the machine training features.

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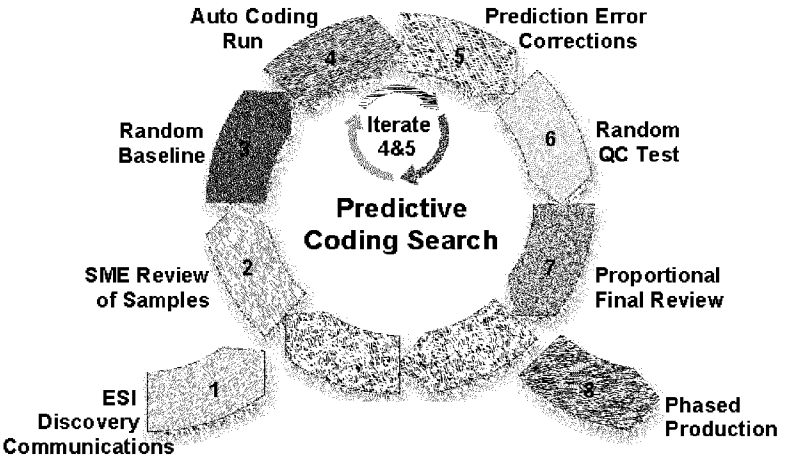
[106] *See infra* Part IV.B.

Diagram 2: Eight-Step Predictive Coding Work Flow[107]



In step one, the process starts with *ESI Discovery Communications,* or *Dialogues*, not only with opposing counsel or other requesting parties, but also with the client and within the e-discovery team assigned to the case. Good communications are critical to the success of all project management functions. The *ESI Discovery Communications* should be facilitated by the lead e-discovery specialist attorney assigned to the case and should include active participation by the team of trial lawyers.

In step two, the SMEs on the case (typically the partners, senior associates, and sometimes also the e-discovery specialist attorney assigned to the case), perform *Manual Reviews of Search Samples* of the data. The samples are not random but are selected by the SMEs' skilled judgments. The selections are made with the help of various software search features, including keyword search, similarities, and concept searches.

Step three in the diagram above, *Random Baseline,* is where statistically random sampling is used to establish a baseline for quality control purposes, the mentioned control set for testing. Most software also uses this random sampling selection and SME coding for initial machine training, so long as the documents do not overlay. In other words, the documents coded by the SMEs in the control sets cannot also be used in the training in the next or following steps.

Step four is the *Auto Coding Run* where the software's predictive coding calculations begin. This is also known as the first iteration of seed set training. Here the predictive coding software analyzes all of the

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[107] Copyright © Ralph Losey 2012.

categorizations made by the SMEs in the prior steps so long as the documents were designated by them as training documents. Based on this input, the software scans all of the data uploaded onto the review platform (the corpus) and assigns a probable value of 0 to 100 to each document in the corpus. A value of 100 represents the highest probability (100%) that the document matches the category trained, such as relevant, or highly relevant. A value of 0 means no likelihood of matching, whereas 50% represents an equal likelihood. In the initial auto coding runs, the software predictions as to a document's categorization are often wrong, sometimes wildly so, depending on the kind of search and data involved. That is why spot-checking and further training are always needed for predictive coding to work properly. This is why it is an iterative process, not a *one-and-done* procedure.

Step five is where *Prediction Error Corrections* are made. Lawyers and paralegals find and correct the computer errors by a variety of methods. The predictive coding software learns from the corrections. Steps four and five then repeat as shown in the diagram. This iterative process is considered a *virtuous feedback loop* that continues until the computer predictions are accurate enough to satisfy the proportional demands of the case. This is a key point to understanding the perfect fit between proportionality and predictive coding.

Step six, *Random Quality Control ("QC") Test*, is where the reasonability of the decision to stop the training is evaluated by an objective quality control test. The test is based on a random sample of all documents to be excluded from the *Final Review* for possible production. The exclusion can be based on both category prediction (i.e., probable irrelevant) and/or probable ranking of documents with proportionate cut-offs. The focus is on a search for any false negatives (i.e., relevant documents incorrectly predicted to be irrelevant) that are hot or otherwise of significance. Perfect recall of all relevant documents is both scientifically impossible and legally unnecessary under best practices for proportional review. But the goal is to avoid all false negatives of hot documents. If this error is encountered, an additional iteration of steps four and five is usually required.

Step seven is where *Proportional Final Review* is performed and where the final decisions are made on the number of documents to be reviewed for possible production. Here the ranking feature of predictive coding makes the use of a proportionality analysis fairly easy and straightforward.[108] You only review the highest ranked documents—the

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[108] *See* Ralph Losey, *Relevancy Ranking is the Key Feature of Predictive Coding Software*, E-DISCOVERY TEAM (Aug. 25, 2013, 8:54 PM), http://e-discoveryteam.com/2013/08/25/relevancy-ranking-is-the-key-feature-of-predictive-coding-software/.

ones most likely to be of any significance to the case—that your proportional budget allows. A decision is then made on the number of documents predicted to be relevant that fit within a reasonable budget for production. Based on prior experience, as of mid-2013, a standard cost of $1.00 to $4.00 per file is often used. Alternatively, specific calculations may be made based upon metrics gathered in that project as to what the per-document final review cost will be. This is accomplished by doing sample reviews and measuring how long the final review takes. After an agreement with the requesting party is reached or deemed unnecessary, or a court order is attained if there is disagreement, the Final Review is then completed, including redaction and logging of privileged documents. In large cases, the Final Review may be outsourced to a document review team to save time and money. The SMEs then play only a supervisory role.

Step eight, *Phased Production*, is where the documents are actually produced after a last quality control check of the media—typically CDs, DVDs, or FTP uploads—on which the production is made. The final work includes preparation of a privilege log, which is typically delayed until after production. Also, production is usually done in rolling stages as review is completed. This allows more time for an orderly process and creates good will with the requesting party and the court.

The selection of documents for training in step five uses all three selection methods (three-cylinders): judgmental sampling (multimodal search), random sampling, and machine-selected sampling. The selection of documents for the initial training (sometimes called the seed set) derives from steps two and three in the chart, with most documents in the first training round coming from step two. The second step uses only judgmental multimodal type searches. The first training round may, however, also include some documents from the random draw in step three. Steps three and six in the chart always use pure random samples and rely on statistical analysis.

My insistence on the use of multimodal judgmental sampling in steps two and five to locate relevant documents follows the consensus view of information scientists specializing in information retrieval[109] and

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[109] *See* Marcia J. Bates, *The Design of Browsing and Berrypicking Techniques for the Online Search Interface*, 13 ONLINE INFO. REV. 407, 409–11, 414, 418, 421–22 (1989); *see also* MANNING ET AL., *supra* note 64, at 309 (explaining that a process is not a bona fide active learning search without including machine-selected sampling); GARY MARCHIONINI, INFORMATION SEEKING IN ELECTRONIC ENVIRONMENTS 5–6, 66–69 (1995); RYEN W. WHITE & RESA A. ROTH, EXPLORATORY SEARCH: BEYOND THE QUERY-RESPONSE PARADIGM 6, 15 (2009). Additionally, Professor Marcia Bates, in 2011, explained her prior article and her work on berrypicking; note the similarity to my *Multimodal* approach:

of many lawyers and courts,[110] but it is not followed by several prominent predictive coding software vendors in e-discovery. They instead rely entirely on machine selected documents for training, or even worse, on randomly selected documents to train the software. In my writings I call this process the *Borg Approach* for its overreliance on machines.[111] It unnecessarily minimizes the role of a legal expert's input and the usefulness of other types of searches to supplement an active learning process. I instead use a hybrid approach[112] where the expert reviewer remains in control of the process and his or her expertise is leveraged for greater accuracy and speed of review.

III. PROPORTIONALITY

A. Origins of the Proportionality Doctrine

The doctrine of proportionality as a legal initiative was launched by The Sedona Conference in 2010[113] as a reaction to the exploding costs of

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> An important thing we learned early on is that successful searching requires what I called "berrypicking." . . .
>
> Berrypicking involves 1) searching many different places/sources, 2) using different search techniques in different places, and 3) changing your search goal as you go along and learn things along the way. . . .
>
> This may seem fairly obvious when stated this way, but, in fact, many searchers erroneously think they will find everything they want in just one place, and second, many information systems have been designed to permit only one kind of searching, and inhibit the searcher from using the more effective berrypicking technique.

Marcia J. Bates, *Online Search and Berrypicking*, QUORA (Dec. 21, 2011), http://www.quora.com/Marcia-J-Bates/Online-Search-and-Berrypicking/An-important-thing-we-learned-early-on-is-that-successful-searching-requires-what-I-called-berrypicking-It-is-usu-1.

[110] *See In re* Biomet M2A Magnum Hip Implant Prods. Liab. Litig., No. 3:12-MD-2391, 2013 WL 1729682, at *1, *3 (N.D. Ind. Apr. 18, 2013); Ralph Losey, *Reinventing the Wheel: My Discovery of Scientific Support for "Hybrid Multimodal" Search*, E-DISCOVERY TEAM (Apr. 21, 2013, 5:16 PM), http://e-discoveryteam.com/2013/04/21/reinventing-the-wheel-my-discovery-of-scientific-support-for-hybrid-multimodal-search; Speros, *supra* note 66.

[111] Losey, *Borg Challenge*, *supra* note 62; Ralph Losey, *Comparative Efficacy of Two Predictive Coding Reviews of 699,082 Enron Documents*, E-DISCOVERY TEAM (June 17, 2013, 9:28 AM), http://e-discoveryteam.com/2013/06/17/comparative-efficacy-of-two-predictive-coding-reviews-of-699082-enron-documents/; Ralph Losey, *Journey into the Borg Hive (Full Story Restatement)*, E-DISCOVERY TEAM (Feb. 13, 2013, 8:03 AM), http://e-discoveryteam.com/2013/02/13/journey-into-the-borg-hive-full-story-restatement/.

[112] In the literature of information science, this hybrid approach is known as Human-Computer Information Retrieval (HCIR). *See* WHITE & ROTH, *supra* note 109, at 15 ("[I]nformation-seeking strategies need to be supported by system features and user interface designs, bringing humans more actively into the search process.").

[113] The Sedona Conference, *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289, 292–94 (2010) [hereinafter Sedona,

e-discovery.[114] Proportionality requires the burdens of e-discovery, including production and preservation, to be reasonably balanced with the likely benefits.[115] The doctrine is intended to prevent litigants from using e-discovery and the expenses it can trigger as a weapon of extortion and a game to force inflated settlements,[116] instead of as a legitimate tool of discovery of the truth.[117]

The Sedona Commentary sets forth six principles of proportionality:

> 1. The burdens and costs of preserving potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.

Commentary on Proportionality (2010)]. I have been a member of The Sedona Conference since 2007. *See also* John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 CAMPBELL L. REV. 455, 460 (2010) ("If courts and litigants approach discovery with the mindset of proportionality, there is the potential for real savings in both dollars and time to resolution."). *But see* Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 895–96 (2009) (criticizing proportionality limits as impossible to implement effectively).

[114] *See* RAND REPORT, *supra* note 43, at xiv, xvi.

[115] Patrick Oot, Anne Kershaw & Herbert L. Roitblat, *Mandating Reasonableness in a Reasonable Inquiry*, 87 DENV. U. L. REV. 533, 544 (2010).

[116] Maura Grossman & Gordon Cormack, *Some Thoughts on Incentives, Rules, and Ethics Concerning the Use of Search Technology in E-Discovery*, 12 SEDONA CONF. J. 89, 94–95, 101–02 (2011); Ralph Losey, *E-Discovery Gamers: Join Me in Stopping Them*, E-DISCOVERY TEAM (June 3, 2012, 6:01 AM), http://e-discoveryteam.com/2012/06/03/e-discovery-gamers-join-me-in-stopping-them/; *see also, e.g.*, Kassover v. UBS A.G., No. 08 Civ. 2753(LMM)(KNF), 2008 WL 5395942, at *3 (S.D.N.Y. Dec. 19, 2008) ("PSLRA's discovery stay provision was promulgated to prevent conduct such as: (a) filing frivolous securities fraud claims, with an expectation that the high cost of responding to discovery demands will coerce defendants to settle; and (b) embarking on a 'fishing expedition' or 'abusive strike suit' litigation."); Bondi v. Capital & Fin. Asset Mgmt. S.A., 535 F.3d 87, 97 (2d Cir. 2008) ("This Court . . . has taken note of the pressures upon corporate defendants to settle securities fraud 'strike suits' when those settlements are driven, not by the merits of plaintiffs' claims, but by defendants' fears of potentially astronomical attorneys' fees arising from lengthy discovery."); Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 332 F.3d 116, 122–23 (2d Cir. 2003) ("The PSLRA afforded district courts the opportunity in the early stages of litigation to make an initial assessment of the legal sufficiency of any claims before defendants were forced to incur considerable legal fees or, worse, settle claims regardless of their merit in order to avoid the risk of expensive, protracted securities litigation."); Lander v. Hartford Life & Annuity Ins. Co., 251 F.3d 101, 107 (2d Cir. 2001) (citations omitted) ("Because of the expense of defending such suits, issuers were often forced to settle, regardless of the merits of the action. PSLRA addressed these concerns by instituting . . . a mandatory stay of discovery so that district courts could first determine the legal sufficiency of the claims in all securities class actions.").

[117] *See* Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 636–37 (1989) (stating that discovery is "both a tool for uncovering facts . . . and a weapon capable of imposing large and unjustifiable costs on one's adversary").

> 2. Discovery should generally be obtained from the most convenient, least burdensome and least expensive sources.
>
> 3. Undue burden, expense, or delay resulting from a party's action or inaction should be weighed against that party.
>
> 4. Extrinsic information and sampling may assist in the analysis of whether requested discovery is sufficiently important to warrant the potential burden or expense of its production.
>
> 5. Nonmonetary factors should be considered when evaluating the burdens and benefits of discovery.
>
> 6. Technologies to reduce cost and burden should be considered in the proportionality analysis.[118]

The principles attempt to establish a balanced approach to proportionality that is not only fair to parties responding to requests for production of ESI but also to those requesting discovery.[119] The Sedona Commentary recognizes the inherent conflict between these positions, and, for that reason, the Commentary advises courts to use caution in its application:

> We recognize that some parties may inappropriately raise proportionality arguments, either as a sword to increase the burden on the producing party or as a shield to avoid legitimate discovery obligations. Courts must be wary of such abuses. In any event, the burden or expense of discovery is simply one factor in a proportionality analysis and may not be dispositive or even determinative in specific cases.[120]

The third principle especially is designed to protect against the unfair use of the doctrine to prevent discovery of relevant evidence based on the producing party's own negligence. The fifth and sixth principles are also intended to ensure a balanced approach that is fair to requesting parties. The sixth principle, mandating consideration of technologies to reduce costs and burdens, underlies the marriage of predictive coding and proportionality proposed in this Article.

The doctrine of proportionality is based on the well-established cost-burden analysis embodied in Federal Rule of Civil Procedure 26(b)(2)(C)(iii).[121] Similar analysis is also contained in Rules 26(b)(2)(B)

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[118] SEDONA, COMMENTARY ON PROPORTIONALITY (2013), *supra* note 56, at 2.

[119] *See* Ralph Losey, *Why a Receiving Party Would Want to Use Predictive Coding?*, E-DISCOVERY TEAM (Aug. 12, 2013, 3:25 PM), http://e-discoveryteam.com/2013/08/12/why-a-receiving-party-would-want-to-use-predictive-coding/; John Tredennick, *Does Technology-Assisted Review Help in Reviewing Productions?*, CATALYST (Aug. 28, 2013), http://www.catalystsecure.com/blog/2013/08/does-technology-assisted-review-help-in-reviewing-productions/.

[120] SEDONA, COMMENTARY ON PROPORTIONALITY (2013), *supra* note 56, at 6 (footnotes omitted).

[121] FED. R. CIV. P. 26(b)(2)(C) provides:

and 26(g)(1)(B)(iii).[122] Magistrate Judge John M. Facciolla, of the United States District Court for the District of Columbia, is one of the leading experts on the proportionality doctrine. He addressed the doctrine in a 2011 opinion:

> All discovery, even if otherwise permitted by the Federal Rules of Civil Procedure because it is likely to yield relevant evidence, is subject to the court's obligation to balance its utility against its cost. . . .
>
> . . . .
>
> Without any showing of the significance of the non-produced e-mails, let alone the likelihood of finding the "smoking gun," the [party's] demands [for additional custodians] cannot possibly be justified when one balances its cost against its utility.[123]

B. Flexible Application of Cost-Burden Analysis

Magistrate Judge Nan R. Nolan, of the United States District Court for the Northern District of Illinois, another proponent of the proportionality doctrine, applied the principle in a 2010 opinion, *Tamburo v. Dworkin*, calling it a "Rule 26 proportionality test."[124] For guidance on application of the test, Judge Nolan relied on The Sedona Conference Commentary:

> "The 'metrics' set forth in Rule 26(b)(2)(C)(iii) provide courts significant flexibility and discretion to assess the circumstances of the case and limit discovery accordingly to ensure that the scope and

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> On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

[122] *See id.* 26(b)(2)(B), 26(g)(1)(B)(iii).

[123] U.S. *ex rel.* McBride v. Halliburton Co., 272 F.R.D. 235, 240–41 (D.D.C. 2011); *see also* Jones v. Nat'l Council of Young Men's Christian Ass'ns of the U.S., No. 09 C 6437, 2011 WL 7568591, at *2 (N.D. Ill. Oct. 21, 2011) ("The Court finds that Plaintiffs' untargeted, all-encompassing request fails to focus on key individuals and the likelihood of receiving relevant information."); Garcia v. Tyson Foods, Inc., No. 2:06-cv-02198-JWL-DJW, 2010 WL 5392660, at *14 (D. Kan. Dec. 21, 2010) (Waxse, Mag. J.) ("Plaintiffs present no evidence that a search of e-mail repositories of the 11 employees at issue is likely to reveal any additional responsive e-mails. . . . Plaintiffs must present something more than mere speculation that responsive e-mails *might* exist in order for this Court to compel the searches and productions requested.").

[124] Tamburo v. Dworkin, No. 04 C 3317, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010) (Nolan, Mag. J.).

> duration of discovery is reasonably proportional to the value of the requested information, the needs of the case, and the parties' resources."[125]

Judge Nolan adopted a phased approach to discovery in *Tamburo* to implement proportionality:

> Accordingly, to ensure that discovery is proportional to the specific circumstances of this case, and to secure the just, speedy, and inexpensive determination of this action, the Court orders a phased discovery schedule. . . . During the initial phase, the parties shall serve only written discovery on the named parties. Nonparty discovery shall be postponed until phase two, after the parties have exhausted seeking the requested information from one another.[126]

Judge Nolan then moved on to specific orders in *Tamburo* regarding what the parties must do, demonstrating an understanding that proportionality should have a space (scope) dimension and a time dimension.[127] She required discovery to be implemented in phases, not all at once, and she also understood that proportionality must be supported by cooperation, even if the cooperation is forced by court order.[128] A shotgun wedding is better than none.[129]

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[125] *Id.* (quoting Sedona, *Commentary on Proportionality* (2010), *supra* note 113, at 294).

[126] *Id.* Other authorities reach similar conclusions. *See* Carroll, *supra* note 113, at 460–61 (internal quotation marks omitted) ("The proportionality concept also guides the court to use common sense techniques for managing discovery, like phased discovery or sequenced discovery. . . . Properly used, the proportionality tools available under the Federal Rules of Civil Procedure can go a long way toward reaching the long sought-after goal of Rule 1: securing the just, speedy, and inexpensive determination of every action and proceeding."); Sedona, *Commentary on Proportionality* (2010), *supra* note 113, at 297 ("Under [certain] circumstances, the court, or the parties on their own initiative, may find it appropriate to conduct discovery in phases, starting with discovery of clearly relevant information located in the most accessible and least expensive sources. Phasing discovery in this manner may allow the parties to develop the facts of the case sufficiently to determine whether, at a later date, further potentially more burdensome and expensive discovery is necessary or warranted.").

[127] *Tamburo*, 2010 WL 4867346, at *3.

[128] *Id.*

[129] Judge Nolan used this language to make all of these points:

> Within the next two weeks, the parties shall conduct an in-person meet and confer to prepare a phased discovery schedule. The parties are expected to be familiar with the Case Management Procedures regarding discovery on the Court's website, the Seventh Circuit's Electronic Discovery Pilot Program's Principles Relating to the Discovery of Electronically Stored Information, and the Sedona Conference Cooperation Proclamation. The parties are ordered to actively engage in cooperative discussions to facilitate a logical discovery flow. For example, to the extent that the parties have not completed their initial disclosures pursuant to Rule 26(a), or if their initial disclosures require updating, the parties should focus their efforts on completing their Rule 26(a) requirement before proceeding to other discovery requests. Second, the parties

In my opinion, electronic discovery production should almost always be conducted in phases. This is in accord with Sedona's second principle of proportionality, that, in general, litigants should seek discovery from the most convenient, least burdensome, and least expensive sources. As The Sedona Conference Proportionality Commentary indicates, parties should always focus first on the low-hanging fruit. In other words, they should focus first on evidence that is likely to have the most probative value and that is the most easily accessible.[130] Additionally, in my experience, requesting parties are open to phased discovery proposals so long as they are not asked to waive their right to additional, future discovery. Further, in most cases, after documents produced in the first round have been studied, the parties realize that they already have all they need to try the case. If there are any subsequent requests, they are usually very focused and constrained.

Where large amounts of ESI are involved, electronic discovery should always be phased, iterative, and fractal, just like the predictive coding process itself. I have found that this approach is the most effective and most efficient way to create order from today's near infinite and chaotic stores of ESI. It is the way to constrain electronic discovery in a just and efficient manner.

Judge Nolan addressed the proportionality doctrine again in her final *Kleen Products LLC v. Packaging Corporation of America* opinion when she considered an allegedly burdensome interrogatory, a motion to compel, and a counter-motion for a protective order.[131] Her analysis again relied on The Sedona Conference Proportionality Commentary. In her order partially granting the plaintiff's motion to compel, Judge Nolan explained that the defendants failed to back up their allegations of undue burden with specific facts:

> While a discovery request can be denied if the "burden or expense of the proposed discovery outweighs its likely benefit," a party objecting to discovery must specifically demonstrate how the request is burdensome. This specific showing can include "an estimate of the

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> should identify which claims are most likely to go forward and concentrate their discovery efforts in that direction before moving on to other claims. Third, the parties should prioritize their efforts on discovery that is less expensive and burdensome. Finally, nothing in this Order shall prejudice the parties from conducting all forms of discovery after the pending motion to dismiss has been ruled upon.

Id. (footnote omitted) (citations omitted).

[130] SEDONA, COMMENTARY ON PROPORTIONALITY (2013), *supra* note 56, at 8–9 (describing the appropriateness in some cases of conducting discovery in phases, starting with the most obvious information located in the easiest-to-reach places).

[131] Kleen Prods. LLC v. Packaging Corp. of Am., No. 10 C 05711, 2012 WL 4498465, at *1, *7, *9–10 (N.D. Ill. Sept. 28, 2012) (Nolan, Mag. J.).

> number of documents that it would be required to provide . . . , the number of hours of work by lawyers and paralegals required, [or] the expense." Here, [the defendants'] conclusory statements do not provide evidence in support of their burdensome arguments.[132]

Judge Nolan makes an important point that proportionality is a mixed question of law and fact and often raises evidentiary issues concerning burden and benefit.

C. Importance of Early Assertion of Proportionality

Courts have shown a preference for enforcing proportionality protection for parties responding to burdensome discovery when they raise the doctrine as early as possible. This is illustrated in three District Court cases that have recently considered the argument: *I-Med Pharma Inc. v. Biomatrix, Inc.* in New Jersey, *United States ex rel McBride v. Halliburton Company* in the District of Columbia, and *DCG Systems, Inc. v. Checkpoint Technologies, LLC* in California.[133]

1. Very Late Assertion

When responding to discovery, the plaintiffs in *I-Med Pharma* waited far too long to raise the argument of the proportionality doctrine. They waited to raise the argument until the day before a stipulated and court-ordered deadline for production.[134] The underlying dispute concerned breach of contract, and the keyword list dreamed up by defense counsel, who apparently engaged in a rousing game of "*Go Fish*,"[135] included such zingers as the following (including variants of some of these terms): *contract, loss, profit, credit, refund, revenue, CL, HS, return, claim, FDA, HA*.[136] I could go on, but you get the picture. The opinion does not explain why plaintiff's counsel agreed to review and produce all non-privileged files that matched this ridiculously long list of keywords from opposing counsel.[137]

In *I-Med Pharma*, the attorneys not only used go fish keyword search, but also agreed to hire an expert to run the search and placed no

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[132] *Id.* at *15, *17 (first two alterations in original) (citations omitted).

[133] I-Med Pharma Inc. v. Biomatrix, Inc., No. 03-cv-3677 (DRD), 2011 WL 6140658 (D.N.J. Dec. 9, 2011); DCG Sys., Inc. v. Checkpoint Techs., LLC, No. C-11-03792 PSG, 2011 WL 5244356 (N.D. Cal. Nov. 2, 2011).; U.S. *ex rel.* McBride v. Halliburton Co., 272 F.R.D. 235 (D.D.C. 2011).

[134] *See* Letter Motion Requesting Modification of Jan. 14, 2011 Discovery Order, *I-Med Pharma, Inc.*, 2011 WL 6140658, ECF No. 219 [hereinafter Letter Motion].

[135] *See* RALPH C. LOSEY, ADVENTURES IN ELECTRONIC DISCOVERY 204–06 (2011).

[136] So Ordered Stipulation at 5–6, *I-Med Pharma Inc.*, 2011 WL 6140658, ECF No. 182.

[137] *See I-Med Pharma Inc.*, 2011 WL 6140658.

limits on target custodians.[138] It was a search of the plaintiff's entire corporate computer system.[139] This is highly unusual. Not only that, the search was not restricted to any specific time periods; moreover, to make matters worse, they not only agreed to search the active files with word matches but also to search the *slack space* too.[140] *Slack space* is the so-called unallocated space files recovered by a forensic exam of plaintiff's computer system.[141] No wonder the wise judge presented with this conundrum, Senior United States District Court Judge Dickinson R. Debevoise, began his opinion with these words: "This case highlights the dangers of carelessness and inattention in e-discovery."[142]

Plaintiff's counsel finally woke up and discovered proportionality after the forensic expert searched the unallocated space of the client's computer system and found 64,382,929 hits covering the estimated equivalent of 95 million pages of documents![143] Given the complete failure to limit the search, this result, in Judge Debevoise's own words, "should come as no surprise."[144]

Since plaintiff's counsel by now probably had a pretty good idea of what a privilege review of another 95 million pages of mostly gibberish from slack space might cost, and since at this point the client probably did not want to pay for more, plaintiff's counsel finally said no. He asked defense counsel for a break on the prior agreement,[145] but defense counsel, perhaps sensing complete case victory, refused to modify the prior stipulation.[146] Then plaintiff requested relief from the prior

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[138] *Id.* at *2.

[139] So Ordered Stipulation, *supra* note 136, at 1–2; *see also I-Med Pharma Inc.*, 2011 WL 6140658, at *2.

[140] Discovery Order at ¶ 5, *I-Med Pharma Inc.*, 2011 WL 6140658, ECF No. 211; *see also I-Med Pharma Inc.*, 2011 WL 6140658, at *2.

[141] *I-Med Pharma Inc.*, 2011 WL 6140658 at *5. "'Slack space' is the unused space at the logical end of an active file's data and the physical end of the cluster or clusters that are assigned to an active file." United States v. Triumph Capital Grp., Inc., 211 F.R.D. 31, 46 n.7 (D. Conn. 2002). Deleted data can be retrieved from slack space, but retrieval requires forensic tools. *Id.*

[142] *I-Med Pharma Inc.*, 2011 WL 6140658, at *1.

[143] *Id.* at *2; Brief in Support of Defendants' Appeal of Magistrate Judge Shipp's Discovery Order Dated September 9, 2011, at 7, *I-Med Pharma Inc.*, 2011 WL 6140658, ECF No. 240. The opinion does not say how many pages of documents with hits were found in the allocated spaces of the system, but it was probably millions more. Indeed, the opinion does not suggest that I-Med Pharma Inc., opposed the privilege review and production of these documents. In all likelihood they paid millions in vendor costs and attorney fees to comply with this portion of the stipulation.

[144] *I-Med Pharma Inc.*, 2011 WL 6140658, at *2.

[145] Letter Motion, *supra* note 134, at 1.

[146] *See I-Med Pharma Inc.*, 2011 WL 6140658, at *2; Letter Motion, *supra* note 134, at 6.

stipulation on discovery that had, as a matter of course, been converted to an order.[147] Plaintiff raised the doctrine of proportionality and suggested that the costs and burdens to review 64,382,929 hits from slack space would exceed any possible benefit from that exercise.[148] The magistrate assigned to hear the dispute, Judge Michael A. Shipp, agreed,[149] and the defendant, having little to lose (except, perhaps, credibility), appealed the decision to Judge Debevoise.[150]

Judge Debevoise, of course, affirmed his magistrate.[151] Judge Debevoise, a master of understatement, notes: "A privilege review of 65 million documents is no small undertaking. Even if junior attorneys are engaged, heavily discounted rates are negotiated, and all parties work diligently and efficiently, even a cursory review of that many documents will consume large amounts of attorney time and cost millions of dollars."[152]

Judge Debevoise granted a hearing on plaintiff's appeal. At the hearing, defense counsel argued that plaintiff's obligation to review 95 million pages need not really be that burdensome.[153] Judge Debevoise responded by asking defense counsel how *they* would do a privilege review of that many documents. Defendants' counsel said they would simply run a search for the word "privilege" and only review the documents with that word.[154] As Judge Debevoise observed, "In spite of the answer given, it is difficult to believe that lawyers from [their firm] regularly disclose large quantities of information from their client's files without examining it."[155]

Judge Debevoise, affirming the magistrate judge, let plaintiff's counsel off the hook and relieved them of elements of their prior e-discovery agreement.[156] But he had some choice words for them too, which provide good advice for all on a better way to do keyword search, going far beyond the simple guessing game the attorneys in this case had apparently been playing:

> While the precise number of hits produced was not known in advance and Plaintiff argues that it could not have predicted the volume of material that the search would uncover, it should have exercised more

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147 Letter Motion, *supra* note 134, at 1.

148 *See I-Med Pharma Inc.*, 2011 WL 6140658, at *2.

149 *Id.*

150 *Id.* at *1–3.

151 *Id.* at *1, 6.

152 *Id.* at *5.

153 *Id.*

154 *Id.* at *5 & n.6.

155 *Id.* at *5 n.6.

156 *Id.* at *6.

> diligence before stipulating to such broad search terms, particularly given the scope of the search. In evaluating whether a set of search terms are [sic] reasonable, a party should consider a variety of factors, including: (1) the scope of documents searched and whether the search is restricted to specific computers, file systems, or document custodians; (2) any date restrictions imposed on the search; (3) whether the search terms contain proper names, uncommon abbreviations, or other terms unlikely to occur in irrelevant documents; (4) whether operators such as "and", "not", or "near" are used to restrict the universe of possible results; (5) whether the number of results obtained could be practically reviewed given the economics of the case and the amount of money at issue.
>
> . . . While Plaintiff should have known better than to agree to the search terms used here, the interests of justice and basic fairness are little served by forcing Plaintiff to undertake an enormously expensive privilege review of material that is unlikely to contain non-duplicative evidence.[157]

I-Med Pharma is a helpful case, not only for proportionality, but also for search. It is very telling that even though the case embodies the doctrine of proportionality, the keyword of "proportionality" itself is never used—even Rule 26(b)(2)(C) is never referred to. The opinion's omission of such key words demonstrates once again the limits of a keyword search.

2. Late Assertion

In *U.S. ex rel. McBride*, the party's timing in asserting the proportionality protection doctrine, though slightly better than in *I-Med Pharma*, was still late. Although not raised until after discovery had closed, at least protection was sought before stipulation to an order.[158] Fortunately for the responding party, the judge, United States Magistrate Judge John M. Facciola, is a strong advocate of proportionality. Although Judge Facciola is an expert and strong proponent of proportionality, my keyword search of the opinion shows that he too never once used the word in this opinion.[159] He cites Rule 26(b)(2)(C) several times,[160] but never says proportionality, showing once again the limits of keyword search.

The proportionality argument was raised in this case by the defendant in opposition to the plaintiff's motion to compel production.[161]

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[157] *Id.* at *5–6.

[158] U.S. *ex rel.* McBride v. Halliburton Co., 272 F.R.D. 235, 236, 238 (D.D.C. 2011).

[159] *See U.S. ex rel. McBride*, 272 F.R.D. 235; *see also id.* at 240 (discussing the obligation to balance utility against cost without using the term "proportionality").

[160] *Id.* at 240–42.

[161] *Id.* at 240.

Defendant Halliburton had already reviewed and produced relevant emails of 230 custodians.[162] Discovery had closed, but the plaintiff wanted Halliburton to search and produce still more email from an additional 35 custodians.[163] These additional custodians were now targeted by the plaintiff, McBride, because they were carbon copied on emails transmitting relevant documents that were already produced as part of the 230.[164] No other reason was provided. Defendant opposed plaintiff's motion with a lengthy and detailed affidavit showing why this supplemental request would be burdensome.[165] Judge Facciola noted the affidavit, and then relied on Rule 26(b)(2)(c) to deny plaintiff's motion to compel:

> While the present record does not permit a precise conclusion, I can presume, given the numbers of hours for which the defendants billed and the period of time at issue, that the amount in controversy is great and that the defendants' resources are greater than the relator's. Claims of fraud in providing services to military personnel raise important, vital issues of governmental supervision and public trust. Thus, these factors might weigh in favor of the discovery sought.
>
> On the other hand, the defendants protest, and relator does not deny, that they have already spent a king's ransom on discovery in this case—$650,000—without the addition of attorneys' fees. They have produced more than two million paper documents, thousands of spreadsheets, and over a half a million e-mails.
>
> Given the discovery that relator has had, what defendants have already spent, and the detailed showing made of how much more time and money will likely have to [be] spent to search an additional thirty-five custodians, surely relator has to make a showing that the e-mails not produced are crucial to her proof. She has not made such a showing, and they are not. . . .
>
> In this context, it is telling that relator does not show from the e-mails she has received that there is good reason to believe that the ones she claims are missing are highly probative of some fact. Indeed, there is no showing whatsoever from what has been produced that those e-mails not produced will make the existence of some crucial fact more likely than not. It is, after all, unlikely that a transmitting e-mail will do any more than transmit attached information and, by copy, alert others of that transmittal.
>
> Without any showing of the significance of the non-produced e-mails, let alone the likelihood of finding the "smoking gun," the search

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[162] *Id.* at 239–40.

[163] *Id.* at 240.

[164] *Id.*

[165] *Id.*; *see also* Defendants' Opposition to Relator's Motion to Compel Production of Documents, U.S. *ex rel.* McBride v. Halliburton Co., 272 F.R.D. 235 (D.D.C. 2011) (No. 1:05-cv-00828-FJS-JMF), ECF No. 108.

> relator demands cannot possibly be justified when one balances its cost against its utility. The motion will be denied.[166]

Therefore, although the timing of the argument was imperfect, proportionality prevailed against an unjustifiable search.

3. Timely Assertion

In *DCG Systems* the timing was right. The issue of proportionality was raised at the Rule 26(f) conference and 16(b) hearing as part of discovery plan discussions.[167] That is what the rules intend. Proportionality protection requires prompt, diligent action, as seen in this case.

DCG Systems was a patent case between two companies with competing patent rights.[168] The defendant wanted to have a *Model Order Limiting E-Discovery in Patent Cases* ("Model Order") entered in the case and thereby limit the initial scope of both sides' e-discovery.[169] The Model Order is not mandatory in patent cases but may be adopted upon court order or the parties' stipulation. The Model Order limits initial e-discovery to email from five custodians and five keywords per custodian.[170] This represents the Patent Bar's first attempt at a procedure to implement proportionality in e-discovery. The parties may jointly agree to modify these limits or request court modification for good cause, but even if they do not agree, or there is no order permitting more email discovery, a requesting party may obtain more discovery *if they pay for it*.[171]

Here the plaintiff objected to the defendant's request to have the Model Order entered in this case, and so they brought the issue to the judge at the Rule 16(b) hearing.[172] United States Magistrate Judge Paul S. Grewal agreed with the defendant and adopted the Model Order, reasoning:

> Critically, the email production requests must focus on particular issues for which that type of discovery is warranted. The requesting party must further limit each request to a total of five search terms and the responsive documents must come from only a defined set of

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166 *United States ex rel. McBride*, 272 F.R.D. at 241 (citations omitted).

167 DCG Sys., Inc. v. Checkpoint Techs., LLC, No. C-11-03792, 2011 WL 5244356, at *1 (N.D. Cal. Nov. 2, 2011).

168 *Id.* at *1–2.

169 *Id.* at *1 (citing Advisory Council for the U.S. Court of Appeals for the Fed. Circuit, An E-Discovery Model Order ¶¶ 10–11 (last visited Oct. 29, 2013) [hereinafter E-Discovery Model Order], *available at* http://www.cafc.uscourts.gov/images/stories/announcements/Ediscovery_Model_Order.pdf).

170 E-Discovery Model Order, *supra* note 169.

171 *Id.* ¶ 11.

172 *DCG Sys., Inc.*, 2011 WL 5244356, at *1.

> five custodians. These restrictions are designed to address the imbalance of benefit and burden resulting from email production in most cases. As Chief Judge Rader noted in his recent address in Texas on the "The State of Patent Litigation" in which he unveiled the Model Order, "[g]enerally, the production burden of expansive e-requests outweighs their benefits. I saw one analysis that concluded that .0074% of the documents produced actually made their way onto the trial exhibit list—less than one document in ten thousand. And for all the thousands of appeals I've evaluated, email appears more rarely as relevant evidence."[173]

Judge Grewal concluded with a cautionary note, however, and left the door open for the plaintiff to return seeking more discovery.[174]

D. Proportionality Requires Justice, as Well as Speed and Efficiency: Criticisms of DCG Systems *and the Patent Bar Model Order*

DCG Systems is, by far, the best of the three cases here examined for applying proportionality, but it is still far from perfect. It embraces proportionality, and will no doubt save the parties money in e-discovery, but at what cost? Litigation is about finding justice. If you lose that, you lose everything.

Rule 1 of the Federal Rules of Civil Procedure requires that litigation be "speedy" and "inexpensive."[175] Limiting discovery to five keywords and five custodians will get you that. But Rule 1 also requires litigation to be "just."[176] That is, after all, the whole point of litigation. In America, like most of the civilized world, we do not just go through the motions of legal process in a fast and cursory manner. Court systems are not just an empty charade. The heart of law as we know it is due process. We decide cases on the merits, on the facts, on the evidence, not just on the whim of judges or juries. That is what justice means to us. For those reasons, we should all be concerned about placing on e-discovery arbitrary limits designed to save money, and speed things along, if the tradeoff is justice.

Judge Grewal, who decided *DCG Systems*, shares these concerns.[177] So too does the Patent Bar who adopted this Model Order, and Chief

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[173] *Id.* (alteration in original).

[174] *Id.* at *2 ("Perhaps the restrictions of the Model Order will prove undue. In that case, the court is more than willing to entertain a request to modify the limits. But only through experimentation of at least the modest sort urged by the Chief Judge will courts and parties come to better understand what steps might be taken to address what has to date been a largely unchecked problem.").

[175] FED. R. CIV. P. 1.

[176] *Id.*

[177] *See DCG Sys., Inc.*, 2011 WL 5244356, at *2.

Judge Randall Rader who promotes it.[178] They are trying hard to find a proportional balance between benefit and burden, to know when *enough is enough* in the search for evidence. They do not want too much, like some unscrupulous attorneys for whom e-discovery is little more than a legal tool in a game to extort settlement. They also do not want too little, like some equally unscrupulous attorneys who play hide-the-ball. Good attorneys are like *Goldilocks*; they are looking for the *just-right* amount of e-discovery. They are looking for proportionality.

The patent judges show this concern in the pains they take to say that the five-and-five rule is just a "starting point."[179] They make clear that more e-discovery outside of these limits may be appropriate, and that parties can always move the court for additional discovery. For instance, in *DCG Systems*, Judge Grewal acknowledged that the restrictions of the Model Order might prove too onerous and said he was "more than willing to entertain a request to modify the limits."[180] The Model Order shows the same concern that justice not be sacrificed at the altar of efficiency.[181]

The intent to preserve justice apparent in *DCG Systems* and the Model Order is, however, frustrated by the order's reliance on go-fish-type keyword search.[182] It is not so much the arbitrary limit to five keywords that is troubling, nor the initial limit to five custodians, which is fine. What is troubling about the Model Order to search experts is the reliance on keyword search alone, and *blind-pick* keyword search at that,[183] which should bother anyone who has read the scientific studies.[184] The Model Order is promoting the worst kind of search: the blind-keyword-guessing kind. That is probably an inadvertent error. The lawyers and judges behind the Model Order were apparently not aware

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[178] *See* Advisory Council for the U.S. Court of Appeals for the Fed. Circuit, *Introduction* to An E-Discovery Model Order 3–4 (last visited Oct. 29, 2013), *available at* http://www.cafc.uscourts.gov/images/stories/announcements/Ediscovery_Model_Order.pdf.

[179] *Id.* at 2–3.

[180] *DCG Sys., Inc.*, 2011 WL 5244356, at *2.

[181] E-Discovery Model Order, *supra* note 169, ¶ 10 ("The Court shall consider contested requests for up to five additional custodians per producing party, upon showing a distinct need based on the size, complexity, and issues of this specific case.").

[182] *See* LOSEY, ADVENTURES IN ELECTRONIC DISCOVERY, *supra* note 135, at 204–06; E-Discovery Model Order, *supra* note 169, ¶ 11 (requiring the use of a limited number of search terms for email production requests without requiring the requesting party to reveal what they are looking for).

[183] *See* Daniel B. Garrie & Yoav M. Griver, *Unchaining E-Discovery in the Patent Courts*, 8 WASH. J.L. TECH. & ARTS 487 (2013) (discussing the debate over the effectiveness of keyword searching); *see also* LOSEY, ADVENTURES IN ELECTRONIC DISCOVERY, *supra* note 135, at 204–06.

[184] *See* sources cited *supra* notes 39–40.

of the limits of blind-guessing-based keywords. When they do become aware, I assume they will consider appropriate revisions to the Model Order, including revisions to the use of keywords to include metrics and information sharing[185] and provisions pertaining to the use of predictive coding. Accordingly, they should consider using language similar to that found in the Commentary to newly enacted Rule 502 of the Federal Rules of Evidence.[186]

The Model Order of the Patent Bar is a good start, but it needs revision so that keyword searches can be more effective, and the use of predictive coding can be encouraged. As is shown in the concluding section, the relevance-ranking features of predictive coding make it easier to adapt to the proportionality doctrine than keyword searches that have no such ability.[187] For that reason, when predictive coding is used, it is much easier to attain efficient cost savings without omission of key relevant documents. Thus, a fair balance can be reached between the seemingly contradictory dictates of Rule 1 to be efficient and inexpensive, but also to be just.

E. The Growing Influence of the Proportionality Doctrine

Even without buttressing the proportionality doctrine with a marriage to predictive coding technology as here proposed, the doctrine is growing in popularity.[188] In addition to the legal opinions already discussed, I have identified 16 other district court opinions which are of

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[185] The Model Order should be reformed to require that basic metrics be shared on proposed keywords. It should require enough disclosure so that the keyword picks are not blind. A requesting party should be permitted some keyword testing before five terms are settled upon.

[186] *See* FED. R. EVID. 502 advisory committee's note to subdivision (b) ("Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken 'reasonable steps' to prevent inadvertent disclosure.").

[187] *See infra* Part IV.

[188] *See generally* Philip J. Favro & the Hon. Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure*, 2012 MICH. ST. L. REV. 933 (2012) (proposing amendments to Utah's rules that emphasize proportionality and citing Ralph Losey for his discussion of proportionality in the *DCG Systems* case); Theodore C. Hirt, *The Quest for "Proportionality" in Electronic Discovery—Moving from Theory to Reality in Civil Litigation*, 5 FED. CRTS. L. REV. 171 (2011) (discussing the development of, the challenges in, and the recent support for the application of proportionality principles); Brian C. Vick & Neil C. Magnuson, *The Promise of a Cooperative and Proportional Discovery Process in North Carolina: House Bill 380 and the New State Electronic Discovery Rules*, 34 CAMPBELL L. REV. 233 (2012) (examining the cooperation and proportionality principles included in North Carolina's new e-discovery rules).

some importance to the growth of the doctrine.[189] Most were written since the Sedona Proportionality paper was first published in 2010.

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[189] Although not a complete list, the 16 cases are helpful to the proportionality doctrine. *See* Apple Inc. v. Samsung Elecs. Co., No. 12-CV-0630-LHK(PSG), 2013 WL 4426512, at *3 (N.D. Cal. Aug. 14, 2013) (footnote omitted) ("[T]he court is required to limit discovery if 'the burden or expense of the proposed discovery outweighs its likely benefit.' This is the essence of proportionality—an all-to-often ignored discovery principle."); Tucker v. Am. Int'l Grp., Inc., 281 F.R.D. 85, 90, 95, 98 (D. Conn. 2012) ("[Plaintiff requested] essentially carte blanche access to rummage through Marsh's electronically stored information, purportedly in the hope that the needle she is looking for lurks somewhere in that haystack. . . . [T]he burdens of plaintiff's proposed inspection upon Marsh outweigh the benefits plaintiff might obtain were she to obtain the emails through a Datatrack inspection. Plaintiff seeks to search, *inter alia*, the mirror images of eighty-three laptops—in effect, to dredge an ocean of Marsh's electronically stored information and records in an effort to capture a few elusive, perhaps non-existent, fish. . . . Courts are obliged to recognize that non-parties should be protected with respect to significant expense and burden of compelled inspections under Fed. R. Civ. P. 45(c)(2)(B)(ii). . . . Moreover, courts have focused on the importance of the Rule 26(b)(2)(C) proportionality limit to implement fair and efficient operation of discovery. . . . Balancing the prospective burden to Marsh against the likely benefit to plaintiff from the proposed inspection, the Court concludes that the circumstances do not warrant compelling Marsh to endure inspection of its computer records by Datatrack."); Madere v. Compass Bank, No. A-10-CV-812 LY, 2011 WL 5155643, at *2 (W.D. Tex. Oct. 28, 2011) ("As the cost to restore Compass Bank's backup tapes 'outweighs its likely benefit,' especially in light of the amount in controversy, the Court DENIES Madere's request for production."); Gen. Steel Domestic Sales, LLC v. Chumley, No. 10-cv-01398-PAB-KLM, 2011 WL 2415715, at *2–3 (D. Colo. June 15, 2011) (rejecting defendant's request for the production of every recorded sales call on plaintiff's database for around a two-year period because it would take four years to listen to the calls to identify potentially responsive information); Thermal Design, Inc. v. Guardian Bldg. Prods., Inc., No. 08-C-828, 2011 WL 1527025, at *1 (E.D. Wis. Apr. 20, 2011) (refusing to approve plaintiff's electronic fishing expedition simply because the defendant had the financial resources to pay for the searches, and holding the financial resources of the defendant are not tantamount to good cause under Federal Rule of Civil Procedure 26(b)(2)(C)); Wood v. Capital One Servs., LLC, No. 5:09-CV-1445 (NPM/DEP), 2011 WL 2154279, at *9 (N.D.N.Y. Apr. 15, 2011) (holding the "rule of proportionality" dictated that the plaintiff's motion be denied "without prejudice to his right to renew the motion to compel in the event he is willing to underwrite the expense associated with any such search"); Call of the Wild Movie, LLC v. Does 1–1,062, 770 F. Supp. 2d 332, 352, 354 (D.D.C. 2011) (granting a motion to compel because the request was narrow and the ESI requested was important, compared with an insufficient showing of undue burden); Hock Foods, Inc. v. William Blair & Co., No. 09-2588-KHV, 2011 WL 884446, at *9 (D. Kan. Mar. 11, 2011) (denying in part a motion to compel in light of estimated costs between $1.2 and $3.6 million dollars to search 12,000 gigabytes of data in order to answer an overbroad interrogatory); Diesel Mach., Inc. v. Manitowoc Crane, Inc., No. CIV 09-4087-RAL, 2011 WL 677458, at *3 (D.S.D. Feb. 16, 2011) (denying a motion to compel the production of documents in native format because no explanation was provided on why information contained in native format was necessary to the facts of the case when those same documents had already been produced as PDFs); Daugherty v. Murphy, No. 1:06-cv-0878-SEB-DML, 2010 WL 4877720, at *7–8 (S.D. Ind. Nov. 23, 2010) (holding that the cost and burden of the additional production outweighed the benefit, and the defendant's sworn testimony on burden and cost was credible); Willnerd v. Sybase, Inc., No. 1:09-cv-500-BLW,

IV. HOW PREDICTIVE CODING SUPPORTS PROPORTIONALITY

In most lawsuits, the focus of proportionality efforts is on document review. That is appropriate because document review typically constitutes between 60% and 80% of the total e-discovery expense.[190] The use of the latest AI-based review technologies can significantly reduce these costs as shown,[191] and for this reason alone predictive coding is the best tool we have for proportionality. But there is more to it than that. What makes this a marriage truly made in heaven is the document-ranking capabilities of predictive coding. This allows parties to limit the documents considered for final production to those that the computer determines have the highest probative value. This key ranking feature of AI-enhanced document review allows the producing party to provide the requesting party with the *most bang for the buck*. This not only saves the producing party money, and thus keeps its costs proportional, but it saves time and expenses for the requesting party. It makes the production much more precise, and thus faster and easier to review. It avoids what can be a costly exercise to a requesting party to wade

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2010 WL 4736295, at *3 (S.D. Idaho Nov. 16, 2010) ("[A] search of the employees' e-mails would amount to the proverbial fishing expedition—an exploration of a sea of information with scarcely more than a hope that it will yield evidence to support a plausible claim of defamation. In employing the proportionality standard of Rule 26(b)(2)(C), as suggested by Willnerd, the Court balances Willnerd's interest in the documents requested, against the not-inconsequential burden of searching for and producing documents."); Moody v. Turner Corp., No. 1:07-cv-692 (S.D. Ohio filed Sept. 21, 2010) ("[T]he mere availability of such vast amounts of electronic information can lead to a situation of the ESI-discovery-tail wagging the poor old merits-of-the-dispute dog."); Bassi & Bellotti S.p.A. v. Transcon. Granite, Inc., No. 08-cv-1309-DKC, 2010 WL 3522437, at *3 (D. Md. Sept. 8, 2010) ("[T]he Federal Rules do impose an obligation upon courts to limit the frequency or extent of discovery sought in certain circumstances, such as when the discovery requested is unreasonably duplicative or cumulative, or the burden or expense of the proposed discovery outweighs the likely benefit, considering the needs of the case, the importance of the issues at stake in the action, and the importance of the discovery in resolving those issues."); Rimkus Consulting Grp. v. Cammarata, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (requiring the parties engage in *reasonable* efforts, and stating that what is reasonable "depends on whether what was done—or not done—was *proportional* to that case"); Rodríguez-Torres v. Gov't Dev. Bank of P.R., 265 F.R.D. 40, 44 (D.P.R. 2010) ("[T]he Court determines that the ESI requested is not reasonably accessible because of the undue burden and cost. The Court finds that $35,000 is too high of a cost for the production of the requested ESI in this type of action. Moreover, the Court is very concerned over the increase in costs that will result from the privilege and confidentiality review that Defendant GDB will have to undertake on what could turn out to be hundreds or thousands of documents."); Dilley v. Metro. Life Ins. Co., 256 F.R.D. 643, 644 (N.D. Cal. 2009) (citation omitted) ("The court must limit discovery if it determines that 'the burden or expense of the proposed discovery outweighs its likely benefit,' considering certain factors including 'the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.'").

[190] *See* RAND REPORT, *supra* note 43, at 41 (finding a 73% average).

[191] *See supra* notes 43, 52, 63 and accompanying text.

through a document dump,[192] a production that contains a high number of irrelevant or marginally relevant documents. Most importantly, it gives the requesting party what it really wants—the documents that are the most important to the case.

A. Two Stages of Document Review Using Predictive Coding

To understand the full value of document ranking, it is necessary to understand how document review using predictive coding is now typically conducted in two stages. The first stage is identification of the likely responsive or relevant documents, which is also known as *first-pass review*. The second is study of the selected likely relevant documents to verify relevancy and determine which relevant documents must nevertheless be withheld, logged, redacted, and/or labeled to protect a client's confidential information. The second stage can also include tagging specific issues unrelated to confidentiality concerns.

There is no need for the second-pass review of any documents determined to be irrelevant, since such documents will not be produced, and thus, there is no need to implement such protections. This second-pass final review is an enormous problem in litigation for a variety of reasons, not just cost, especially as it concerns attorney-client privileges.[193] Therefore, the ability to limit the number of documents passed through to second review is critical to effectuating both cost and risk efficiencies.

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[192] See Branhaven, LCC v. Beeftek, Inc., 288 F.R.D. 386, 392–93 (D. Md. 2013), where the plaintiff's document dump in response to a request for production led to the imposition of sanctions upon both plaintiff and its attorneys. As the court explained:

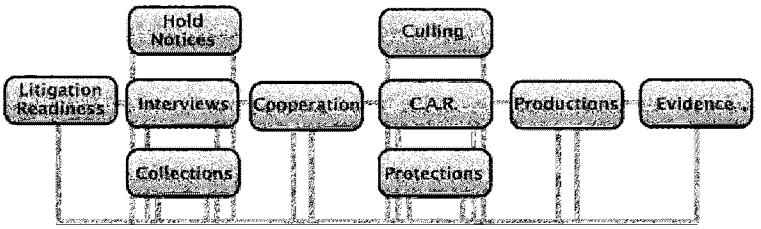
> As plaintiff's counsel has an affirmative duty to assure that their client responds completely and promptly to discovery requests [sic]. Their inaction seriously frustrated the defense of this case. The record here demonstrates a casualness at best and a recklessness at worst in plaintiff's counsel's treatment of their discovery duties. I agree with defense counsel that the attorneys abdicated their responsibilities while representing that they had not. If all counsel operated at this level of disinterest as to discovery obligations, chaos would ensue and the orderliness of the discovery process among counsel in federal courts, which is exquisitely dependent on honorable attorney self-regulation, would be lost.

Id. See also Ralph Losey, *The Increasing Importance of Rule 26(g) to Control e-Discovery Abuses*, E-DISCOVERY TEAM (Feb. 24, 2013, 6:10 PM), http://e-discoveryteam.com/2013/02/24/the-increasing-importance-of-rule-26g-to-control-e-discovery-abuses/.

[193] *See* Anonymous, *An Open Letter to the Judiciary—Can We Talk? (Part One)*, E-DISCOVERY TEAM (Sept. 11, 2011, 10:09 PM), http://e-discoveryteam.com/2011/09/11/an-open-letter-to-the-judiciary-%E2%80%93-can-we-talk-part-one/; Anonymous, *An Open Letter to the Judiciary—Can We Talk? (Part Two)*, E-DISCOVERY TEAM, (Sept. 18, 2011, 8:04 PM), http://e-discoveryteam.com/2011/09/18/an-open-letter-to-the-judiciary-%E2%80%93-can-we-talk-part-two/.

The second stage review is still computer-assisted, but it primarily involves human study of the documents identified in the first pass as likely relevant. The second stage does not consider the documents rejected in the first-pass review.[194] In the *Electronic Discovery Best Practices* ("EDBP") work flow diagram used to explain all of the legal work involved in e-discovery,[195] not just document review, this second stage of document review is called *Protections*. That is because its primary focus is on protection of attorney-client and work-product privileges. Protections is step number eight in the EDBP ten-step model shown below. The binary relevancy identification work, first-pass review, is step seven, labeled as C.A.R. for computer-assisted review, in the EDBP diagram. This step can be understood as containing the first five steps in the six-step model of predictive coding, or the first six steps in the eight-step model of predictive coding.

Diagram 3: Electronic Discovery Best Practices[196]



In the vast majority of cases, litigants do not dispense with final manual review of documents or rely *solely* on automated software in the Protections step.[197] The likelihood of error is simply still too high at this point in AI-enhanced software development for this to be an acceptable risk, at least in most cases for most clients. In some cases, for some clients, the risk of waiver may be acceptable. But in most cases the damage caused by disclosure of some privileged communications cannot be fully repaired by clawback agreements and orders, even when they

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[194] The second-stage review is identified as the last step in the six-step model of predictive coding described above where it is labeled *Protection Reviews and Productions*. *Supra* Diagram 1. In the eight-step predictive coding model, it is step number seven, called *Proportional Final Review*. *Supra* Diagram 2.

[195] See ELECTRONIC DISCOVERY BEST PRACTICES, www.EDBP.com for a complete explanation of the Electronic Discovery Best Practices model and its ten steps.

[196] Created by e-Discovery Team, Copyright © Ralph Losey 2012.

[197] This is based on my informal polling and questions of leaders of e-discovery departments of many large law firms and corporate law departments and hundreds of participants in CLE events around the country.

are enforced.[198] That is the primary reason litigants are unwilling to rely on technology and clawback agreements alone.

The only exceptions routinely encountered at this point are non-litigation circumstances, such as internal investigations, or in some productions, such as various productions to the government or second reviews in merger approvals. The second review may also sometimes be waived in a litigation context when the client has little choice but to save expenses or where the client thinks the risk of disclosure is very low. This later scenario typically arises when the data under review is very unlikely to contain confidential information that the client cares about, such as old data of a company that it acquired or where the data has been previously viewed by the requesting party.

Since second-pass review is required in most cases to preserve client secrets and confidential data, the reduction of the number of documents subject to second review by elimination in the first-pass review as probable irrelevant has a direct impact on the cost of the project. This is where the ranking features of AI-based search come in. Only documents determined appropriate according to a ranking system are subject to the second review. All others are culled out of consideration for production.

The ranking cut-off point is within the reviewer's control. Like most things in the law, the appropriate number depends on the case. The most common threshold is a simple probable relevance point where only documents ranked as 50% or higher probable relevance are subject to second review. Most predictive coding software can easily determine and segregate these documents and channel them for second review.[199] The documents with 50% or lower ranking are automatically classified as irrelevant and not produced although they should be subject to some quality control verifications. Alternatively, a higher or lower probability level could be used as a threshold, such as 75% or higher probable relevance. Using this higher threshold would typically reduce the number of documents subject to second review.

The selection of a gatekeeper probability level is dependent on a number of factors, including quality controls, special sampling, and

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[198] *See* Brookfield Asset Mgmt., Inc. v. AIG Fin. Prods. Corp., No. 09 Civ. 8285(PGG)(FM), 2013 WL 142503 (S.D.N.Y. Jan. 7, 2013). The privileged documents produced in *Brookfield* because of a vendor error were ordered returned to defendant, but plaintiff's counsel and plaintiff still were able to read the documents and become aware of the secrets. *Id.* *Neuralyzer* devices to erase human memory are only fictional; thus, the bell sounding client secrets cannot be un-rung.

[199] I am aware that some predictive coding software does not so categorize and rank the document collection. A percentage-probable-ranking feature is an essential feature to my proportional review methods here discussed. For that reason, I do not recommend those vendors, or their software, but instead encourage these companies to enhance their products to include this key feature.

many different project metrics. No particular probability percentage is appropriate for all cases. Instead, this is dependent on the data itself, the functioning of the machine learning software and ranking, the number of files in each ranking category, and, as will be shown next, on the overall proportionality analysis of the case.

B. Bottom-Line-Driven Proportional Review and Production

The new method of review and production analysis that I developed over the past 7 years is called *Bottom-Line-Driven Proportional Review*. The bottom line in e-discovery production is what it costs. Despite what some lawyers and vendors may say, total cost is not an impossible question to answer. It takes an experienced lawyer's skill to answer, but, after a while, you can get quite good at such estimation. It is basically a matter of estimating attorney billable hours plus vendor costs. With practice, cost estimation can become a reliable art, a projection that you can count on for budgeting purposes, and, as we will see, for proportionality arguments. Furthermore, as better technological tools are developed in the future to assist in this process I expect cost estimation to become much more of a science than an art.

Total cost projections may never be exact, but the ranges can usually be predicted, subject, of course, to the target changing after the estimate is given. If the complaint is amended or different evidence becomes relevant, then, just like a construction project, a change order may be required for the new specifications.[200]

Price estimation is an obvious thing to do before you begin work on any big project, especially complex projects, such as building construction or large e-discovery document reviews. Estimating legal review costs is basically the same thing as construction estimating—projecting materials and labor costs. In construction you calculate prices per square foot. In e-discovery you estimate prices per file.

The new strategy and methodology is based on a bottom line approach where you estimate what review costs will be, make a proportionality analysis as to what should be spent, and then engage in defensible culling to bring the review costs within the proportional budget. The producing party determines the number of documents to be subjected to final review by calculating backwards from the bottom line of what they are willing, or required, to pay for the production.

The defensible culling aspect of the method has been significantly buttressed by predictive coding software, especially the new ranking abilities. As discussed, predictive coding software evaluates the strength

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[200] I had two years of experience in the 1970s before law school as a construction estimator.

of relevance and irrelevance of every document in the data set analyzed. Before probability ranking, although parties always tried to cull out the least likely relevant documents when using Bottom-Line-Driven Proportional Review, there was considerable guesswork involved.

No legal review software existing before the new AI-enhanced predictive coding versions had any real document ranking abilities. Lawyers would instead rely on their own judgment and experience, coupled with sampling. There was too much room for human error. Only lawyers with extremely high skill and experience levels could cull accurately. There was too much art, and not enough science. But all of that changed with AI-enhanced document ranking. Now it is much easier to accurately focus your review on the documents most likely to have probative value to the case. With this new technology, we can, for the first time, confidently attain our proportional budget goals by culling out documents that are the *least likely* to be relevant.

1. Setting a Budget Proportional to the Case

The process begins by the producing party calculating the maximum amount of money appropriate to spend on ESI production. This is typically a range rather than one specific number. The budget range is usually tied to a number of different conditions and assumptions. This kind of budgetary analysis requires not only an understanding of the ESI production requests, but also a careful and realistic evaluation of the merits of the case. This is where the all important *proportionality* element comes in.

The amount selected for the budget should be proportional to the monies and issues in the case. As shown in the discussion on the proportionality doctrine, a producing party is not required to assume excessive, disproportional expenses, but it is required to pay for proportional discovery. The art is in knowing where to draw the line.

The budget becomes the bottom line that drives the review and keeps the costs proportional. The producing party seeks to keep the total costs within that budget. The budget should either be by agreement of the parties after some discussion at a Rule 26(f) conference, or at least without objection, and, failing that, by court order that in some way protects the producing party from excessive expense. If a party chooses not to disclose the restraints they have decided to utilize, they risk later second-guessing and an expensive do-over. The proportional approach is, as we have seen in the case law, necessarily based on a cooperative approach[201] and some disclosure.[202]

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[201] *See supra* notes 58, 128–29 and accompanying text.

[202] *See supra* notes 90–94, 102–03 and accompanying text.

The failure of most practicing attorneys to estimate and project future costs and decide in advance to conduct the review so as to stay within budget, is one of the primary reasons that e-discovery costs today are so high. Once you spend the money, it is very hard to have additional costs shifted to the requesting party.[203] But if you raise objections and argue proportionality before the spend, then you will have a much better chance.[204]

Under the Bottom-Line-Driven Proportional approach, after analyzing the case merits and determining the maximum proportional expense, the responding party makes a good faith estimate of the likely maximum number of documents that can be reviewed within that budget. The document count represents the number of documents that you estimate can be reviewed for final decisions of relevance, confidentiality, privilege, and other issues and still remain within budget. The review costs you estimate must be based on best practices, which in all large review projects today means predictive coding, and the estimates must be accurate (i.e., no puffing or mere guesswork).

The producing party then uses predictive coding techniques and quality controls to find the documents most likely to be responsive within the number of documents the budget allows. Since predictive coding is based on document relevancy ranking, it is the perfect tool to facilitate bottom-line-driven review.

By using best methods with predictive coding search[205] and taking advantage of the relevancy ranking features, you can get the most bang for your buck, arriving at the core truth. That in turn helps persuade the requesting party or court to go along with your budgetary limits. That is the essential reason I consider predictive coding to be a great facilitator of the Bottom-Line-Driven Proportional Review method.

2. Small Case Example

A few examples may help clarify how this method works. Assume a case where you determine a proportional cost of production to be $50,000, and estimate, based on sampling and other hard facts, that it will cost you $1.25 per file for both the automated and manual review before production of the ESI at issue (steps seven and eight of the EDBP

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[203] *See, e.g.*, *In re* Fannie Mae Sec. Litig., 552 F.3d 814, 822 (D.C. Cir. 2009) (discussing the lower court's denial of request for cost-shifting after expenses were incurred).

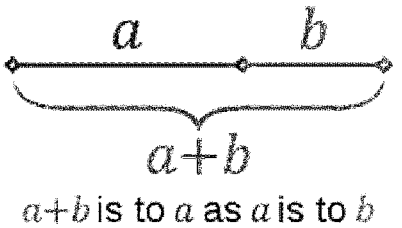
[204] Boeynaems v. LA Fitness Int'l, LLC, 285 F.R.D. 331, 340, 342–43 (E.D. Pa. 2012) (granting a defense motion to shift costs to plaintiff based on estimates that the requested search for emails would cost $219,000 and the member notes search would cost $360,000).

[205] This requires careful use of SMEs and a hybrid multimodal approach. *See supra* notes 60–67, 109–10, 112 and accompanying text.

flow chart).[206] Then you can review no more than 40,000 documents and stay within budget. It is that simple. No higher math is required.

The most difficult part is the legal analysis to determine a budget proportional to the real merits of the case. But that is nothing new. What is the *golden mean* in litigation expense? How to balance just, with speedy and inexpensive?[207] The essence of the ideal proportionality question has preoccupied lawyers for decades. Proportionality has also preoccupied scientists, mathematicians, and artists for centuries. Many mathematicians and artists claim to have found a mathematical and aesthetic answer that they call the *golden mean* or *golden ratio*, shown below.

Diagram 4: Golden Mean[208]



In law, this is the perennial *Goldilocks* question. How much is too much? Too little? Just right? How much is appropriate to spend to produce documents? The issue is old. I have personally been dealing with this problem since 1980. What is new is applying this legal analysis to a modern-day, high-volume-ESI search and review plan. Unfortunately, unlike art and math, there is no generally accepted golden ratio in the law, so it has to be recalculated and reargued for each case.[209]

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[206] *Supra* Diagram 3.

[207] FED. R. CIV. P. 1.

[208] This graphic is open-source.

[209] Ralph Losey, *My Basic Plan for Document Reviews: The "Bottom Line Driven" Approach (2013 Second Updated Version)*, E-DISCOVERY TEAM (Oct. 1, 2013, 4:47 PM), http://e-discoveryteam.com/2013/10/01/my-basic-plan-for-document-reviews-the-bottom-line-driven-approach/ ("If the golden ratio [of art and science] were accepted in law as an ideal proportionality, the number [would be] 1.61803399, aka *Phi*. That would mean 38% is the perfect proportion. I have argued that when applied to litigation that means the total cost of litigation should never exceed 38% of the amount at issue. In turn, the total cost of discovery should not exceed 38% of the total litigation cost, and the cost of document production should not exceed 38% of the total costs of discovery (as opposed to our current 73% reality). (It's like Russian nesting dolls that get proportionally smaller.) Thus for a $1 million case you should not spend more than $54,872 for document productions (1,000,000 – 380,000 – 144,400 – 54,872)."). Perhaps someday a judge will agree and at least refer to the *golden mean* in math and nature as part of a proportionality analysis. In the

Estimation for bottom-line-driven review is essentially a method for marshaling evidence to support an undue burden argument under Rule 26(b)(2)(C). It is basically the same thing we have been doing to support motions for protective orders in the paper production world for over 60 years. The only difference is that now the facts are technological, the numbers and variety of documents are enormous, sometimes astronomical, and the methods of review, especially the preferred predictive coding methods, are complex and not yet standardized.

3. Estimate of Projected Costs

The calculation of projected cost per file to review can be quite complicated, and is frequently misunderstood or is not based on best practices. Still, in essence, this cost projection is also fairly simple. Parties project how long it will take to do the review and the total cost of the time. (The materials costs, i.e., software usage fees, may also have to be factored in.)

Thus, for example (and this is an over-simplification), assume again the review project of 40,000 documents. Note that it probably started as 100,000 or 200,000 documents, but it is bulk-culled down[210] before beginning review by making such legal decisions as custodian ranking and phasing, date ranges, and file types. In other words, irrelevant date ranges, file types (such as music or graphics), and custodians are culled out.

Your next step is to identify the relevant documents from the 40,000 remaining after bulk culling. This is the previously described first-pass relevancy review where predictive coding is primarily used. It sets the stage for the protections review, where documents that were coded likely relevant, and only those documents, are then re-reviewed for privilege and confidentiality, redacted, labeled, and logged. They are often also issue-tagged at this stage for the later use and convenience of trial lawyers. Mistakes in first-pass relevancy review are also corrected; for example, an attorney may find that a document predicted to be relevant is not relevant in that attorney's judgment. Some mistakes will always be made by the machine in the probability projection process, no matter how many iterations there are. But it is not uncommon to reduce the errors to 20% or less, depending on the difficulty of the search.

The first-pass relevancy review used to be done (and still is as of late 2013 by most lawyers and review companies) by having a lawyer actually look at—meaning skim or read—each of the 40,000 documents.

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meantime, the 38% ratio it is at least an interesting starting point for analysis and discussion.

[210] *Culling* is step six in the EDBP. *Supra* Diagram 3.

Using low paid contract lawyers, this kind of first-pass relevancy review typically goes at a rate of 50 to 100 files per hour. But by using predictive coding, a skilled search expert, who must also be an SME for predictive coding to work, can attain speeds in excess of 10,000 files per hour for first-pass review. A good SME, therefore, can use machine training and determine file relevancy at a speed at least 1,000 times faster than a contract lawyer, and with far more accurately. That is why the SME with good software can charge 20 times as much as a contract lawyer, if not more, and still do the first-pass review at a fraction of the cost.[211]

In my experimental review of the 699,082 Enron documents for evidence concerning involuntary employee terminations, a fairly simple relevancy determination, my first-pass review was completed at an average speed of 13,444 files per hour.[212] Speeds such as this are common in many types of employment law issues, but similar speeds are attainable in other types of cases as well.[213]

Returning to the small case example of only 40,000 documents, let us assume a modest, AI-enhanced, first-pass review speed of 2,000 files per hour. That means a SME could complete the review in 20 hours.[214] It would probably take the SME about 3 hours to master the particular factual issues in the case, so let us assume a total time of 23 hours and a review rate for this SME of $550 per hour (in a small case like this, SMEs at relatively low rates are common, whereas the SME rates can be much higher in larger cases, but the speed of review and savings realized can also be much larger). That means an expense for first-pass review (excluding software charges) of $12,650, which is still less than half the cost of traditional manual review. Under a traditional contract lawyer review, where we assume a very fast speed (for them) of 75 files per hour, and a low, unmotivated lawyer rate of $50 per hour, you have a projected fee of $26,666.67.

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[211] *See* Gabriel Techs. Corp. v. Qualcomm Inc., No. 08cv1992 AJB (MDD), 2013 WL 410103, at *9–10 (S.D. Cal. Feb. 1, 2013).

[212] *See* Ralph Losey, *Predictive Coding Narrative: Searching for Relevance in the Ashes of Enron (Restatement),* E-DISCOVERY TEAM (Mar. 18, 2013, 2:27 PM), http://e-discoveryteam.com/2013/03/18/predictive-coding-narrative-searching-for-relevance-in-the-ashes-of-enron-restatement/.

[213] For instance, I recently completed another more complex fraud case review of over 1.5 million documents at an average speed of 35,831 files per hour. I did this review myself in one week's time, as I happened to be the only SME available for this project.

[214] Typical predictive coding review projects involve far more documents than this to review and so are able to attain faster speeds; still, I have done it in small cases with only 40,000 documents before. The math and cost savings still work with small projects like this if the predictive coding software cost is not too high.

Thus, even though the SME's $550 rate is 11-times higher than the contract lawyer's rate, since the SME is 26.67 times faster, the net savings are still greater than 50%. That is because it would take the contract lawyers 533.33 hours to complete the project, and, importantly, they would necessarily do so with a far lower accuracy rate.[215] They are likely to find far fewer relevant documents than the automated SME approach. This makes clear the power and importance of SMEs doing predictive coding work, and why, along with their current scarcity, they are now in such demand.[216]

Again returning to the example, the slower protections review comes after the first-pass review. Now the highly skilled SMEs are no longer required. The lower-paid contract lawyers can do the review on the documents the SMEs have determined to be relevant. Assume that the first-pass review found that 10,000 of the 40,000 documents were relevant. This means that 10,000 documents are subject to confidentiality protections review.[217] Let us assume this work goes at an average rate of 50 files per hour. This means a final pass review should be completed in 200 hours at a cost of $10,000. So the *base minimum* review cost for both passes is $22,650.

I say *base minimum* because there are additional expenses beyond just contract reviewer time, including the expense of partner and senior associate management time, direct supervision of contract lawyers, quality control reviews, et cetera, plus software costs, which, depending on the vendor and the particular deal, can sometimes be very high. Let us assume that there is another $7,000 cost here, for a total expense of $29,650. You would then have completed your review of 40,000 documents at a cost of $0.74 per document. That is pretty good. But in larger projects, where millions of documents are involved with more realistic prevalence rates, frequently less than 5%, the savings are even higher, and the per-document rate even lower, sometimes much lower.

All of these costs could be estimated in advance by having a bank of experience to draw upon to know the likely costs-per-file range. Still,

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[215] *See, e.g.*, Maura R. Grossman & Gordon V. Cormack, *Inconsistent Responsiveness Determination in Document Review: Difference of Opinion or Human Error?*, 32 PACE L. REV. 267, 287–88 (2012); Grossman & Cormack, *supra* note 39, at 14–17, 24; Roitblat, Kershaw & Oot, *supra* note 40, at 79; Ellen M. Voorhees, *Variations in Relevance Judgments and the Measurement of Retrieval Effectiveness*, 36 INFO. PROCESSING & MGMT. 697, 714–15 (2000).

[216] *See* David Cowen, *Job Market Heating Up for E-Discovery Technologists, Managers, and Attorneys*, E-DISCOVERY TEAM (Feb. 17, 2013, 8:30 PM), http://e-discoveryteam.com/2013/02/17/job-market-heating-up-for-e-discovery-technologists-managers-and-attroneys/.

[217] *Protections Review* is step eight in the EDBP. *Supra* Diagram 3.

practitioners should remember that even in the world of repeat litigation, like many employment law claims, all projects are different. All document sets are different. They have to, as I like to say, get their hands dirty in the digital mud.[218] Practitioners have to know their ESI collection, which they can only accomplish by spending time reading sample documents themselves. Even, for example, in the type of ESI most common in e-discovery today—email and attachments—the variances in email collections can be enormous.

The review speeds and thus review costs depend on the *density*[219] of the documents, the type of documents, and the general difficulty in understanding the documents. For example, emails are easier to read than spreadsheets, and shorter documents are generally easier to review than longer documents. The difficulty of the relevancy determinations also has a major impact on the speed of review. That is where the art of estimation comes in, and success will depend on your comprehension and detailed understanding of the project. Just as in building cost estimation, the practitioner must understand the blueprints and specifications of any project before having the capacity to make a valid estimate.

This is especially true of the SME work. You need to do some sampling to see what review rates apply. How long will it take these particular SMEs or contract reviewers to do the tasks assigned to them in this case with this data? Sampling is the only reliable way to answer that, especially when it comes to the all-important prevalence calculations.

4. A Big Data Example

Let us change the scenario somewhat for a final example. Assume there are 10,000,000 documents *after culling* for the SMEs to review. Assume sampling by an SME showed a prevalence of 10% (somewhat high), and a predictive coding review rate of 10,000 files per hour (somewhat slow for Big Data reviews). This means that only around 1,000,000 documents will need final protection review.[220] More sampling shows the contract reviewers using advanced AI-based techniques

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[218] *See* Ralph Losey, *"The Hacker Way"—What the E-Discovery Industry Can Learn From Facebook's Management Ethic*, E-DISCOVERY TEAM (Aug. 18, 2013, 9:10 PM), http://e-discoveryteam.com/2013/08/18/the-hacker-way-what-the-e-discovery-industry-can-learn-from-facebooks-management-ethic/.

[219] *Density*, *yield*, and *prevalence* are terms that all refer to the percent of relevant documents in larger collection. In raw, unfiltered data such as email collections, the percent of relevant documents is usually less than 5% and often far less than 1%.

[220] 10% of 10,000,000 = 1,000,000.

(smart routing, et cetera) will be able to review 1,000,000 documents at the rate of 100 files per hour.

With this information from sampling, you can now estimate a total first-pass review cost of $1,000,000 ($1,000 per hour SME fee x 1,000 hours). Note that this $1,000,000 charge compares very well to the actual $2,829,349.10 charge approved in one large case in 2013 as a costs award for computer assisted review.[221] Next you can estimate a total final-pass protection review cost of $250,000 ($25 per hour contract lawyer fee x 10,000 hours).

Also assume, from experience, that other supervision fees and software costs are likely to total another $150,000. The total cost estimate for the project would thus be $1,400,000. That represents a cost to review the total corpus of 10,000,000 documents of only $0.14 a document.[222]

Too high you say? Perhaps it is not proportionate to the value of the case? Maybe it is not proportionate to the expected probative value in this case from these 10,000,000 documents, which is something your sampling can indicate and can provide evidence to support? Then use ranking to further limit the review costs.

If the SME's identification of 1,000,000 likely relevant documents was based on a 50% or higher probability ranking using predictive coding, then try a higher ranking cut-off. Again, with experience this becomes fairly easy to do using sampling and good software. Maybe a 75% or higher ranking cut-off will bring the document count down from 1,000,000 to 250,000. Or maybe you just arbitrarily decide to use the top ranked 200,000 documents because that is all you can afford, or all you think is proportionate for this data and case. That may result in only reviewing documents ranked 79% or higher. Either way, you are now only passing the strongest documents along for second-pass review. You are only producing the documents most likely to have the strongest probative value.

Using the higher cut off, the cost for second-pass protection review would then be 25% of what it was, reduced from $250,000 for review of 1,000,000 documents, to $62,500 to review 250,000 documents. The other fees and costs also drop in your experience by 50%, from $150,000 to $75,000. The total estimate is now $1,137,500, instead of $1,400,000. It

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[221] This cost is significantly less than the fee approved in *Gabriel Technologies Corp. v. Qualcomm, Inc.* No. 08cv1992 AJB (MDD), 2013 WL 410103 (S.D. Cal. Feb. 1, 2013); Defendants Qualcomm, Inc., Snaptrack Inc., & Norman Krasner's Motion for Attorneys' Fees at 26, Gabriel Techs. Corp. v. Qualcomm Inc., No. 08cv1992 AJB (MDD) (S.D. Cal. Oct. 12, 2012), ECF No. 332-1.

[222] $1,400,000 / 10,000,000 = 0.14.

has gone down to just over $0.11 a document.[223] Assume this $1,137,500 number is now within your legal judgment to be proportional to this document request. It is now within your budget. You are done, and you now try to implement it within projected costs. Sometimes you succeed and the total costs are almost exactly what you projected. Other times you will go over, or sometimes maybe even come in under budget. With experience, your estimates become more reliable. Typically, a good estimator will estimate slightly on the high side so as to be more likely to surprise with savings.

If the $1,137,500 number was still not proportional in your judgment or your client's opinion, there are many other things to try. Typically I would focus on the bulk culling before the SME first-pass relevancy review. Change the custodian count or date range (but please, do not filter using keyword search). Bring the initial 10,000,000 documents down to 5,000,000 documents, then do the math. Thus, you may be talking about around $700,000, back to fourteen cents per document. Is that within the budget? Is that an amount that a court is likely to force you to spend anyway?

Another approach, one you have to take if further bulk culling is not possible, is to only review a smaller top range of the probable relevant documents. For instance, just review the top 10%, the documents with a probable-relevant ranking of 90% or higher. In some cases, it may even be appropriate and reasonable to only review the top 1%, those with a 99% or higher probable-relevant ranking. The quantity and quality of the top 1% may be so good that you do not need to see any additional documents. After all, sometimes it only takes one smoking-gun-type document to win or lose a case.

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[223] The costs of review have come way, way down in the past few years for those who are using AI-based methods. For some context on the $0.14 and $0.11 per document numbers used in this example, back in 2007 the Department of Justice spent $9.09 per document for review in the *Fannie Mae* case, even though it used contract lawyers for the review work. *In re* Fannie Mae Secs. Litig., 552 F.3d 814, 817 (D.C. Cir. 2009) ($6,000,000/660,000 emails). There were no comments by the court that this price was excessive when the government later came back and sought cost-shifting. At about the same time, Verizon paid about $6.11 per record for a massive second-review project that enjoyed large economies of scale and, again, utilized contract review lawyers. Roitblat, Kershaw & Oot, *supra* note 40, at 73, 79 ($14,000,000 to review 2.3 million documents in four months). A large construction case that went to trial in 2012 incurred a charge per file of $2.85 to process, host, and review 2,700,000 files comprising more than 17 million pages using contract lawyers paid $85 per hour. Tampa Bay Water v. HDR Eng'g, Inc., No. 8:08-CV-2446-T-27TBM, 2012 WL 5387830, at *2, *15 (M.D. Fla. Nov. 2, 2012); *see also* Losey, *supra* note 29. In 2011, before AI-enhanced software started to become available, I still saw an average cost of $5.00 per file for reviews.

5. All Review Projects Are Different

In order to make a valid estimate for bottom-line-driven proportional review, you must closely study the case and review project goals. It is not enough to have handy per-file cost estimates. This move to actual examination of the ESI at issue, and study of the specific review tasks, is equivalent to the move in construction estimation from rough estimates based on average per square foot prices to a careful study of the building's plans and specifications and a site visit with inspection and measurements of all relevant conditions. No builder would bid on a project without first doing the detailed, real-world estimation work. Lawyers must do the same for this method to succeed.

Even in the same organization, when just dealing with email, the variances between custodians can be tremendous. Some, for instance, may have large amounts of privileged communications. This kind of email takes the most time to review, and if relevant, to log. High percentages of confidential documents, especially partially confidential ones, can also significantly drive up the costs of the second-pass review. All of the many unique characteristics of ESI collections can affect the speed of review and total costs of review. That is why parties must look at the data and test-sample the emails in the collection to make accurate predictions. Estimation in the blind is never adequate. It would be like bidding on a building without first reading the plans and specs.

Even when you have dealt with a particular client's email collection before, a repeat customer so to speak, the estimates can still vary widely depending on the type of lawsuit, the issues, and the amount of money in controversy or the general importance of the case. The opposing counsel and judge can also have a big impact on your analysis. The less sophisticated they are on these subjects, the more difficult the task, and the more important it is to engage in fair and respectful education efforts.

Although this may seem counter-intuitive, it is easiest to conduct e-discovery in complex, big-ticket cases, especially if the goal is to do so in a proportional manner. If there is a billion dollars at issue, a reasonable budget for ESI review is fairly large. On the other hand, proportional e-discovery in small cases is a real challenge, no matter how simple they supposedly are. Many cases that are small in monetary value are still very complex. And complex or not, all cases today have a lot of ESI. The medium to small size cases are where bottom-line-driven proportional review has the highest application for cost control and the greatest promise to bring e-discovery to the masses.

C. The More-Bang-for-the-Buck-Bottom-Line-Ranked Approach Is Good for Both the Requesting Party and the Producing Party

When you are able to use ranking and predictive coding in a bottom-line-driven proportional review, it is much easier to persuade the requesting party to accept your proposed budgetary constraints. Failing that, it is much easier to persuade the court. The use of AI and predictive-coding ranking so that you only review and produce the best documents, the ones with the highest relevancy ranking, is a win/win proposal. It gives everyone the most truth for the dollar. This benefits both the producing party, who can thereby budget and avoid disproportionate burdens, and the requesting party. The requesting party benefits by a smart search system that finds more relevant documents—indeed, the most important documents. They benefit by not wasting their valuable time and resources reviewing irrelevant or marginally relevant documents. They are not overburdened by a document dump, an overly large production where they have to sort through thousands of barely relevant documents to find a few gems. The plaintiffs in the large, multi-district, class-action case, *Kleen Products*, reached the same conclusion, which is one reason why they tried to force the defendants to use predictive coding in their productions.[224]

In spite of the *Kleen Products* precedent, a producing party will often need to sell the benefits of these new methods to the requesting party. The requesting party will be more likely to cooperate if they understand the value to *them* of these methods. This often requires the producing party to provide some reasonable degree of transparency for the proposed review processes. For instance, tell them if you have an experienced, high quality SME lined up to direct the machine learning; share the SME's qualifications and experience.

As discussed, it is important to also engage the requesting party in relevancy dialogues. Make sure you are training the machine to find the documents that are really wanted. Clarify the target. If need be, share some examples early on of the relevant documents to be used in the training. Invite them to provide documents they consider relevant to use in the training. In some cases it may even make sense to invite them to fabricate documents to use for training. You can do that yourself as well, with or without their participation, or even knowledge. It makes a powerful persuasive tool to document your good faith attempts to try to find documents the requesting party is looking for, even if they would be seriously damaging to your case should they exist.

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[224] Kleen Prods. LLC v. Packaging Corp. of Am., No. 10 C 5711, 2012 WL 4498465, at *5 (N.D. Ill. Sept. 28, 2012).

Try to make the AI search at least a somewhat collaborative effort. Input on gray-area documents, where relevance is uncertain, can often have a big effect on machine learning.[225] If the requesting party refuses to cooperate, for instance, by refusing to give a clear idea of what they are looking for, then document your efforts. As shown by the three proportionality cases, you need to take any disputes to the judge as early as possible.[226]

Use of a collaborative approach, even if it is largely unreciprocated and only partial, is the best way to convince a requesting party that your estimates and proportionality positions are reasonable. It is the best way to show the requesting party that you are not still stuck in the old paradigm of *hide-the-ball* discovery games. I cannot overstate how important it is to develop *trust* between opposing counsel on discovery. Often, the only way to do that is through some level of transparency. You do not have to disclose all of your search secrets, but you may have to keep the requesting party at least partially informed and involved in the process. That is what cooperation looks like. It involves honest, good-faith communications. That builds trust and so makes it easier to represent your client's interests. It also makes it easier to fulfill the Rule 1 dictates of speedy, inexpensive, and just litigation.

CONCLUSION

The future of discovery involves new methods of technology-assisted discovery where Man and Machine work together to find the core truth. This day will come; in fact, it is already here. As the science fiction writer William Gibson said: "The future is already here. It's just not evenly distributed yet."[227] The key facts needed to try a case and to do justice can be found in any size case, big and small, at an affordable price, but you have to embrace change and adopt new legal and technical methodologies. The Bottom-Line-Driven Proportional Review method is part of that answer, and so too is advanced-review software at affordable prices. When the two are used together, it is a marriage made in heaven.

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[225] *See supra* notes 93–95 and accompanying text.

[226] *See supra* Part III.C.

[227] Pagan Kennedy, *William Gibson's Future Is Now*, N.Y. TIMES, Jan. 15, 2012, at BR1.

PREDICTIVE CODING: A TRIAL COURT JUDGE'S PERSPECTIVE

Judge Henry Coke Morgan, Jr.[*]

INTRODUCTION

Achieving "just, speedy, and inexpensive"[1] conduct in discovery will not succeed without the exercise of integrity and good faith on the part of counsel.[2] Requiring lead counsel to be involved at the earliest stages of the discovery and predictive coding process is crucial. Less experienced counsel are more likely to fall victim to the rationale of using zealous advocacy as a basis for failing to cooperate with opposing counsel in reaching the proper protocols for efficiently producing electronically stored information ("ESI").

Good faith and cooperation will prove more important than technology in solving problems with ESI. The court's first step should be to encourage counsel to reach a timely agreement on the production of ESI regardless of whether they select the most technologically-advanced protocols. Predictive coding is currently the most advanced form of technologically-assisted research ("TAR") and is the focus of this Article.

However, if counsel fail to reach an agreement or if their agreement fails to produce results, predictive coding appears to be the preferred path to promoting the objectives of Federal Rule of Civil Procedure One ("Rule One").[3] "[E]lectronic discovery should be a solution, not a

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[1] FED. R. CIV. P. 1. Although this Article is written based upon the framework of the Federal Rules, many states have similar rules, and at least one state court judge pioneered the use of predictive coding in state courts. *See* Global Aerospace Inc. v. Landow Aviation, L.P., No. CL 61040, 2012 WL 1431215 (Va. Cir. Ct. Apr. 23, 2012) (ordering that predictive coding be employed for producing ESI).

[2] *See* Robert L. Byman, *Venturing Some Predictions on Predictive Coding*, NAT'L L.J., Apr. 1, 2013, at 22, 22 (emphasizing cooperation and transparency in discovery).

[3] "These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1.

problem."[4] If predictive coding is the state of the art in electronic discovery, trial courts may adopt it with respect to ESI without waiting for further precedent or rule-making.

This Article suggests that trial courts should adopt predictive coding as it appears to be an improvement upon simple keyword- or manual-search systems. As the cost of civil litigation continues to escalate, primarily driven by ever increasing discovery and pre-trial motion practice, immediate solutions should be sought, or the civil jury trial will face obsolescence as a method of resolving civil disputes over money damages and property rights. Minimizing the costs of handling ESI[5] is only one of the many facets of controlling the costs of civil litigation, but it is an increasingly important facet, and controlling litigation costs has important long-term consequences for both the bench and the bar. This Article, therefore, addresses the question of whether predictive coding promotes the underlying principles of Rule One. Given the threefold nature of these principles, the analysis proceeds in three parts to reach the conclusion that predictive coding represents a positive step toward achieving just, speedy, and inexpensive trials.

I. IS PREDICTIVE CODING JUST?

The Federal Rules of Civil Procedure provide federal trial judges with an excellent framework within which to encourage the efficient handling of ESI. Beginning in 2006, these rules treated ESI as a separate subset of documents subject to production pursuant to Rules 26,[6] 34,[7] and 45.[8] The rules recognize proportionality in balancing the relevance and importance of ESI with the costs of its production, and provides cost shifting where ESI is inaccessible and sanctions where production efforts fall below acceptable standards.[9] However, these rules

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[4] William W. Belt et al., *Technology-Assisted Document Review: Is it Defensible?*, 18 RICH. J.L. & TECH., no. 3, art. 10, Spring 2012, at 43, http://jolt.richmond.edu/v18i3/article10.pdf.

[5] For a discussion addressing the various costs associated with ESI see Mia Mazza et al., *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 RICH. J.L. & TECH., no. 3, art. 11, Spring 2007, at 3–5, http://law.richmond.edu/jolt/v13i3/article11.pdf.

[6] *See* FED. R. CIV. P. 26(a)(1)(A)(ii)-(iii) (requiring initial production, including damage information) and advisory committee's note to 2006 amendments. The early production of comprehensive damage information is most important as it is often the case in civil litigation that the damages available at the end of the day do not justify the cost of the litigation.

[7] *See* FED. R. CIV. P. 34 and advisory committee's note to 2006 amendments.

[8] *See* FED. R. CIV. P. 45 and advisory committee's note to 2006 amendments.

[9] *See* FED. R. CIV. P. 26(b)(2)(B), (g)(3) and advisory committee's note to 2006 amendments; FED. R. CIV. P. 37(b)–(e).

wisely do not attempt to classify what forms of ESI qualify as accessible or what should be deemed inaccessible due to the difficulty or cost of production.[10] Case law, industry principles, and law reviews have categorized ESI for the purpose of discovery and furnish useful guidelines.[11] However, such guidelines are a moving target, and the rapid evolution of technology suggests rule-makers should continue to leave such fine-tuning to the discretion of the trial judge based upon the developing state of the art.

The term "predictive coding" does not lend itself to a single precise definition.[12] Generally, it may be defined as a five-step process: (1) performance of a form of keyword search, which may include such concepts as clustering, categorizing, culling, and threading through which raw electronic data is organized into a sample set of documents potentially subject to production;[13] (2) review of the sample by the lead attorneys who will code the sample documents as responsive or nonresponsive to discovery or as privileged or work product,[14] which is a process known as seeding;[15] (3) use of the seeded documents to enable the software to learn what is relevant and subject to discovery;[16] (4) organization of the discoverable documents for production, perhaps in terms of percentages of probability for individual documents, and creation of sample subsets of discoverable and non-discoverable documents for use in the verification process;[17] and, finally, (5) manual

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[10] The Fourth Circuit, in a case where sanctions were not involved, ruled upon the issue of what forms of ESI discovery may be included as taxable costs. *See* Country Vintner of N.C., LLC v. E. & J. Gallo Winery, Inc., 718 F.3d 249, 260 (4th Cir. 2013).

[11] *See, e.g.*, D'Onofrio v. SFX Sports Grp., Inc., 254 F.R.D. 129, 132 (D.D.C. 2008); THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 11 (Jonathan M. Redgrave et al. eds., 2d ed. 2007) [hereinafter SEDONA PRINCIPLES], *available at* https://thesedonaconference.org/publication/sedona-principles-addressing-electronic-document-production-second-edition; *see also* Thomas Y. Allman, *Local Rules, Standing Orders, and Model Protocols: Where the Rubber Meets the (E-Discovery) Road*, 19 RICH. J.L. & TECH., no. 3, art. 8, Spring 2013, http://jolt.richmond.edu/v19i3/article8.pdf.

[12] *See* Nicholas Barry, Note, *Man Versus Machine Review: The Showdown Between Hordes of Discovery Lawyers and a Computer-Utilizing Predictive-Coding Technology*, 15 VAND. J. ENT. & TECH. L. 343, 354–55 (2013).

[13] *Id.* at 354.

[14] *See id.*

[15] *See* Daniel Martin Katz, *Quantitative Legal Prediction—or—How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry*, 62 EMORY L.J. 909, 946 (2013).

[16] Barry, *supra* note 12, at 354.

[17] *See id.*

review of the sample subsets by lead counsel to verify the accuracy of the process.[18]

Manual review has always been the norm in handling paper documents and has been adapted to document-by-document screen searching for relevant ESI.[19] It is interesting to note who has been utilized to perform this search by law firms. A list that is not necessarily in historic order includes: (1) entry-level associates; (2) paralegals (full time or contract); (3) contract lawyers; and (4) third-party providers, including offshore providers. New associates probably did not envision this type of activity when they applied to law school or when they accepted employment with their respective firms, but may be compelled to perform such searches as a rite of passage. Contract lawyers and paralegals likely foresaw what type of work they would be performing, but the issue of oversight is still important here. Although contract lawyers and paralegals may willingly undertake this type of labor, particularly in the current legal market, this does not relieve the fatigue, boredom, and inattention inherent in a document-by-document manual review.[20] Such manual review is not likely to result in perfection, and its flaws will only be exacerbated as the volume of documents increases.[21] The use of third-party providers may involve the same level of personnel through a different entity and produce similar problems. Because third-party providers may have the same level of personnel performing similar tasks as within the law firms, oversight by more experienced lawyers will be necessary.

An analogy may be appropriate here. For most of the twentieth century, home closings were a staple source of practice and significant income for many lawyers. Typically, a title search fee of one percent of the purchase price or loan amount plus some additional fee for document

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[18] *See id.* at 354–55. It is not suggested that substituting lead counsel for another person or entity is a solution. Studies have shown that the participation of lead counsel at the step-two seeding process and step-five verification process promotes efficiency and saves time in the overall process. *See* Adam M. Acosta, *Predictive Coding: The Beginning of A New E-Discovery Era*, RES GESTAE, Oct. 2012, at 8, 8–9. There are also intangible benefits to bringing lead counsel together early in the litigation. For example, discovery issues tend to be solved more quickly.

[19] The Sedona Conference, *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 SEDONA CONF. J. 189, 198–99 (2007).

[20] Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient than Exhaustive Manual Review*, 17 RICH. J.L. & TECH., no. 3, art. 11, Spring 2011, at 46, http://jolt.richmond.edu/v17i3/article11.pdf.

[21] *See* Grossman & Cormack *supra* note 20, at 43, 46. *See also*, Titan Atlas Mfg. Inc. v. Sisk, Nos. 1:11CV00012 & 1:11CV00068, 2012 WL 5494459, at *1 (W.D. Va. Nov. 13, 2012) (discussing contract lawyers who overlooked discoverable emails).

preparation or review were charged to the buyer.[22] As home prices escalated, the marketplace would no longer support the one percent fee, and the gold standard of title searches, which utilized practicing lawyers to search grantor indices and judgment liens, gave way to searches by paralegals with reduced closing fees to lawyers.[23] The next evolution involved title searches and closings by title insurers and resultant reductions in participation by lawyers at any level.[24] The marketplace would not continue to support the cost of lawyers performing these ministerial tasks, and lawyers are increasingly being replaced by title companies in the home-closing process.[25]

Similarly, even if lawyers or trained and supervised laypersons were available to manually search ESI, they would likely be challenged by the volume of e-documents while simultaneously being pressured to control the time and cost of the search. As occurred in the home-closing area of law practice, the marketplace will likely doom manual searches of ESI to instances where its volume is large enough to justify what is admittedly a complex process.

The next development after manual searches of ESI has been a keyword search, not unlike the format used in Westlaw and Lexis legal research programs.[26] While this process has been accepted by the courts as an improvement upon manual searches, it has not proven to be an efficient solution.[27] The volume of documents necessary to justify moving from a manual search to predictive coding, however, remains unclear.

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[22] *See, e.g.*, Goldfarb v. Va. State Bar, 421 U.S. 773, 775–76 (1975) (implying that in 1971, all attorneys in Fairfax County, Virginia, were charging this one percent fee).

[23] *See* AM. BAR ASS'N COMM'N ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS 52–53 (1995).

[24] *See* Michael Braunstein, *Structural Change and Inter-Professional Competitive Advantage: An Example Drawn from Residential Real Estate Conveyancing*, 62 MO. L. REV. 241, 247–48 (1997).

[25] Some states, notably North Carolina, retain the lawyer-performed, or at least supervised, title search. *See* N.C. GEN. STAT. § 84-2.1 (LEXIS through 2012 Reg. Sess.) (defining the practice of law to include "abstracting or passing upon titles"); N.C. State Bar, Authorized Practice Advisory Op. 2002-1, 2003 WL 26113126, at *3 (Jan. 24, 2003) (revised Jan. 26, 2012) (defining "legal services associated with a closing" to include "providing title searches").

[26] *See* Jason R. Baron, *Law in the Age of Exabytes: Some Further Thoughts on 'Information Inflation' and Current Issues in E-Discovery Search*, 17 RICH. J.L. & TECH., no. 3, art. 9, Spring 2011, at 7, http://jolt.richmond.edu/v17i3/article9.pdf; Sedona Conference, *supra* note 19, at 199–200.

[27] William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 135 (S.D.N.Y. 2009); Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 256–57 (D. Md. 2008); Baron, *supra* note 26, at 8–10.

Some have estimated it to be approximately 100,000 documents.[28] The question may arise if there is some intermediate volume of documents where a keyword search is more just, speedy, and inexpensive than the direct transition from manual to predictive coding. Since the first step in the predictive-coding process is similar to a keyword search, counsel should be able to make the judgment as to whether the keyword search is adequate at this point. If it is not adequate, the predictive-coding process should proceed.

If handled professionally, and compared with the alternatives of manual and keyword searches, predictive coding should satisfy the reasonableness standard of Rule 26(g).[29] Professional handling includes the marshaling of all potentially discoverable documents for the keyword search, participation by senior counsel in the seeding and verification processes, and finally, transparency throughout the entire process.

II. IS PREDICTIVE CODING SPEEDY?

How is the trial judge to guide the efficient handling of ESI? It will require early and close attention to establishing protocols for the preservation and prompt production of ESI. In those cases where the court must resolve issues involving ESI, the trial judge must be prepared to rule promptly, or expensive delays and burgeoning discovery costs may result. A valuable tool is a requirement for periodic reports from counsel on the general progress of discovery as well as ESI in particular, which should reveal disputed issues in a timely fashion. If problems arise or if counsel cannot agree at the outset, should the trial judge require the parties to use predictive coding? The court's initial order covering ESI may prescribe predictive coding as the default provision where counsel are unable to agree upon a protocol. This may cause difficulties where the parties are not familiar with the predictive coding process, and although experienced third-party providers are available, the cost of some could be an issue. Nevertheless, with guidance from the court and experience in usage, predictive coding should solve more problems than it creates.

In most cases the parties should be able to design the predictive coding protocol and reach an agreement about it. It is expected that lead

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[28] *See, e.g.*, ARI KAPLAN & JOE LOOBY, ADVICE FROM COUNSEL: CAN PREDICTIVE CODING DELIVER ON ITS PROMISE? 5 (2012), *available at* http://www.fticonsulting.com/global2/media/collateral/united-states/advice-from-counsel-can-predictive-coding-deliver-on-its-promise.pdf.

[29] *See* FED. R. CIV. P. 26(g)(1)(B)(iii) (requiring attorneys or parties to certify that their discovery requests, responses, or objections are "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action").

counsel for all parties will participate in the two-step process of selecting the seed set of documents for coding.[30] Step three, translating the seed set into a program which will recognize relevant and discoverable documents, requires technical expertise which might be found among the law firms, in-house with clients, or through third-party providers. Wherever this expertise is found, the source of the program must be transparent and acceptable to all parties, and, if they cannot agree, the court must step in. The process should be compatible with each party's e-document storage protocols as well as compatible or easily convertible to the programs which will be used for discovery and trial. The fourth step is the application of the coded software to a defined set of e-documents in order to extract those which are relevant, and then to separate and index the privileged and work-product documents from those which must be produced. The product of the fourth step is the creation of subsets for production, which are used in the fifth step for verification of the accuracy of the search. While there are several methods of verification, the preferable approach seems to be random sampling of the subsets, with senior counsel coding the samples as accurate or inaccurate, and then running a statistical analysis to determine the error rate—this process is known as "statistical sampling."[31]

Ultimately, the speediness of the discovery of ESI will depend upon the selection of the most effective means of conducting the search. For a relatively small volume of documents, a manual search remains most efficient, but as the volume increases, the need for technology increases and should lead, at some level, to the use of predictive coding. There may be an intermediate level at which the less technologically advanced keyword search will be more efficient.[32] Another advantage of predictive coding is its ability to handle larger volumes of documents, and its potential to become more efficient as the technology continues to improve and counsel becomes more familiar with its utilization.[33]

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[30] Barry, *supra* note 12, at 354. If lead counsel delegates this task, such counsel should be given the opportunity to explain this decision to the court if such seeding leads to later problems. For example, delegating could create problems when lead counsel is the author of documents excludable from discovery because of work product or privilege, and, therefore, is better equipped to deal with such issues.

[31] *Id.* at 368–69 (discussing five methods of verification and commending statistical sampling because it was "created . . . to check the quality of a large set of goods (here, documents) for which time and cost prohibit individual quality assurance").

[32] *See* Jacob Tingen, *Technologies-That-Must-Not-Be-Named: Understanding and Implementing Advanced Search Technologies in E-Discovery*, 19 RICH. J.L. & TECH., no. 1, art. 2, 2012, at 41.

[33] *See id.* at 40.

III. IS PREDICTIVE CODING INEXPENSIVE?

The answer to whether predictive coding is inexpensive depends upon the volume of ESI and the available alternatives. Third-party vendors have evolved, including one which has secured a method patent upon its predictive coding process.[34] While the predictive-coding process appears cumbersome at first inspection, there are studies and experience-based, anecdotal evidence that predictive coding is both more accurate and less costly than manual- and simple-keyword search processes.[35] In the step-five verification process, a sample set of documents found to be relevant and irrelevant (as well as privileged or unprivileged) are examined by lead attorneys to determine the accuracy of the software. Again, a relatively few hours by lead counsel should prove more effective than a large number by less experienced attorneys or lay providers.[36] If the statistical accuracy is unsatisfactory, then the process must be repeated.[37] While studies have suggested that predictive coding is already more accurate than a manual search,[38] technological

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[34] *See* Barry, *supra* note 12, at 356. *See also* U.S. Patent No. 7,933,859 (filed May 25, 2010); Press Release, Recommind, Recommind Patents Predictive Coding (June 8, 2011), *available at* http://www.recommind.com/releases/recommind-patents-predictive-coding.

[35] *See* Wood v. Capital One Servs., LLC, No. 5:09-CV-1445 (NPM/DEP), 2011 WL 2154279, at *1, *8 (N.D.N.Y. Apr. 15, 2011) (discussing the exorbitant costs of an overbroad keyword search); Anne Kershaw & Joseph Howie, *Foreward* to EDISCOVERY INST., EDISCOVERY INSTITUTE SURVEY ON PREDICTIVE CODING, at ii, ii–iii (2010), *available at* http://www.discovia.com/wp-content/uploads/2012/07/2010_EDI_PredictiveCodingSurvey.pdf; NICHOLAS M. PACE & LAURA ZAKARAS, RAND CORP., WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY, at xvii (2012), *available at* http://www.rand.org/pubs/monographs/MG1208.html; Baron, *supra* note 26, at 27 ("[U]se of [predictive] selection methods at early stages of collection and culling have led to substantial bottom line savings in a wide variety of complex litigation."); Grossman & Cormack, *supra* note 20, at 20, 26–27; Steven Hunter, *E-Discovery: Cutting Costs with Predictive Coding*, INSIDECOUNSEL (Sept. 7, 2011), http://www.insidecounsel.com/2011/09/07/e-discovery-cutting-costs-with-predictive-coding; Ben Kerschberg, *E-Discovery and the Rise of Predictive Coding*, FORBES (Mar. 23, 2011, 10:04 AM), http://www.forbes.com/sites/benkerschberg/2011/03/23/e-discovery-and-the-rise-of-predictive-coding/; Sharon D. Nelson, *Predictive Coding: Will it Gain Widespread Acceptance?*, RIDE THE LIGHTNING (Oct. 12, 2010, 10:00 AM), http://ridethelightning.senseient.com/2010/10/predictive-coding-will-it-gain-widespread-acceptance.html.

[36] Acosta, *supra* note 18, at 8.

[37] Barry, *supra* note 12, at 354.

[38] *See* Grossman & Cormack, *supra* note 20, at 4 (citing BRUCE HEDIN ET AL., *Overview of the TREC 2009 Legal Track*, *in* NIST SPECIAL PUBLICATION: SP 500-278, THE EIGHTEENTH TEXT RETRIEVAL CONFERENCE (TREC 2009) PROCEEDINGS § 2.3.5 & tbl.5 (2009), *available at* http://trec.nist.gov/pubs/trec18/papers/LEGAL09.OVERVIEW.pdf; DOUGLAS W. OARD ET AL., *Overview of the TREC 2008 Legal Track*, *in* NIST SPECIAL PUBLICATION: SP 500-277, THE SEVENTEENTH TEXT RETRIEVAL CONFERENCE (TREC 2008)

developments should continue to enhance the accuracy and cost-effectiveness of predictive coding, and the mind-numbing process of manual review will only become more impractical as the quantity of ESI continues to multiply.[39]

CONCLUSION

Accordingly, there is a sound basis for moving on from the treatment of manual review as the gold standard.[40] Predictive coding is currently the most technologically advanced and accurate system of identifying and producing ESI. However, technology cannot replace integrity and good faith in the discovery process—it can only make the system operate more efficiently when it receives the proper input. The discovery process is at the root of professionalism in trial practice[41]—it can only operate justly if counsel and parties to the litigation endeavor to produce all discoverable documents and do not tolerate those who do not. Above all, the courts must not tolerate discovery abuse.[42] The rules and precedent provide methods for cost shifting and sanctions for careless and deliberate discovery abuse, and courts must be willing to impose them in appropriate cases.[43] It is often difficult for courts to determine fault or misconduct, and counsel must be prepared to document such shortcomings in order for courts to perform their duty. Cost shifting, monetary sanctions, and even directed verdicts are not enough for certain levels of discovery abuse—disbarment and criminal prosecution

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PROCEEDINGS § 2.8.1 (2008), *available at* http://trec.nist.gov/pubs/trec17/papers/LEGAL.OVERVIEW08.pdf.

[39] *Cf.* E.I. du Pont de Nemours & Co. v. Kolon Indus., 803 F. Supp. 2d 469, 475–76 (E.D. Va. 2011) (discussing how, even with suspicious deletions which resulted in sanctions, over 1.2 million pages of discovery were produced).

[40] *See* SEDONA PRINCIPLES, *supra* note 11, at 5; Grossman, *supra* note 20, at 48; Andrew Peck, *Search, Forward: Will Manual Document Review and Keyword Searches Be Replaced by Computer-Assisted Coding?*, L. TECH. NEWS, Oct. 2011, at 25, 25–26.

[41] *See* Judge Jesse G. Reyes, *The Role of the Judiciary in Fostering Professionalism and Civility*, THE BENCHER, Nov./Dec. 2011, at 9–10 (discussing professionalism and mentioning the need to reliably provide documents).

[42] Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001) (alteration in original) (quoting United States v. Shaffer Equip. Co., 11 F.3d 450, 457 (4th Cir. 1993)) ("The courts must protect the integrity of the judicial process because, '[a]s soon as the process falters . . . the people are then justified in abandoning support for the system.'"); *see* Taylor v. Mitre Corp., No. 1:11-cv-1247, 2012 WL 5473573, at *1–3 (E.D. Va. Nov. 8, 2012) (adopting the magistrate judge's report and recommendation for dismissal where the plaintiff used a computer program to permanently wipe his hard drive of evidence).

[43] *See* FED. R. CIV. P. 37; Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 283–84 (S.D.N.Y. 2003).

may be appropriate.[44] Much is at stake. The high cost of civil litigation threatens the civil trial as the gold standard for dispute resolution. Discovery and its abuse are prime drivers of this escalation of costs, and every effort must be made by courts and attorneys to control such costs. While technology has the potential to uncover discovery abuse, the process of uncovering is itself costly, as it will frequently require an expensive search of otherwise inaccessible documents.

Alternative dispute resolution is a valuable aid in resolving civil litigation, but its purpose should not be to replace the civil trial. If judges and juries become obsolete in resolving civil disputes, who is next? May paraprofessionals replace licensed attorneys in appearing before mediators or arbitrators?

Yes, technology can help, and predictive coding should help control costs with increased usage. As technology progresses, predictive coding may be displaced by a more efficient system, but until such time, it is the best available system for ESI production. However, technology will never replace professionalism as the most important factor in the just, speedy, and inexpensive determination of civil actions.

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[44] *See* United States v. Lundwall, 1 F. Supp. 2d 249, 250 (S.D.N.Y. 1998) (holding that the crime of obstruction of justice under 18 U.S.C. § 1503 covers willful destruction of documents during civil litigation); Peter Vieth, *Murray Agrees to a 5-Year Suspension*, VA. LAW. WKLY., Aug. 5, 2013, at 2 (reporting a five year suspension from the practice of law for discovery abuse among other things); *see also* Justin P. Murphy & Matthew A.S. Esworthy, *The ESI Tsunami: A Comprehensive Discussion About Electronically Stored Information in Government Investigations and Criminal Cases*, CRIM. JUST., Spring 2012, at 31, 33 (mentioning multiple cases where discovery abuses were referred to the United States Attorney for criminal prosecution).

DISCOVERY AND THE DUTY OF COMPETENCE

Monica McCarroll[*]

INTRODUCTION

The duty of competence is fundamental to the practice of law; yet, many of today's civil litigators risk running afoul of this basic requirement of our profession by failing to appreciate the seismic impact of electronically stored information ("ESI") on the discovery process. Much has been written about the 2006 Amendments to the Federal Rules of Civil Procedure,[1] and an entire industry has been created to address the discovery of ESI.[2] This Article does not attempt to cover those topics but instead endeavors to evaluate recent opinions issued by a handful of federal judges widely recognized as "pioneers" in e-discovery.[3] Along with the evaluation of recent opinions from the e-

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[1] *E.g.*, Bennett B. Borden, Monica McCarroll, Brian C. Vick, & Lauren M. Wheeling, *Four Years Later: How the 2006 Amendments to the Federal Rules Have Reshaped the E-Discovery Landscape and Are Revitalizing the Civil Justice System*, 17 RICH. J.L. & TECH., no. 3, art. 10, Spring 2011, http://jolt.richmond.edu/v17i3/article10.pdf; Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171 (2006); Jessica DeBono, Comment, *Preventing and Reducing Costs and Burdens Associated with E-Discovery: The 2006 Amendments to the Federal Rules of Civil Procedure*, 59 MERCER L. REV. 963 (2008).

[2] Evan Koblentz, *Gartner Forecasts E-Discovery Growth to $2.9 Billion in 2017*, L. TECH. NEWS (Jan. 3, 2013), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202583045089&slreturn=20130922125157.

[3] These e-discovery forerunners are: Judge Paul W. Grimm, of the United States District Court for the District of Maryland; Judge Lee H. Rosenthal, of the United States District Court for the Southern District of Texas; Judge Shira A. Scheindlin, of the United States District Court for the Southern District of New York; Magistrate Judge John M. Facciola, of the United States District Court for the District of Columbia, Magistrate Judge Nan R. Nolan, of the United States District Court for the Northern District of Illinois; Magistrate Judge Andrew J. Peck, of the United States District Court for the Southern District of New York; and Magistrate Judge David J. Waxse, of the United States District Court for the District of Kansas. *See, e.g.*, Lisa Holton, *A Front-Row Seat: Five Pioneer Judges Who Shaped the Evolution of E-Discovery*, L. TECH. NEWS, Aug. 2013, at 46, 46–49 (profiling Judges Scheindlin, Rosenthal, Peck, Grimm, and Facciola); *see also* David J. Waxse, *"Do I Really Have to do That?" Rule 26(a)(1) Disclosures and Electronic Information*, 10 RICH. J.L. & TECH., no. 5, art. 50, Spring 2004, http://jolt.richmond.edu/v10i5/article50.pdf (discussing, two years prior to the 2006 E-Discovery Amendments, what

discovery bench, this Article highlights commentaries and proclamations from a number of the think tanks, models, and conferences that have grown out of the need to address best practices in e-discovery, such as The Sedona Conference, the Electronic Discovery Reference Model, the Text Retrieval Conference Legal Track, and others. The goal of this Article is to analyze the case law and commentary described above to outline the "knowledge, skill, thoroughness and preparation"[4] a litigator should possess to competently represent a client engaged in civil discovery in federal court today.[5]

I. THE DUTY OF COMPETENCE GENERALLY

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[6]

Lawyers' duties to act with reasonable competence arise from their role as fiduciaries; "that is, a person to whom another person's affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary."[7] Lawyers who fail to understand and comply with the rules of the court in which they practice not only risk losing their client and damaging their reputation with the court, but they may also face disciplinary sanctions, civil liability, and even disbarment.[8]

The expectation that a lawyer provide competent representation may seem self-evident; yet, it was not defined in a clear and concise manner until the adoption of Model Rule of Professional Conduct 1.1 in

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electronic information means and how it impacts Federal Rule of Civil Procedure 26(a)(1)(B)).

4 MODEL RULES OF PROF'L CONDUCT R. 1.1 (1983).

5 This Article focuses on federal rules, but thirty-six of the fifty states have adopted the same or similar rules. *See* KROLL ONTRACK, STATE COURT RULES AND STATUTES REGARDING ELECTRONICALLY STORED INFORMATION (2012), *available at* http://www.krollontrack.com/library/Rules_Feb_2012_-_New_Draft.pdf.

6 MODEL RULES OF PROF'L CONDUCT R. 1.1 (1983).

7 RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 16 (2000).

8 *See, e.g.*, *In re* Dempsey, 632 F. Supp. 908, 909–10 (N.D. Cal. 1986) (disbarring a lawyer from practice in federal district court because he "failed to notice motions in accordance with local rules, attempted to subpoena witnesses in an improper manner, consistently made improper or unintelligible objections . . . , and generally conducted himself in a manner that caused the trial judge to question his competence"); *In re* Belser, 287 S.E.2d 139, 139 (S.C. 1982) (censuring a lawyer for his admitted failure to familiarize himself with court rules); *see also* ABA Ctr. for Prof'l Responsibility, Annotated Model Rules of Professional Conduct 22 (6th ed. 2007) ("[a] lawyer is expected to know [and comply with] the rules of the courts before which the lawyer practices.").

1983.[9] Since then, all states and the District of Columbia have adopted some version of Rule 1.1, with most jurisdictions adopting the Model Rule verbatim and a few modifying the duty to clarify or limit it based on circumstances.[10] There is no question that competence extends to discovery, which is governed by the Federal Rules of Civil Procedure and its state equivalents. Consider the recent amendment to Comment 8 to Model Rule 1.1: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."[11]

A. The 2006 "E-Discovery Amendments" to the Federal Rules of Civil Procedure

Lawyers currently practicing civil litigation, regardless of jurisdiction, would be hard-pressed to identify a greater change to that practice than the 2006 Amendments to the Federal Rules (the "E-Discovery Amendments").[12] While evidence existed in electronic form long before 2006,[13] the E-Discovery Amendments incorporated the concept of ESI into every aspect of the civil discovery process. Since 2006, the volume of ESI generated by human beings has grown at an exponential rate and shows no signs of slowing.[14] Moreover, common

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[9] MODEL RULES OF PROF'L CONDUCT R. 1.1 (1983).

[10] Thirty-nine states have adopted Model Rule 1.1 verbatim. *See* ABA CPR POLICY IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 1.1: COMPETENCE (Aug. 16, 2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_1.authcheckdam.pdf. The remaining eleven states and the District of Columbia have adopted some modified version of Rule 1.1. *Id.* Georgia, Michigan, New Hampshire, North Carolina, and Texas require lawyers who lack the requisite skill or knowledge to associate with a lawyer who is competent to handle the matter while Alaska, California, Louisiana, New Jersey, New York, and the District of Columbia all have additional requirements. *Id.*

[11] MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (2013) (emphasis added). Forty states have adopted the comments along with their adoption of the Model Rules. ABA CPR POLICY IMPLEMENTATION COMM., STATE ADOPTION OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT AND COMMENTS (May 23, 2011), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.authcheckdam.pdf.

[12] Amendments to Federal Rules of Civil Procedure, 547 U.S. 1233 (2006).

[13] The Advisory Committee first considered changes to the Federal Rules regarding the role of ESI in discovery back in the late 1990s. *See* COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE 22 (2005) [hereinafter 2005 REPORT OF THE JUDICIAL CONFERENCE].

[14] *See* MICHAEL R. ARKFELD, PROLIFERATION OF "ELECTRONICALLY STORED INFORMATION" (ESI) AND REIMBURSABLE PRIVATE CLOUD COMPUTING COSTS 4–5 (2011) (stating that "[t]he total amount of digital information created grew from 494 billion

sources of discoverable ESI have expanded beyond business documents and email to databases, social media postings, and text messages, to name but a few.[15]

The Advisory Committee proposed the E-Discovery Amendments "to reduce the costs of [electronic] discovery, to increase its efficiency, to increase uniformity of practice, and to encourage the judiciary to participate more actively in case management."[16] Stated differently, the E-Discovery Amendments were implemented, at least in part, to help lawyers practice e-discovery in a competent manner and to do so as early in the case as possible.[17]

Lawyers practicing under the E-Discovery Amendments must consider ESI at every step of the discovery process, starting with preservation. The amendments to Rule 26 require counsel to discuss the preservation of discoverable ESI, to confer on any issues related to the discovery of ESI, and to reach agreements as to how to handle privileged ESI at the Rule 26(f) conference.[18] Then, moving into identification and collection, the amendments to Rule 16 require counsel to identify the sources and scope of that ESI in advance of the Rule 16(b) conference and to be prepared to discuss those issues with their adversary[19] while the amendments to Rule 26 require counsel to include ESI in their initial

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gigabytes in 2008, to 800 billion gigabytes . . . in 2009 or a 62 percent increase, to 1.2 [trillion] gigabytes . . . in 2010" and that "enterprise data is doubling every three years"), *available at* http://www.lexisnexis.com/documents/pdf/20110721073226_large.pdf.

15 *See* Jay M. Zitter, Annotation, *Authentication of Electronically Stored Evidence, Including Text Messages and E-Mail*, 34 A.L.R. 6th 253, §§ 4, 5, 7, 9, 11 (2008) (listing cases where e-mails, messages from social networking sites, text messages, databases, and chat room transcripts were allowed into evidence).

16 ADVISORY COMM. ON THE FED. RULES OF CIVIL PROCEDURE, COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 21 (May 27, 2005) [hereinafter REPORT OF THE CIVIL RULES ADVISORY COMMITTEE], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2005.pdf.

17 *See* Steven S. Gensler, *Some Thoughts on the Lawyer's E-volving Duties in Discovery*, 36 N. KY. L. REV. 521, 532 (2009) ("The belief that lawyers should, if not must, significantly increase their early efforts in order to properly address the demands of e-discovery seems nearly universal.").

18 Amendments to Federal Rules of Civil Procedure, 547 U.S. 1233, 1244 (2006); *see also* FED. R. CIV. P. 26(f); REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, *supra* note 16, at 31–33, 38–39.

19 Amendments to Federal Rules of Civil Procedure, 547 U.S. at 1239–40; *see also* FED. R. CIV. P. 16(b); REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, *supra* note 16, at 26–27, 29. The language, but not the substance, of Rule 16 has since been amended to read, "*provide* for disclosure or discovery of electronically stored information" and "any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after *information is produced*." FED. R. CIV. P. 16(b)(3)(B)(iii)–(iv) (emphasis added).

disclosures.[20] Finally, proceeding through search, review, and production, the amendments to Rules 33 and 34 require counsel to consider and to include ESI when drafting responses to interrogatories or producing items in response to requests for production and to produce said ESI in the form requested by the adversary or in a reasonably usable form.[21]

It is for these reasons that this Article posits that civil litigators who continue to profess ignorance about all things e-discovery are essentially admitting that they are unable to fulfill their duty of competence. As Judge Shira A. Scheindlin, the "mother of e-discovery,"[22] reminded us in her groundbreaking *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities* opinion:

> Courts cannot and do not expect that any party can meet a standard of perfection. Nonetheless, the courts have a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party. . . . [W]hen this does not happen, the integrity of the judicial process is harmed and the courts are required to fashion a remedy.[23]

Fortunately, Judge Scheindlin and a growing cadre of her colleagues on the federal bench, as well as some practitioners dedicated to shaping and guiding the discovery process, have issued numerous opinions, proclamations, and protocols that provide an excellent roadmap for what practitioners and litigants must do to meet the basic threshold of competence when it comes to the practice of e-discovery.

B. Why Else Should We Want to Practice E-Discovery Competently?

Anyone who practices regularly in federal court knows how long and involved the discovery process can be, even in self-proclaimed "Rocket Dockets."[24] Discovery decisions made at the start of the process are

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[20] Amendments to Federal Rules of Civil Procedure, 547 U.S. at 1241–42; *see also* FED. R CIV. P. 26(a)(1)(A)(ii); REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, *supra* note 16, at 30.

[21] Amendments to Federal Rules of Civil Procedure, 547 U.S. at 1244–47; *see also* FED. R. CIV. P. 33(d), 34(a)–(b); REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, *supra* note 16, at 68–78, 80–82.

[22] John A. Chandler, *Business and Commercial Litigation in Federal Courts*, GA. BAR J., Feb. 2013, at 64, 65 (book review).

[23] Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., 685 F. Supp. 2d 456, 461–62 (S.D.N.Y. 2010), *abrogated by* Chin v. Port Auth., 685 F.3d 135, 162 (2d Cir. 2012) (holding that failure to institute a litigation hold did not constitute gross negligence per se).

[24] The Eastern District of Virginia is the original "Rocket Docket," but has since been followed by the Eastern District of Texas, Northern District of California, Northern

generally based on incomplete information and "best guesses" that often prove to be inadequate or completely wrong as more information is uncovered and analyzed.[25] Consequently, the ability to adjust your discovery process as new developments occur is critical to achieving quality in the process. Lawyers who practice discovery in a competent manner, however, should encounter no difficulties in adapting and in satisfying the purpose of the Federal Rules of Civil Procedure; namely, "to secure the just, speedy, and inexpensive determination of every action and proceeding."[26] If that aspirational goal is not sufficient motivation for hardened trial attorneys seeking to advocate zealously for their clients, then perhaps the following guidelines set out by The Sedona Conference, which succinctly define why lawyers should care about competently conducting discovery, might prove persuasive.[27]

"First, failure to employ a quality e-discovery process can result in failure to uncover or disclose key evidence," which can affect the outcome of litigation.[28] At its essence, discovery is about finding and developing facts to support or refute your client's position. Conducting discovery in a haphazard or ad hoc manner can cause you to overlook or, even worse, fail to find important evidence that would inform your trial strategy and your client's decisions about proceeding with a particular matter.

Second, an inadequate discovery process "may allow privileged or confidential information to be inadvertently produced."[29] The risk of accidentally producing privileged or confidential information generally increases with the volume of information being produced. Competent litigators know that although negotiating a protective order under Federal Rule of Civil Procedure 26(c) and clawback orders under Federal

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District of Georgia, and Western District of Wisconsin. *See* Xuan-Thao Nguyen, *Justice Scalia's "Renegade Jurisdiction": Lessons for Patent Law Reform*, 83 TUL. L. REV. 111, 121–22 (2008); *see also* CHRIS BARRY ET AL., PRICEWATERHOUSECOOPERS LLP, 2013 PATENT LITIGATION STUDY: BIG CASES MAKE HEADLINES, WHILE PATENT CASES PROLIFERATE 22 (2013), *available at* http://www.pwc.com/en_US/us/forensic-services/publications/assets/2013-patent-litigation-study.pdf.

[25] Robbins & Myers, Inc. v. J.M. Huber Corp., 274 F.R.D. 63, 74–75 (W.D.N.Y. 2011) (summarizing the history of Rule 26(e)'s response to how discovery information can be incomplete in its initial stages).

[26] FED. R. CIV. P. 1.

[27] *See* THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COMMENTARY ON ACHIEVING QUALITY IN THE E-DISCOVERY PROCESS 8 (Jason R. Baron et al. eds., 2009) [hereinafter ACHIEVING QUALITY IN THE E-DISCOVERY PROCESS], *available at* https://thesedonaconference.org/publication/The%20Sedona%20Conference%C2%AE%20Commentary%20on%20Achieving%20Quality%20in%20the%20E-Discovery%20Process (giving four reasons, besides sanctions, as to why lawyers should care about e-discovery).

[28] *Id.*

[29] *Id.*

Rule Evidence 502[30] greatly diminish the impact of accidentally producing confidential or privileged information, such agreements cannot "unring the bell" when such information is disclosed to the other side.

Third, procedures that measure the quality of an e-discovery process allow timely course corrections and provide greater assurance of accuracy, especially of innovative processes.[31] As technology adapts and advances to address the challenges of e-discovery, litigators must be able to assess that technology throughout the discovery process, as opposed to waiting until discovery has closed only to find that a set of data was excluded from production for improper purposes, or worse, that a set of data was produced that never should have been.

Fourth, a poorly planned effort can also cost more money in the long run if the deficiencies ultimately require that e-discovery must be redone.[32] This simple yet salient point requires little exposition—if you don't do it right the first time, you run a significant risk of having to do it again, usually under tight deadlines and severe scrutiny, and often at a cost that greatly exceeds what it would have been had it been done properly from the start.

The message of The Sedona Conference's Commentary was echoed by another author in a slightly different manner: "[P]erhaps litigators should consider that courts no longer recognize e-discovery inexperience (either on the litigator's or client's part) as an excuse for failure to produce or comply with discovery obligations and that courts, generally, seem to find e-discovery disputes even more insufferable than traditional discovery disputes."[33] In other words, the competent practice of e-discovery cannot be limited to the small bar that has embraced the 2006 E-Discovery Amendments, joined The Sedona Conference, et cetera. Rather, it is a fundamental knowledge and skill required of all those who practice under the Federal Rules today.

II. WHAT *IS* "COMPETENT REPRESENTATION" WHEN IT COMES TO CONDUCTING DISCOVERY UNDER THE FEDERAL RULES TODAY?

There is no question that practicing e-discovery in a competent manner under the Federal Rules is challenging. When the broad scope of the Rules collides with the vast volumes of ESI that businesses and

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[30] *See* Ronald J. Hedges, *Federal Rule of Evidence 502: The Intersection of Privilege with Intellectual Property Litigation*, N.J. LAW. MAG., June 2009, at 27, 30.

[31] ACHIEVING QUALITY IN THE E-DISCOVERY PROCESS, *supra* note 27, at 8.

[32] *Id.*

[33] Rachel K. Alexander, *E-Discovery Practice, Theory, and Precedent: Finding the Right Pond, Lure, and Lines Without Going on a Fishing Expedition*, 56 S.D. L. REV. 25, 27 (2011) (footnote omitted).

individuals create on a daily basis and store in a myriad of locations, practitioners can find themselves at a loss for how best to proceed. This is especially true if they fail to implement a comprehensive discovery plan at the start of a case.

The Federal Rules allow discovery on any unprivileged matter that is relevant to the claim or defense of any party.[34] This broad scope has a purpose: "'Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.'"[35] While the scope of discovery under the Federal Rules is exceptionally, and intentionally, broad,[36] it is not limitless. Courts have the authority, and indeed the obligation, to limit discovery for a variety of reasons, including a determination that the discovery sought is not proportional to the needs of the case.[37] Magistrate Judge John M. Facciola described the obligation as follows:

> All discovery, even if otherwise permitted by the Federal Rules of Civil Procedure because it is likely to yield relevant evidence, is subject to the court's obligation to balance its utility against its cost. More specifically, the court is obliged to consider whether (1) the discovery sought is unreasonably cumulative or duplicative, or obtainable from a cheaper and more convenient source; (2) the party seeking the discovery has had ample opportunity to obtain the sought information by earlier discovery; or (3) the burden of the discovery outweighs its utility. The latter requires the court to consider (1) the needs of the case; (2) the amount in controversy; (3) the parties' resources; (4) the importance of the issues at stake in the action; and (5) the importance of the discovery in resolving the issues.[38]

Proportionality has become a touchstone of competency in e-discovery because of the inherent conflict between the broad scope of

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[34] FED. R. CIV. P. 26(b)(1).

[35] Norfolk Cnty. Ret. Sys. v. Ustian, No. 07 C 7014, 2010 WL 1489996, at *2 (N.D. Ill. Apr. 13, 2010) (quoting Thomas Consol. Indus., Inc., No. 04 CV 6185, 2005 WL 3776322, at *6 (N.D. Ill. May 19, 2005)); *see also* Abrahamsen v. Trans-State Express, Inc., 92 F.3d 425, 428 (6th Cir. 1996) ("The rules of discovery . . . do not permit parties to withhold material simply because the opponent could discover it on his or her own.").

[36] FED. R. CIV. P. 26(b)(1) ("Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.").

[37] *See id.* at 26(b)(2)(C).

[38] United States *ex rel.* McBride v. Halliburton Co., 272 F.R.D. 235, 240–41 (D.D.C. 2011) (citations omitted).

discovery and the vast volumes of information subject to discovery.[39] The traditional discovery request to "produce all documents or information relating to X topic" has the potential to yield innumerable technically responsive items in even the simplest dispute involving the smallest of companies. Thus, courts are being called on with greater frequency to determine whether the discovery efforts of a party are in proportion to what is called for in the case, and that assessment of proportionality is informed by the reasonableness of a party's actions. For example, in the context of preservation of evidence, then-Magistrate Judge Paul W. Grimm wrote that the "assessment of reasonableness and proportionality should be at the forefront of all inquiries into whether a party has fulfilled its duty to preserve relevant evidence."[40]

As one of the authors of the E-Discovery Amendments, Judge Lee H. Rosenthal[41] is uniquely situated to assess the interplay between reasonableness, proportionality, and the duty to preserve and similar duties required in the practice of e-discovery. In the seminal case of *Rimkus Consulting Group, Inc. v. Cammarata*,[42] she found:

> Whether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether

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[39] *See generally* 2005 REPORT OF THE JUDICIAL CONFERENCE, *supra* note 13, at 22–23 (explaining the advisory committee's mission to devise mechanisms for providing full disclosure in the context of growing ESI); George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH., no. 3, art. 10, Spring 2007, at 8–10, http://jolt.richmond.edu/v13i3/article10.pdf (providing examples of the amount of electronic information produced today); *Data, Data Everywhere: A Special Report on Managing Information*, ECONOMIST, Feb. 27, 2010, at 1, *available at* http://www.emc.com/collateral/analyst-reports/ar-the-economist-data-data-everywhere.pdf (describing the enormous amount of ESI created today and citing Wal-Mart's vast databases as an example, which hold ESI equivalent to 167 times the amount of information in all the books in the Library of Congress); Bernadette Starzee, *Settling on the Double-Edged Sword of Technology*, LONG ISLAND BUS. NEWS, Jan. 14–20, 2011, at 29A (giving an attorney's experience with the large amount of ESI produced during discovery); *About the Library*, LIBR. CONGRESS, http://www.loc.gov/about/generalinfo.html#2007_at_a_glance (last visited Oct. 28, 2013) (giving statistics showing the immense volume of data received by the Library of Congress).

[40] Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 523 (D. Md. 2010). "[R]easonableness is the key to determining whether or not a party breached its duty to preserve evidence." *Id.* (alteration in original) (quoting Jones v. Bremen High Sch. Dist. 228, No. 08 C 3548, 2010 WL 2106640, at *6 (N.D. Ill. May 25, 2010)). On January 29, 2013, now-District Court Judge Grimm issued a standard Discovery Order that specifically incorporates reasonableness and proportionality into the Court's consideration of whether a party has complied with its duty to preserve evidence. Paul W. Grimm, Discovery Order (Jan. 29, 2013), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Grimm_Discovery_Order.pdf.

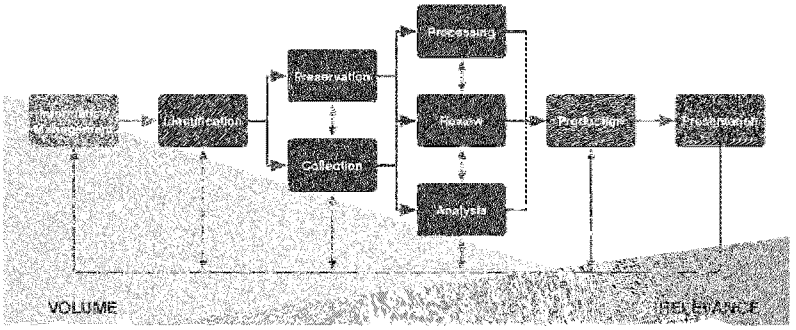
[41] REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, *supra* note 16.

[42] Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598 (S.D. Tex. 2010).

> what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards. As Judge Scheindlin pointed out in *Pension Committee*, that analysis depends heavily on the facts and circumstances of each case and cannot be reduced to a generalized checklist of what is acceptable or unacceptable.[43]

While practitioners would love it if such a checklist were available, there are other resources that allow counsel to evaluate and to assess what is required of them when practicing e-discovery. An excellent starting place is the Electronic Discovery Reference Model ("EDRM"), which provides a visual representation of the various phases of discovery.

Figure 1: Electronic Discovery Reference Model[44]



Moving chronologically through the phases of discovery as set out in the EDRM can help lawyers ensure that they are practicing e-discovery in a competent manner, as set forth in more detail below.

A. The Duty of Competence in Preservation

"Proceeding chronologically, the first step in any discovery effort is the preservation of relevant information."[45] The duty to preserve arises or is triggered once litigation becomes reasonably likely,[46] which, by definition, occurs before a lawsuit is filed for a plaintiff, and at the latest, when a lawsuit is served on a defendant.[47] The duty arises from the

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[43] *Id.* at 613.

[44] Copyright 2009, Electronic Discovery Reference Model, http://www.edrm.net/resources/guides/edrm-framework-guides (last visited Oct. 28, 2013).

[45] Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., 685 F. Supp. 2d 456, 464 (S.D.N.Y. 2010), *abrogated by* Chin v. Port Auth., 685 F.3d 135, 162 (2d Cir. 2012).

[46] *See, e.g.*, *Victor Stanley*, 269 F.R.D. at 521–22; *Rimkus Consulting Grp.*, 688 F. Supp. 2d at 612; *Pension Comm.*, 685 F. Supp. 2d at 466.

[47] *See* Sekisui Am. Corp. v. Hart, No. 12 CIV. 3479, 2013 WL 4116322, at *1 (S.D.N.Y. Aug. 15, 2013); *Victor Stanley*, 269 F.R.D. at 516; *Rimkus Consulting Grp.*, 688

common law and is a duty the litigants owe to the court, not merely to each other.[48] Complying with this duty can be fraught with peril when counsel is competent[49] and can result in the "death penalty" of a case—terminating sanctions—when counsel is unwilling or unable to ensure that a client is undertaking the necessary steps to preserve all potentially relevant information, whether it is helpful or harmful to the client's case.[50]

The duty to preserve potentially relevant evidence may be the most important duty a litigant has, in that a failure to meet that duty, whether intentional or merely negligent, can deprive the court of the ability to properly assess the dispute before it. Furthermore, failure to uphold that duty can result in sanctions against the litigant, and sometimes against counsel too, running the gamut from additional discovery to terminating sanctions.[51] Yet, more often than not, this duty generally arises well before counsel is engaged or otherwise consulted, and for at least one party, and often for both, the duty arises before there is "a case or controversy" to which the Rules apply.[52] Over the last few years, there has been a lively debate regarding whether a new Rule

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F. Supp. 2d at 613; *Pension Comm.*, 685 F. Supp. 2d at 466 ("A Plaintiff's duty is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation.").

[48] *Victor Stanley*, 269 F.R.D. at 525 (footnote omitted) ("What heretofore usually has been implicit—but seldom stated—in opinions concerning spoliation is that, with the exception of a few jurisdictions that consider spoliation to be an actionable tort, the duty to preserve evidence relevant to litigation of a claim is a duty owed to the *court*, not to a party's adversary."); *see generally* Paul W. Grimm et al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. BALT. L. REV. 381, 386 (2008) (describing the court's inherent power that stems from the common-law preservation duty).

[49] *See, e.g.*, E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 803 F. Supp. 2d 469, 501, 509–10 (E.D. Va. 2011) (holding that, although litigation hold orders were issued, monetary sanctions were necessary for the spoliation of evidence and that, although it was a close call, default judgment was not appropriate).

[50] *See, e.g.*, Suntrust Mortg. v. AIG United Guar. Corp., 3:09CV529, 2011 WL 1225989, at *26–28 (E.D. Va. Mar. 29, 2011) (stating that the court has the power to order dismissal when a party perpetrates fraud or litigation abuse and weighing factors of the egregiousness of the plaintiff's wrongdoing in deciding whether to dismiss the case but ultimately holding that a less severe sanction was appropriate), *aff'd sub nom.* Suntrust Mortg., Inc. v. United Guar. Residential Ins. Co. of N.C., 508 F. App'x 243, 254–55 (4th Cir. 2013); *Victor Stanley*, 269 F.R.D. at 540–41 (entering default judgment as to one count due to the defendant's spoliation of discoverable ESI).

[51] *See, e.g.*, United States v. Shaffer Equip. Co., 11 F.3d 450, 462–63 (4th Cir. 1993) (opining as to a court's power to punish or even dismiss a case when there is wrongful conduct and using a six-factor test to determine whether it is appropriate to dismiss a case due to spoliation).

[52] *See* A. Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court*, 79 FORDHAM L. REV. 2005, 2006–08 (2011).

should be promulgated to more accurately define when the duty of preservation arises and what litigants must do to comply with it.[53]

As a common law duty, the duty to preserve potentially relevant evidence long predates the advent of electronically stored information.[54] It makes perfect sense that a litigant who alleges that his adversary came into possession of his ring through theft is entitled to have that ring proffered to the court in order for the court to properly resolve the dispute. Likewise, if a litigant claims that his car burst into flames due to faulty parts, he must make those parts available to his adversary for inspection and analysis so the court can properly adjudicate the dispute.[55] What is harder to grasp is how the availability of a certain piece of data can similarly effect the outcome of a dispute, especially when hundreds of thousands, if not millions, of other pieces of data have been made available.

Prior to the 2006 Amendments, when the discovery rules related primarily to paper documents and other tangible items, competent counsel merely had to caution their clients against throwing away or shredding documents or items once the duty to preserve attached.[56] This was not a particularly challenging task given that the volume of documents at issue in even the largest, most complex class action was a fraction of the data that is now regularly exchanged in today's run-of-the-mill cases. Litigants also intuitively understood that it was in their best interest to preserve documents related to the dispute, with the rare exception of those bad actors who elected to destroy evidence to keep it out of an adversary's hands.

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[53] *See, e.g.*, Thomas Y. Allman, *Local Rules, Standing Orders, and Model Protocols: Where the Rubber Meets the (E-Discovery) Road*, 19 RICH. J.L. & TECH., no. 3, art. 8, Spring 2013, at 24–27, http://jolt.richmond.edu/v19i3/article8.pdf; Memorandum from Andrea Kuperman to the Discovery Subcommittee of the Civil Rules Advisory Committee, Case Law on Elements of a Potential Preservation Rule 1–17 (Sept. 23, 2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Case_Law_on_Potential_Preservation_2011-11.pdf.

[54] *See, e.g.*, Armory v. Delamirie, (1722) 93 Eng. Rep. 664 (K.B.) 664 (requiring the defendant to produce the jewel that he removed from a ring as evidence, otherwise the jury "should presume the strongest against him, and make the value of the best jewels the measure of their damages").

[55] Silvestri v. Gen. Motors Corp., 271 F.3d 583, 589–91 (4th Cir. 2001).

[56] *See, e.g.*, Arthur Anderson LLP v. United States, 544 U.S. 696, 698 (2005) (holding that Arthur Anderson, Enron's auditor, did not knowingly persuade Enron employees to destroy documents because Arthur Anderson instructed employees to destroy documents pursuant to its document retention policy up until the time a formal investigation was opened).

In the current "Information Age,"[57] however, the sheer volume of data at issue in even the simplest of disputes, coupled with the fact that ESI is constantly being modified and altered often without users being aware of that fact,[58] require attorneys to take a more proactive approach to preservation. It demands that competent attorneys advise their clients against not only the willful destruction of potentially relevant information (i.e. "Don't wipe your laptop."), but also against the merely negligent, even unwitting destruction of potentially relevant information (i.e. "If you have an auto-delete function as part of your email program, be sure to turn it off for the people who might have potentially relevant information until we take steps to identify and collect that information.").

In order to competently counsel clients regarding the duty to preserve today, lawyers must first educate themselves generally about the various forms of ESI and how each form is created, stored, modified, and deleted. Lawyers must also educate themselves specifically as to what potentially relevant ESI a particular client creates, stores, modifies, and deletes and as to how it does so. Due to the fact that the duty to preserve has generally attached sometime prior to counsel getting involved, this latter task often must take place under extremely tight time frames. Therefore, it is imperative that attorneys take the time to educate themselves as to the former issues outside the confines of a particular case.

Computers, backup tapes, hard drives, archives, databases, smartphones, the cloud, et cetera, are all simply containers of information, analogous to the folders, desk drawers, file cabinets, and warehouses full of documents that were the primary source of discovery materials in the years prior to the 2006 Amendments.[59] In the good old days of paper discovery, it was almost unheard of for a lawyer to advise a client to save every document in a warehouse, sight unseen and without having any idea what those documents were, "just in case" they might be relevant to the lawsuit at hand. However, it is exceedingly common in the current Information Age for risk-averse lawyers to take the path of most caution and least resistance and to advise clients to "save

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[57] MICROSOFT ENCARTA COLLEGE DICTIONARY 739 (2001) (defining the information age as "a period characterized by widespread electronic access to information through the use of computer technology").

[58] *See* Wayne S. Moskowitz, *Electronic Discovery Under the New Federal Rules*, BENCH & BAR MINN. (Dec. 2006), http://www.mnbar.org/benchandbar/2006/dec06/electronic.htm.

[59] Note that paper documents are still subject to discovery and, in some cases, are still voluminous, but that is now in addition to the massive data stores that most companies have.

everything," including ceasing the rotation of disaster recovery backup tapes and imaging every hard drive, in an effort to ensure that the client is satisfying its duty to preserve.

The unintended consequence of such a cautious strategy, however, is that even the smallest companies will find themselves drowning quickly in data if they are prohibited from deleting anything during the course of a years-long lawsuit, or even just for the few months it may take for the parties to reach an agreement as to preservation. Moreover, to truly "save everything" for some indefinite time period beyond the business utility of such information means that information unrelated to the dispute at hand will not be destroyed during the ordinary course of business. Thus, it may be available and subject to discovery when another dispute arises during the interim of the first dispute, and so on and so on, until companies find themselves maintaining warehouses full of backup tapes and other data indefinitely, at great cost and even greater risk, all because counsel advised them that they must "save everything."

As far back as *Zubulake v. UBS Warburg LLC*, courts have recognized that the "save everything" method is neither a reasonable nor practical means to satisfy a party's preservation obligation.[60] However, in *Zubulake*, Judge Scheindlin also made it clear that a party, through counsel, must be able to explain and defend why it did or did not save certain documents or data that later proved to be pertinent to the dispute.[61] However, before lawyers and litigants can make reasonable, practical, and defensible decisions as to what must be preserved for purposes of a lawsuit and what may properly be deleted or destroyed, they must first determine what types of information they may have that could reasonably be considered potentially relevant to any claim or defense in a suit. Then, they must determine the sources of that information and how accessible those sources might be.[62]

The process of discerning what to preserve and how is sometimes made simpler by determining first who may have knowledge or information about the issues in dispute, and then determining what potentially relevant documents or data such potential witnesses or

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[60] Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 432–34 (S.D.N.Y. 2004) (requiring that counsel take reasonable steps to ensure preservation beyond just instructing their client to save everything).

[61] *Id.* at 436, 439–40. This concept was codified in the 2006 Amendments: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." Amendments to Federal Rules of Civil Procedure, 547 U.S. 1233, 1247 (2006); *see also* FED. R. CIV. P. 37(e).

[62] *See Zubulake*, 229 F.R.D. at 432–34; Alexander, *supra* note 33, at 43–44, 54.

custodians may have in their possession, custody, or control.[63] When utilizing a "custodians-first" model,[64] however, competent counsel must bear in mind that much of the information or data generated by a company or an entity is not maintained or controlled by a single individual (e.g., an accounting database). Such potentially relevant, non-custodial sources must be included in the scope of a preservation notice or protocol.

Because counsel may not be engaged until after the duty to preserve has attached, it is critical that one of the first steps a competent litigator takes when working on a new lawsuit is to promptly inform his or her client regarding the duty to preserve and to determine whether the client has taken the appropriate steps to comply with the duty. If the client has not taken appropriate or sufficient steps to comply with its duty to preserve, regardless of whether such a decision was conscious or simply uninformed, competent counsel must ensure that appropriate steps are taken promptly to satisfy the duty to preserve and simultaneously must determine whether any potentially relevant information has been accidentally or intentionally destroyed. Time is especially of the essence regarding this latter determination because there are short windows where deleted data can be recovered fairly

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[63] Courts construe the "possession, custody, or control" of documents differently. Some courts apply a "practical ability to obtain" standard. *See, e.g., In re* NTL, Inc. Sec. Litig., 244 F.R.D 179, 195 (S.D.N.Y. 2007) (quoting Bank of New York v. Meridien BIAO Bank Tanzania Ltd., 171 F.R.D. 135, 146 (S.D.N.Y. 1997)) ("'[C]ontrol' does not require that the party have legal ownership or actual physical possession of the documents at issue; rather, documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action."), *aff'd sub nom.* Gordon Partners v. Blumenthal, No. 02 Civ. 7377(LAK), 2007 WL 1518632 (S.D.N.Y. May 17, 2007). Other courts adopt an "ability to obtain" understanding that strains the meaning of control. *See, e.g.*, Chaveriat v. Williams Pipe Line Co., 11 F.3d 1420, 1427 (7th Cir. 1993) (noting that "the fact that a party could obtain a document if it tried hard enough and maybe if it didn't try hard at all does not mean that the document is in its possession, custody, or control; in fact it means the opposite"); Bleecker v. Standard Fire Ins. Co., 130 F. Supp. 2d 726, 739 (E.D.N.C. 2000) ("Adopting the 'ability to obtain' test would usurp these principles, allowing parties to obtain documents from non-parties who were in no way controlled by either party.").

[64] U.S. DIST. COURT FOR THE N. DIST. OF CAL., GUIDELINES FOR THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION 2, *available at* http://www.cand.uscourts.gov/filelibrary/1117/ESI_Guidelines.pdf (last visited Oct. 28, 2013) (stating that a useful issue to discuss in a Rule 26(f) Meet and Confer is the "phasing of discovery so that discovery occurs first from sources most likely to contain relevant and discoverable information"); F. Matthew Ralph & Caroline B. Sweeney, *E-Discovery and Antitrust Litigation*, ANTITRUST, Fall 2011, at 58, 61 ("By collecting and processing ESI from the highest priority custodians first, it may be possible to refine search methodologies for custodians whose documents are to be produced later, or to confirm that no further productions are necessary.").

easily,[65] but once those windows close, recovery of deleted data can become very expensive or even impossible.

As for the former determination, the first thing counsel will want to know is whether a client has issued a legal hold notice, also called a "litigation hold," or a notice of preservation.[66] A legal hold notice informs key witnesses, custodians, and/or other stakeholders within an organization about the lawsuit and the duty to preserve potentially relevant information relating to the lawsuit.[67] While the contents of a legal hold notice are generally considered work product, the fact of whether a hold was issued, when, and to whom is generally discoverable.[68]

While it was generally accepted after the 2006 Amendments that issuing a written legal hold notice was a "best practice,"[69] Judge Scheindlin rocked the e-discovery world again, in January 2010, when she held in *Pension Committee* that the failure to issue a written litigation hold was "gross negligence."[70] Never before had such a bright line been drawn regarding what parties and their counsel must do to satisfy the duty to preserve and concomitantly avoid spoliation sanctions. Many found the line to be too bright, and a chorus of legal

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[65] For example, the Microsoft Exchange "database dumpster" retains items, by default, for fourteen days. IBM, TECHNICAL REPORT: IBM SYSTEM STORAGE N SERIES AND MICROSOFT EXCHANGE SERVER 2007 BEST PRACTICES GUIDE 17 (2008).

[66] *E.g.*, United States v. Quattrone, 441 F.3d 153, 190 (2d Cir. 2006) (using the term "document-preservation notices"); Apple Inc. v. Samsung Elecs. Co., 881 F. Supp. 2d 1132, 1137 (N.D. Cal. 2012) (utilizing the term "litigation hold"); Major Tours, Inc. v. Colorel, No. 05-cv-3091(JBS/JS), 2009 WL 2413631, at *1 n.1 (D.N.J. Aug. 4, 2009) (citation omitted) (indicating many terms used for this notice: "hold," "hold order," "suspension order," "freeze notice," "preservation order," or "hold notice").

[67] *See Major Tours, Inc.*, 2009 WL 2413631, at 1 n.1 (citation omitted) (internal quotation marks omitted) (defining a legal hold as a communication "that suspends the normal disposition or processing of records"); Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 439 (S.D.N.Y. 2004) (recognizing the duty to preserve through the use of a litigation hold to communicate with information technology personnel, employees, and key players in the litigation).

[68] Cannata v. Wyndham Worldwide Corp., No. 2:10-cv-00068-PMP-VCF, 2011 WL 5598306, at *2 (D. Nev. Nov. 17, 2011).

[69] THE SEDONA CONFERENCE, THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION & RECORDS IN THE ELECTRONIC AGE 50 (Lori Ann Wagner et al. eds., 2d ed. 2007), *available at* https://thesedonaconference.org/publication/Managing%20Information%20%2526%20Records ("Although documenting preservation efforts is a recommended practice, there is no legal requirement mandating the creation of such a 'paper trail.'"); The Sedona Conference, *The Sedona Conference Commentary on Legal Holds: The Trigger & the Process*, 11 SEDONA CONF. J. 265, 267–70 (2010).

[70] Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., 685 F. Supp. 2d 456, 471 (S.D.N.Y. 2010), *abrogated by* Chin v. Port Auth., 685 F.3d 135, 162 (2d Cir. 2012).

commentators and other members of the judiciary voiced their disagreement with the opinion.[71] Ultimately, two years later, in *Chin v. Port Authority of New York & New Jersey*, the Second Circuit expressly overruled this portion of Judge Scheindlin's *Pension Committee* opinion.[72] While the line may have dimmed a bit, issuing a legal hold, even if it is only verbal, remains essential to the competent representation of a client involved in discovery under the Federal Rules after the 2006 E-Discovery Amendments.

When a discovery dispute arises and there are allegations that a party has failed to properly preserve pertinent information, an attorney must be prepared to respond. Whether it be through written discovery responses, at a Rule 30(b)(6) deposition, during the "meet and confer" process, or in motions practice and the subsequent hearing, competent lawyers must be able to articulate the steps their clients took to comply with their duty to preserve. Counsel must know whether their clients issued a written legal hold notice, when, and to whom, or whether their preservation steps consisted of a call to IT to save all backup tapes and image all hard drives, or something somewhere in between. Counsel also must be prepared to explain not only what steps their clients took to preserve potentially relevant information, but also why they took those steps and not others. While counsel is not required to gain a computer science background in advance of such an analysis, counsel must be prepared to ask the right questions and understand the answers provided regarding what has been preserved and what has not, and why not, in order to convey the answers in a clear and concise manner to both opposing counsel and the court, if necessary.

Whether a legal hold has been issued and whether it was in writing comprises only one aspect of compliance with the duty to preserve. Competent lawyers also must determine whether simply informing key custodians and other stakeholders of the duty is sufficient to ensure that they have complied with the duty.[73] For example, counsel will need to determine the extent to which custodians or users have the ability to delete information from an individual workstation or a network location, regardless of whether they also have the authority and/or discretion to

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[71] *See, e.g.*, Surowiec v. Capital Title Agency, Inc., 790 F. Supp. 2d 997, 1007 (D. Ariz. 2011) ("The Court disagrees with *Pension Committee*'s Holding that a failure to issue a litigation hold constitutes gross negligence per se."); Rimkus Consulting Grp., Inc., v. Cammarata, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (opposing a bright-line standard regarding what is acceptable and unacceptable conduct in preserving information).

[72] *Chin*, 685 F.3d at 162.

[73] Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 439 (S.D.N.Y. 2004) ("[C]ounsel has a duty to effectively communicate to her client its discovery obligations so that all relevant information is discovered, retained, and produced.").

do so. Then, they need to weigh that information against the allegations in the case to determine whether "preserving in place" is an acceptable option or whether other steps must be taken to ensure that potentially relevant information is, in fact, preserved.[74]

Another aspect of preservation that competent counsel must consider and address is whether third parties may be in possession, custody, or control of a client's potentially relevant information.[75] As more and more companies move their data to the Cloud and/or utilize software applications and other technology wherein their data is stored in a location other than an onsite server or piece of hardware, the issues of control and access to one's own data are becoming more prevalent. Counsel must be prepared to evaluate any agreements their clients have entered into regarding the storage of data in order to determine when and how the client can access and secure that data for discovery purposes. Also, counsel must alert opposing counsel and even the Court, if necessary, if they identify any potential issues caused by the third-party arrangement that could interfere with their clients' duty to preserve.

Similar issues regarding the role of third parties arise in the context of preservation with social media. To the extent that potentially relevant evidence may exist on a party's website, Facebook page, online blog, or Twitter feed, this potentially relevant evidence also must be preserved, and it must be preserved in a manner that does not alter or decrease the functionality of the underlying data. Failing to take the proper steps to secure dynamic data can have devastating consequences.[76]

B. The Duty of Competence in Identification and Collection

"The next step in the discovery process is collection and review."[77] In order to make competent decisions as to what to collect and eventually

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[74] Certain types of cases warn against preservation by custodians and/or preservation in place (e.g., a sexual harassment suit that relies on the alleged harasser to preserve potentially relevant information). *See* Jones v. Bremen High Sch. Dist. 288, No. 08 C 3548, 2010 WL 2106640, at *7, *9–10 (N.D. Ill. May 25, 2010) (holding that it was "unreasonable to allow a party's interested employees to make the decision about the relevance" of discoverable emails and that, even though there was no obvious fraud in the case, "the defendant's attempts to preserve evidence were reckless and grossly negligent").

[75] *See supra* note 63 and accompanying text.

[76] Allied Concrete Co. v. Lester, 736 S.E.2d 699, 702–03 (Va. 2013) (sanctioning the attorney in the amount of $542,000 and the defendant in the amount of $180,000 for spoliation of evidence when the defendant intentionally removed items from his Facebook page on advice of counsel).

[77] Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010), *abrogated by* Chin v. Port Auth., 685 F.3d 135, 162 (2d Cir. 2012).

review, however, competent lawyers first must identify the relevant custodians or witnesses, along with the sources of potentially responsive data in their control, as well as any non-custodial sources. This task is arguably as important to the litigation process as satisfying the duty to preserve—if a party fails to identify a key witness or source of information, then the goals of discovery may be thwarted, just as they can be when a party fails to preserve and, thus, produce, pertinent evidence.[78]

Identification of key custodians is often inextricably intertwined with the duty to preserve, especially to the extent a party is relying primarily on custodian-based preservation to satisfy its duty to preserve.[79] Judge Scheindlin reminded us how important identification of key players is to the discovery process in *Pension Committee*:

> After a discovery duty is well established, the failure to adhere to contemporary standards can be considered gross negligence. Thus, after the final relevant *Zubulake* opinion in July, 2004, the following failures support a finding of gross negligence, when the duty to preserve has attached: to issue a written litigation hold; *to identify all of the key players and to ensure that their electronic and paper records are preserved*; to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control; and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.[80]

While, at first glance, the identification of key players or custodians and the sources of data under their control that would likely contain potentially relevant information would seem like a fairly easy task, similar to most things in discovery, it can prove to be a challenge. Even

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[78] *See, e.g.*, Abrahamsen v. Trans-State Express, Inc., 92 F.3d 425, 428 (6th Cir. 1996) ("The rules of discovery, however, do not permit parties to withhold material simply because the opponent could discover it on his or her own."); Stafford v. Jewelers Mut. Ins. Co., No. 3:12-CV-050, 2012 WL 6568325, at *4 (S.D. Ohio Dec. 17, 2012), *motion to reopen granted*, No. 3:12-CV-050, 2013 WL 796272 (S.D. Ohio Mar. 4, 2013); Norfolk Cnty. Ret. Sys. v. Ustian, No. 07 C 7014, 2010 WL 1489996, at *6–7 (N.D. Ill. Apr. 13, 2010) (granting a motion to compel production of documents previously withheld even though it would require "a fairly extensive search").

[79] *See supra* note 64 and accompanying text.

[80] *Pension Comm.*, 685 F.Supp. 2d at 471 (emphasis added). For whatever reason, Judge Scheindlin's holding that the failure to identify key players and ensure the preservation of their data supported a finding of gross negligence did not generate the same hue and cry that surrounded her holding regarding the failure to issue a written litigation hold. *See generally* Michael W. Deyo, *Deconstructing* Pension Committee*: The Evolving Rules of Evidence Spoliation and Sanctions in the Electronic Discovery Era*, 75 ALB. L. REV. 305, 306–07 (2012) (examining and discussing the criticisms of the *Pension Committee* opinion).

the most competent lawyers making reasonable inquiries of their clients at the outset of a case are acting on, at best, somewhat incomplete and, at worst, wholly inaccurate information when identifying custodians who may have knowledge or information relating to the issues in dispute, whether for purposes of preservation or for initial disclosures.[81]

As the issues are developed and refined and information becomes more complete and accurate, competent counsel must revisit the initial list of custodians or witnesses with potentially relevant information that were placed under legal hold and/or provided in initial disclosure and determine whether additional preservation steps must be taken and/or supplemental disclosures made.[82] In those cases or jurisdictions where initial disclosures are not required, counsel may be tempted to delay identifying key witnesses or custodians until receiving a discovery request for that information, but such delay could prove costly, if not fatal, if it leads to the destruction of evidence.[83]

Postponing decisions about discovery, including when to discuss issues with opposing counsel, is rarely, if ever, a prudent course of action. While many members of the defense bar rejoiced when the Supreme Court handed down the *Twombly*[84] and *Iqbal*[85] decisions, Magistrate Judge Nan R. Nolan recently reminded litigants that they cannot put off discovery efforts solely based on the belief that the case can and will be dismissed under these new standards:

> [O]ne argument that is usually deemed insufficient to support a stay of discovery is that a party intends to file, or has already filed, a motion to dismiss for failure to state a claim under Rule 12(b)(6). . . . *Twombly* and *Iqbal* do not dictate that a motion to stay [discovery] should be granted every time a motion to dismiss is placed before the Court.[86]

Courts are urging parties to confer about custodians and data sources early and often. While the identification of custodians and

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[81] FED. R. CIV. P. 26(a)(1)(A)(i)–(ii).

[82] FED. R. CIV. P. 26(g)(1)(A) ("Every disclosure . . . and every discovery request, response, or objection must be signed by at least one attorney of record . . . . By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry: with respect to the disclosure, it is complete and correct as of the time it is made . . . .").

[83] *See, e.g.*, Allstate Ins. Co. v. Dooley, 243 P.3d 197, 203–04 (Alaska 2010) (stating that "[a] party who intentionally withholds disclosable evidence for a prolonged period of time . . . fraudulently delays another party's access to such evidence in violation of an existing duty to disclose" and holding that a claim for fraudulent concealment of evidence was appropriate).

[84] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

[85] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1954 (2009).

[86] Tamburo v. Dworkin, No. 04 C 3317, 2010 WL 4867346, at *2 (N.D. Ill. Nov. 17, 2010) (citations omitted) (internal quotation marks omitted).

sources is not specifically required as part of a Rule 26(f) conference, "[s]electing . . . data custodians should be a matter of cooperation and transparency among parties."[87] If nothing else, an early discussion of the custodians and sources will identify whether a party is sufficiently preserving potentially relevant information. While some courts have issued model orders that limit the number of custodians regardless of the issues in the case or the size of the party,[88] other courts have recommended a more thoughtful approach: "[T]he selection of custodians is more than a mathematical count. The selection of custodians must be designed to respond fully to document requests and to produce responsive, nonduplicative documents during the relevant period."[89]

The early identification of custodians and data sources is not only a good practice, but it also helps parties to the extent they are claiming burdensomeness as a basis for objecting to certain discovery requests.

> [A] party must articulate and provide evidence of its burden. While a discovery request can be denied if the "burden or expense of the proposed discovery outweighs its likely benefit," a party objecting to discovery must specifically demonstrate how the request is burdensome. . . . This specific showing can include "an estimate of the number of documents that it would be required to provide . . . , the number of hours of work by lawyers and paralegals required, [or] the expense."[90]

Counsel must be willing and able to explain why the burden and/or cost of collecting, reviewing, and producing data from a particular individual, class of employees, or source of data outweighs the benefit of doing so. Consequently, the only way counsel can make such explanations is by

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[87] DeGeer v. Gillis, 755 F. Supp. 2d 909, 929 (N.D. Ill. 2010).

[88] *E.g.*, Advisory Council for the U.S. Court of Appeals for the Fed. Circuit, An E-Discovery Model Order ¶ 10 (last visited Oct. 28, 2013), *available at* http://www.cafc.uscourts.gov/images/stories/announcements/Ediscovery_Model_Order.pdf (proposing a model order that limits the number of custodians to five although the court has not yet approved this model order); U.S. Dist. Court for the Dist. of Or., Order Regarding E-Discovery in Patent Cases ¶ 10 (last visited Oct. 28, 2013), *available at* http://www.ord.uscourts.gov/phocadownload/userupload/attorneys/tutorials_practice_tips/EDiscovery%20Model%20Order%20in%20LR%2026-6%20March%201%202013.pdf (adopting the Federal Circuit's Advisory Council's model order verbatim and limiting the number of custodians to five); U.S. Dist. Court for the E. Dist. of Tex., Order Regarding E-Discovery in Patent Cases ¶ 8 (last updated Feb. 28, 2012), *available at* http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=22218&download=true (limiting requests to eight custodians).

[89] Kleen Products LLC v. Packaging Corp. of Am., No. 10 C 5711, 2012 WL 4498465, at *15 (N.D. Ill. Sept. 28, 2012). *See also* Eisai Inc. v. Sanofi-Aventis U.S., LLC, No. 08-4168, 2012 WL 1299379, at *9 (D.N.J. Apr. 16, 2012).

[90] *Kleen Products*, 2012 WL 4498465, at *15 (citations omitted); *see also* F.T.C. v. Church & Dwight Co., 747 F. Supp. 2d 3, 8 (D.D.C. 2010).

understanding who the proposed custodians are and what data they control.

C. The Duty of Competence in Search, Review, and Production

Perhaps nowhere is competence in discovery more demanded than in the realm of search. Counsel can preserve perfectly, identify the key custodians and sources of potentially relevant information flawlessly, and coordinate the collection of information without a hitch, and still find themselves and their client facing sanctions if they fail to search adequately and thoroughly for potentially responsive information.[91]

More than any other element of the EDRM, the importance of search has developed almost entirely as a result of the 2006 E-Discovery Amendments. In *National Day Laborer Organizing Network v. United States Immigration and Customs Enforcement Agency*,[92] Judge Scheindlin addressed how the role of search has grown to such prominence in the Information Age and why it is so important that counsel are competently executing searches:

> It is impossible to evaluate the adequacy of an electronic search for records without knowing what search terms have been used. In earlier times, custodians and searchers were responsible for familiarizing themselves with the scope of a request and then examining documents individually in order to determine if they were responsive. Things have changed. Now custodians can search their entire email archives, which likely constitute the vast majority of their written communications, with a few key strokes. The computer does the searching. But as a result, the precise instructions that custodians give their computers are crucial.
>
> . . . .
>
> Thus, "[i]n order to determine adequacy, it is not enough to know the search terms. The method in which they are combined and deployed is central to the inquiry."
>
> Describing searches with this level of detail was not necessary in the era when most searches took place "by hand." Then, as now, a court largely relied on the discretion of the searching parties to determine whether a document was responsive; but at least in that era, courts knew that the searching parties were actually looking at the documents with their eyes. With most electronic searches, custodians never actually look at the universe of documents they are searching. Instead, they rely on their search terms and the computer

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[91] Parties are required to produce any nonprivileged information that may be responsive to a discovery request unless they make a proper objection to said request. *See* FED. R. CIV. P. 26(b)(1), (c)(1). Responsive information is *not* synonymous with relevant information, which makes proper search methods even more important.

[92] Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency, 877 F. Supp. 2d 87 (S.D.N.Y. 2012).

> to produce a subset of potentially responsive records that they then examine for responsiveness.[93]

When counsel are confronted with the need to search any substantial volume of ESI, more often than not they turn to keywords. Perhaps this is because lawyers are comfortable plugging a few words into Westlaw or Lexis and finding the case citation or law review article they need for their latest brief, or perhaps we have all become too accustomed to using Google and other search engines to scour the Internet starting with just a few words or phrases. Company data sets, however, are not at all similar to the well drafted legal opinions and treatises that form the corpus of what the legal search engines are combing through. Moreover, while e-discovery search tools, including those incorporated into email systems like Outlook and Lotus Notes, are becoming increasingly sophisticated, they cannot match the algorithms that have turned Google from a company name to a verb. As Judge Scheindlin found in *National Day Laborer:*

> [M]ost custodians cannot be "trusted" to run effective searches because designing legally sufficient electronic searches in the discovery or FOIA contexts is not part of their daily responsibilities. Searching for *an* answer on Google (or Westlaw or Lexis) is very different from searching for *all* responsive documents in the FOIA or e-discovery context. Simple keyword searching is often not enough: "Even in the simplest case requiring a search of on-line e-mail, there is no guarantee that using keywords will always prove sufficient." There is increasingly strong evidence that "[k]eyword search[ing] is not nearly as effective at identifying relevant information as many lawyers would like to believe."[94]

Stated slightly differently, relying solely on custodians to create their own keywords and then run those keywords against their own ESI in order to reach the data set that needs to be reviewed in a particular case

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[93] *Id.* at 106–07 (footnote omitted); *see also* Families for Freedom v. U.S. Customs & Border Prot., 837 F. Supp. 2d 331, 335 (S.D.N.Y. 2011) (stating that knowing the structure of an email archiving system and what search methods are being used to respond to discovery requests is insufficient because it does not indicate what Boolean connectors are used, it still does not address storage systems other than email, and "it still does not fully describe whose email archives are being searched, over what time periods, using what search terms and methods").

[94] *Nat'l Day Laborer*, 877 F. Supp. 2d at 108–09 (alteration in original) (footnotes omitted); *see also* Maura R. Grossman & Terry Sweeney, *What Lawyers Need to Know About Search Tools: The Alternatives to Keyword Searching Include Linguistic and Mathematical Models for Concept Searching*, NAT'L L.J. (Aug. 23, 2010), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202470870777&What_lawyers_need_to_know_about_search_tools (citing three studies showing that Boolean keyword search identifies between twenty and twenty-five percent of relevant documents).

does not satisfy counsel's duty of competence when it comes to search and review.

In his ground-breaking opinion approving computer-assisted review, *Da Silva Moore v. Publicis Groupe*,[95] Magistrate Judge Andrew J. Peck discussed at length the inherent limitations of lawyers relying upon keywords when crafting a search protocol, including the gamesmanship that too often surrounds an exchange of keywords during the discovery process:

> Because of the volume of ESI, lawyers frequently have turned to keyword searches to cull email (or other ESI) down to a more manageable volume for further manual review. Keywords have a place in production of ESI—indeed, the parties here used keyword searches (with Boolean connectors) to find documents for the expanded seed set to train the predictive coding software. In too many cases, however, the way lawyers choose keywords is the equivalent of the child's game of "Go Fish." The requesting party guesses which keywords might produce evidence to support its case without having much, if any, knowledge of the responding party's "cards" (*i.e.*, the terminology used by the responding party's custodians). Indeed, the responding party's counsel often does not know what is in its own client's "cards."[96]

This was not the first time Judge Peck admonished the Bar about the need for competent representation when it comes to search:

> This Opinion should serve as a wake-up call to the Bar in this District about the need for careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms or "keywords" to be used to produce emails or other electronically stored information ("ESI").
>
> . . . .
>
> Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI. Moreover, where counsel are using keyword searches for retrieval of ESI, they at a minimum must carefully craft the appropriate keywords, with input from the ESI's custodians as to the words and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of "false positives." It is time that the Bar—even those lawyers who did not come of age in the computer era—understand this.[97]

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[95] 287 F.R.D. 182 (S.D.N.Y. 2012).

[96] *Id.* at 190 (citing RALPH C. LOSEY, ADVENTURES IN ELECTRONIC DISCOVERY 204–10 (2011) (discussing how choosing random keywords is akin to the game of "Go Fish" and that this is a poor model for e-discovery search)).

[97] William A. Gross Constr. Assoc. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 134, 136 (S.D.N.Y. 2009); *see also* Victor Stanley, Inc. v. Creative Pipe, Inc. (*Victor Stanley I*), 250 F.R.D. 251, 262 (D. Md. 2008) (Grimm, Mag. J.) ("Selection of the appropriate search and information retrieval technique requires careful advance planning by persons qualified to design effective search methodology."); Equity Analytics, LLC v. Lundin, 248 F.R.D. 331,

Judge Scheindlin echoed these sentiments and expounded upon them further in the *National Day Laborer* case a few years later:

> There is a "need for careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms or 'keywords' to be used to produce emails or other electronically stored information." And beyond the use of keyword search, parties can (and frequently should) rely on latent semantic indexing, statistical probability models, and machine learning tools to find responsive documents. Through iterative learning, these methods (known as "computer-assisted" or "predictive" coding) allow humans to teach computers what documents are and are not responsive to a particular FOIA or discovery request and they can significantly increase the effectiveness and efficiency of searches. In short, a review of the literature makes it abundantly clear that a court cannot simply trust the defendant agencies' unsupported assertions that their lay custodians have designed and conducted a reasonable search.
>
> The more complicated question is this: when custodians *do* keep track of and report the search terms that they have used, how should a court evaluate their adequacy? As the cases cited by the parties show, the evaluation of search terms is highly context-specific: the failure to use certain search terms will sometimes be fatal, sometimes unproblematic, and sometimes improper but harmless or at least mitigated. Furthermore, even courts that have carefully considered defendants' search terms have generally not grappled with the research showing that, in many contexts, the use of keywords without testing and refinement (or more sophisticated techniques) will in fact not be reasonably calculated to uncover all responsive material.[98]

It is helpful to remember that search, whether through keywords or the use of technology, is more often than not just the means to an end, and that end is review.[99] The goal or objective of review is "to identify as many relevant documents as possible, while reviewing as few non-relevant documents as possible,"[100] recognizing that "relevant" is a very

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333 (D.D.C. 2008) (Facciola, Mag. J.) ("[D]etermining whether a particular search methodology, such as keywords, will or will not be effective certainly requires knowledge beyond the ken of a lay person (and a lay lawyer) . . . ."); United States v. O'Keefe, 537 F. Supp. 2d 14, 24 (D.D.C. 2008) (Facciola, Mag. J.) ("Given this complexity [of determining the efficacy and adequacy of search], for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread.").

[98] Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency, 877 F. Supp. 2d 87, 109–10 (S.D.N.Y. 2012) (footnotes omitted).

[99] While the author is certain that some parties agree to exchange data sets after search without conducting *any* review, presumably under a "quick-peek" or "clawback" agreement, she has never been personally aware of such an arrangement after more than thirteen years of federal practice, with the last five focusing exclusively on e-discovery.

[100] Da Silva Moore v. Publicis Groupe, 287 F.R.D. 182, 189 (S.D.N.Y. 2012); *see, e.g.*, Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery*

broad concept. The technical terms associated with achieving this goal are known as "recall" and "precision." As Judge Peck explained, "Recall is the fraction of relevant documents identified during a review; precision is the fraction of identified documents that are relevant. Thus, recall is a measure of completeness, while precision is a measure of accuracy or correctness."[101] In order to achieve the goal of finding the greatest amount of relevant documents while reviewing the least amount of non-relevant documents, counsel need to find a method of review that achieves the highest recall and precision that is available at a cost that is "proportionate to the 'value' of the case."[102] Not all cases will justify the predictive coding approved by Judge Peck in *Da Silva Moore*, nor do all cases require an attorney to put "eyes on" every single item before it is produced.[103] As technology progresses and data volumes increase, litigators who are unable to grasp the basic concepts and goals of search and review may find themselves unable to satisfy their duties to their clients and to the courts. Judge Peck cautions: "As with keywords or any other technological solution to ediscovery, counsel [utilizing computer assisted review] must design an appropriate process, including use of available technology, with appropriate quality control testing, to review and produce relevant ESI while adhering to Rule 1 and Rule 26(b)(2)(C) proportionality."[104]

III. FUTURE CHANGES IN E-DISCOVERY AND THE DUTY OF COMPETENCE

While some practitioners may have dismissed the E-Discovery Amendments as much ado about nothing when they were adopted in 2006, there can be little question that these amendments have fundamentally changed the practice of civil litigation. Competent lawyers must acknowledge and adapt to that change, but they also must be prepared for what comes next.

Can Be More Effective and More Efficient Than Exhaustive Manual Review, 17 RICH. J.L. & TECH., no. 3, art. 11, Spring 2011, at 8, http://jolt.richmond.edu/v17i3/article11.pdf.

[101] *Da Silva Moore*, 287 F.R.D. at 189–90.

[102] *Id.* at 190.

[103] *See, e.g.*, Monica McCarroll et al., *Why Document Review is Broken*, WILLIAMS MULLEN NEWS (May 16, 2011), http://www.williamsmullen.com/news/why-document-review-broken (detailing how the typical tiered review process is inherently inefficient and explaining how "the ability to reasonably and proportionally limit discovery to those sources of ESI most likely to contain key facts" and "to efficiently distill the key facts out of the vast volume of ESI" can effectuate an efficient resolution to litigation).

[104] *Da Silva Moore*, 287 F.R.D. at 193.

A. Understanding and Implementing Technological Solutions Will Become the Norm

The technology surrounding the preservation, identification, collection, search, review, and production of ESI will continue to change at a rapid pace. While competent practitioners must stay abreast of these changes, they also must recognize the need to rely on experts in these areas not only to understand the technology but to ensure that their adversary and the court understand and accept it as well. In *Da Silva Moore*, Judge Peck commented:

> [T]he Court found it very helpful that the parties' ediscovery vendors were present and spoke at the court hearings where the ESI Protocol was discussed. . . . Even where as here counsel is very familiar with ESI issues, it is very helpful to have the parties' ediscovery vendors (or in-house IT personnel or in-house ediscovery counsel) present at court conferences where ESI issues are being discussed. It also is important for the vendors and/or knowledgeable counsel to be able to explain complicated ediscovery concepts in ways that make it easily understandable to judges who may not be tech-savvy.[105]

This trend of courts requiring parties to make their vendors or IT staff available to each other and the court if necessary to discuss the best way to proceed with discovery in a particular matter well in advance of any discovery deadlines will continue, if for no other reason than it will help courts better manage their dockets by ensuring that parties are not playing games with each other or running out the clock.[106]

B. Proportionality Will Play an Increasingly Large Role in Competent E-Discovery Practice

As potential sources of ESI multiply and the volume of potentially relevant ESI increases exponentially, proportionality will continue to play a critical role in competently managing the discovery process. "If courts and litigants approach discovery with the mindset of proportionality, there is the potential for real savings in both dollars and time to resolution."[107] This August, the United States District Court for the District of Kansas issued its *Guidelines for Cases Involving*

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[105] *Id.*

[106] *See* Craig Ball, *10 E-Discovery Tips for Judges*, BALL IN YOUR COURT (August 9, 2013), http://ballinyourcourt.wordpress.com/2013/08/09/1370/ ("Tip 3: Get the Geeks Together . . . . Requiring the warring camps to designate technically-astute liaisons and making the lawyers simmer down while their experts figure things out may be the single smartest step a judge can take to promote an efficient resolution of e-discovery issues.").

[107] John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 CAMPBELL L. REV. 455, 460 (2010).

Electronically Stored Information,[108] which place proportionality front and center:

> The purpose of these guidelines is to facilitate the just, speedy, and inexpensive resolution of disputes involving ESI, and to promote, whenever possible, the resolution of disputes regarding the discovery of ESI without Court intervention. *Parties should consider the proportionality principle inherent within the Federal Rules in using these guidelines.*[109]

While the word "proportionality" does not appear in its text, "Rule 26(g) 'imposes an affirmative duty [on parties] to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37.'"[110] Judge David J. Waxse, one of the committee members behind the District of Kansas's new guidelines, recently issued an opinion taking defense counsel to task for failing to make a reasonable inquiry into the factual basis of document requests[111] and then taking plaintiffs' counsel to task for asserting "meaningless" general objections to those document requests.[112] The Court found that both parties had violated the Rule 26(g) certification that the discovery request, response, or objection is "'neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.'"[113] But before holding a hearing on these violations, the court ordered the parties to meet and confer and made the following "suggestion":

> [W]hile conferring, counsel may revise the document requests, responses, and objections in an effort to avoid sanctions under Rule 26(g), which the Court is mandated to asses should it find that counsel violated Rule 26(g) without substantial justification. Counsel are further instructed to read *Mancia v. Mayflower Textile Servs. Co.*, 253

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[108] U.S. DIST. COURT FOR THE DIST. OF KAN., GUIDELINES FOR CASES INVOLVING ELECTRONICALLY STORED INFORMATION [ESI] 1 (2013), *available at* http://www.ksd.uscourts.gov/guidelines-for-esi/.

[109] *Id.* (emphasis added).

[110] Ace USA v. Union Pac. R.R. Co., No. 09-2194-KHV-DJW, 2010 WL 4629920, at *2 (D. Kan. Nov. 8, 2010).

[111] *Id.* ("[T]he Court is hard-pressed to conclude that a request seeking all communications concerning the [subject of the dispute] is reasonable in light of the facts known to Defendant.").

[112] *Id.* ("Plaintiffs asserted numerous general objections, all of which are meaningless and waste the Court's time. . . . Where a party has not made an attempt to show the application of the theoretical general objection, the Court will deem those general objections waived and will decline to consider them as objections at all.").

[113] *Id.* at *1 (citing FED. R. CIV. P. 26(g)(1)(A)(iii)).

> F.R.D. 354 (D. Md. 2008) to assist them in complying with Rule 26(g).[114]

Had the parties here considered the principle of proportionality when they approached discovery in this case, they could have saved their clients a great deal of money and avoided wasting the court's time and patience. In the future, litigants like those here should look to resources like the District of Kansas's Guidelines or *The Sedona Conference Commentary on Proportionality in Electronic Discovery*[115] for help. The Commentary adopted six broad principles:

> 1. The burdens and costs of preservation of potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.
>
> 2. Discovery should generally be obtained from the most convenient, least burdensome, and least expensive sources.
>
> 3. Undue burden, expense, or delay resulting from a party's action or inaction should be weighed against that party.
>
> 4. Extrinsic information and sampling may assist in the analysis of whether requested discovery is sufficiently important to warrant the potential burden or expense of its production.
>
> 5. Nonmonetary factors should be considered when evaluating the burdens and benefits of discovery.
>
> 6. Technologies to reduce cost and burden should be considered in the proportionality analysis.[116]

C. Courts Will Demand Competence When It Comes to E-Discovery

In *Victor Stanley, Inc. v. Creative Pipe, Inc.*, Judge Grimm reminds us that "[f]or the judicial process to function properly, the court must rely 'in large part on the good faith and diligence of counsel *and the parties* in abiding by these rules [of discovery] and conducting themselves and their judicial business honestly.'"[117] Part of this good faith and diligence is approaching discovery in a competent manner. In a recent article providing his "top ten" tips for judges regarding e-discovery, commentator Craig Ball concluded his list as follows: "Tip 10: Demand Competence[:] The next time counsel says, 'Judge, I don't understand this e-discovery stuff,' don't let it pass. Coming unprepared fosters waste, delay and injustice. It's disrespectful to you and to our

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[114] *Id.* at *4.

[115] The Sedona Conference, *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289, 291 (2010).

[116] *Id.*

[117] Victor Stanley, Inc. v Creative Pipe, Inc., 269 F.R.D. 497, 525 (D. Md. 2010) (alteration in original) (quoting Metro. Opera Ass'n v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union, 212 F.R.D. 178, 181 (S.D.N.Y. 2003)).

justice system. Demand competence in ESI from counsel in matters involving ESI."[118]

The author agrees. Every lawyer practicing under the Federal Rules of Civil Procedure should take the time and make the effort to gain the "knowledge, skill, thoroughness, and preparation" necessary to practice discovery in a competent matter. Our clients should demand it, and more and more, our courts will too.

[118] Ball, *supra* note 106.

ADVANCING THE GOALS OF A "JUST, SPEEDY, AND INEXPENSIVE" DETERMINATION OF EVERY ACTION: THE RECENT CHANGES TO THE DISTRICT OF KANSAS GUIDELINES FOR CASES INVOLVING ELECTRONICALLY STORED INFORMATION

*Judge David J. Waxse**

INTRODUCTION

As most parties and counsel agree, litigation today is a method of resolving disputes that is too costly and time consuming for most parties involved. I see that on a day-to-day basis in my case management work as a Federal Magistrate Judge. The Federal Judicial Center ("FJC") has also recognized this issue. As part of its 2010 conference on civil litigation held at Duke Law School ("Duke Conference"), the FJC presented its findings on a research study of the cost of civil litigation in federal court. Those findings confirmed the existence of the problem, as well as a consensus in the civil justice system for the need for solutions to this problem.[1] More specifically, effective solutions are needed to find ways to effectuate the purposes of the Federal Rules of Civil Procedure—"to secure the just, speedy, and inexpensive determination of every action and proceeding."[2]

Before discussing solutions, it helps to understand some of the causes of the problem. There are several causes, but three of the major ones are (1) the volume of electronically stored information ("ESI") involved in litigation, (2) the lack of technical competence by counsel, and (3) the lack of cooperation among counsel in litigation. In an effort to respond to the resulting problems caused by lack of lawyer technical

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* David J. Waxse is a United States Magistrate Judge in the District of Kansas. The author thanks Ken Withers, Director of Judicial Education for The Sedona Conference, for his insight and support, as well as the author's law clerks, Brenda Yoakum-Kriz and Dan Ostaszewski, and intern Kurtis Wiard, for their assistance with editing and revising this Article. The views expressed in this Article are those of the author alone and not the United States District Court for the District of Kansas.

1 *See* JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES & THE COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 3–4 (2010) [hereinafter CIVIL LITIGATION CONFERENCE REPORT] (summarizing the conference); EMERY G. LEE III & THOMAS E. WILLGING, LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS, REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 7 (2010); THOMAS E. WILLGING & EMERY G. LEE III, IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION 14–21 (2010).

2 FED. R. CIV. P. 1.

competence and lack of cooperation, the United States District Court for the District of Kansas has recently revised its Guidelines for Cases Involving ESI ("New Guidelines").[3] These New Guidelines are attached as Appendix A to this Article.

I. WHY ESI HAS MADE LITIGATION MORE EXPENSIVE AND TIME-CONSUMING

A. Volume of ESI

Looking first at the problem of volume, the FJC publication, "Managing Discovery of Electronic Information: A Pocket Guide for Judges," states:

> It is a fact of modern life that an enormous volume of information is created, exchanged, and stored electronically. Conventional documents originate as computer files, e-mail is taking the place of both telephone calls and postal letters, and many, if not most, commercial activities are transacted using computer-based business processes. Electronically stored information (ESI) is commonplace in our personal lives and in the operation of businesses, public entities, and private organizations.[4]

To put that in numerical terms, one study estimates that a typical corporate user sends or receives about 110 e-mail messages per day.[5] Since an average e-mail contains one and one-half pages of text,[6] that equates to approximately 165 pages of e-mail messages per user, per day. This can translate into multiple gigabytes of ESI in complex litigation. To put that in perspective, one gigabyte is equal to 75,000 pages of text, or a pick-up truck full of paper.[7] Just one DVD can store 4.7 gigabytes of information, or 350,000 pages.[8] Since the amount of data

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[3] *See* U.S. DIST. COURT FOR THE DIST. OF KAN., GUIDELINES FOR CASES INVOLVING ELECTRONICALLY STORED INFORMATION [ESI] 1 (2013) [hereinafter NEW ESI GUIDELINES] (explaining that the purposes of the Guidelines are "to promote . . . the resolution of disputes regarding the discovery of ESI without Court intervention" and to foster principle of cooperation) (reprinted in Appendix A).

[4] BARBARA J. ROTHSTEIN ET AL., MANAGING DISCOVERY OF ELECTRONIC INFORMATION: A POCKET GUIDE FOR JUDGES 1 (2007), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/$file/eldscpkt.pdf.

[5] THE RADICATI GRP., INC., EMAIL STATISTICS REPORT, 2010, at 3 (Sara Radicati ed., 2010), *available at* http://www.radicati.com/wp/wp-content/uploads/2010/04/Email-Statistics-Report-2010-2014-Executive-Summary2.pdf.

[6] E-DISCOVERY TEAM, http://e-discoveryteam.com (last visited Oct. 30, 2013) (see section in right-hand column, entitled "How Much Data Do You Have").

[7] *Id.*

[8] *Id.*

created doubles approximately every 18 months,[9] we are moving beyond gigabytes and are now dealing with terabytes (1000 gigabytes) and petabytes (1000 terabytes, or 250 billion pages of text)[10] of ESI, so the problem continues to grow.

B. Lack of Technical Competence

A second contributing factor to why ESI has made litigation more expensive and time-consuming is the general lack of technical competence by counsel. As a judge responsible for case management, I have observed too many lawyers who do not have the necessary competence with technology to properly represent their clients in litigation that involves e-discovery. Rule 1.1 of the ABA Model Rules of Professional Conduct has always required that lawyers "provide competent representation to a client."[11] As a result of concerns about lawyers' lack of technical competence, in August 2012, the Commission on Ethics 20/20 ("Commission") submitted Report 105A to the ABA House of Delegates.[12] In its report, "the Commission concluded that competent lawyers must have some awareness of basic features of technology," and recommended an amendment to the comments of Model Rule of Professional Conduct 1.1 (Competence) emphasizing "that, in order to stay abreast of changes in the law and its practice, lawyers need to have a basic understanding of the benefits and risks of relevant technology."[13] The Commission also concluded that, "in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology and that this aspect of competence should be expressed in the Comment."[14] The Commission cited, as an example, a lawyer who does not know how to use email or create an electronic document as one who "would have difficulty providing competent legal services in today's environment."[15]

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[9] *See* Gil Press, *A Very Short History of Big Data*, FORBES.COM (May 9, 2013, 9:45 AM), http://www.forbes.com/sites/gilpress/2013/05/09/a-very-short-history-of-big-data (citing JOHN F. GANTZ ET AL., IDC, THE EXPANDING DIGITAL UNIVERSE 3 (2007)) (noting that data was estimated to double every eighteen months between 2006 and 2010 based on projected growth rates).

[10] E-DISCOVERY TEAM, *supra* note 6.

[11] *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2012); MODEL RULES OF PROF'L CONDUCT R. 1.1 (1983).

[12] AM. BAR ASS'N COMM'N ON ETHICS 20/20, REPORT TO THE HOUSE OF DELEGATES 105A 1 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf.

[13] *Id.* at 2.

[14] *Id.* at 3.

[15] *Id.*

The Commission also noted that the comments "already encompass[] an obligation to remain aware of changes in technology that affect law practice," but concluded that making this explicit, by adding "the phrase 'including the benefits and risks associated with relevant technology,' would offer greater clarity in this area and emphasize the importance of technology to modern law practice."[16] While the proposed amendment "does not impose any new obligations on lawyers," it "is intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent."[17]

In response to the Commission's report, the ABA House of Delegates approved the following comment, labeled "Maintaining Competence," to Rule 1.1:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.[18]

C. Lack of Cooperation

Adding to the problems of ESI volume and lack of technical competence is the failure of counsel to cooperate in the discovery process. This was one of the conclusions of the Duke Conference, which resulted in a consensus recommendation that courts should encourage cooperation in the discovery process.[19] This is also the position of The Sedona Conference,[20] as indicated by its development of The Sedona Conference Cooperation Proclamation in 2008 ("Cooperation

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[16] *Id.*

[17] *Id.*

[18] AM. BAR ASS'N COMM'N ON ETHICS 20/20, REPORT TO THE HOUSE OF DELEGATES 105A REVISED 3 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_amended.authcheckdam.pdf (amending Comment 6 of Rule 1.1 by inserting "including the benefits and risks associated with relevant technology"); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (2012) (amending Comment 6 by resolution 105A and renumbering it as Comment 8).

[19] CIVIL LITIGATION CONFERENCE REPORT, *supra* note 1, at 4.

[20] *Frequently Asked Questions*, THE SEDONA CONFERENCE, https://thesedonaconference.org/faq (last visited Oct. 30, 2013) (introducing The Sedona Conference as a nonprofit, 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights).

Proclamation").[21] The Cooperation Proclamation begins with this observation:

> The costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system. This burden rises significantly in discovery of electronically stored information ("ESI"). In addition to rising monetary costs, courts have seen escalating motion practice, overreaching, obstruction, and extensive, but unproductive discovery disputes—in some cases precluding adjudication on the merits altogether—when parties treat the discovery process in an adversarial manner. Neither law nor logic compels these outcomes.[22]

Several courts have now written opinions promoting cooperation.[23] Judge Paul Grimm, in *Mancia v. Mayflower Textile Services Co.*,[24] wrote:

> Although judges, scholars, commentators and lawyers themselves long have recognized the problems associated with abusive discovery, what has been missing is a thoughtful means to engage all the stakeholders in the litigation process—lawyers, judges and the public at large—and provide them with the encouragement, means and incentive to approach discovery in a different way. The Sedona Conference, a non-profit, educational research institute best known for its *Best Practices Recommendations and Principles for Addressing Electronic Document Production*, recently issued a *Cooperation Proclamation* to announce the launching of "a national drive to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery." . . . In the meantime, however, the present dispute evidences the need for clearer guidance how to comply with the requirements of Rules 26(b)(2)(C) and 26(g) in order to ensure that the Plaintiffs obtain appropriate discovery to support their claims, and the Defendants are not unduly burdened by discovery demands that are disproportionate to the issues in this case.[25]

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[21] THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COOPERATION PROCLAMATION 1 (2008) [hereinafter COOPERATION PROCLAMATION], *available at* https://thesedonaconference.org/publication/sedona-conference%C2%AE-cooperation-proclamation.

[22] *Id.*

[23] *See, e.g.*, Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency, 877 F. Supp. 2d 87, 109 (S.D.N.Y. 2012); DeGeer v. Gillis, 755 F. Supp. 2d 909, 929 (N.D. Ill. 2010); William A. Gross Constr. Assoc. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 134, 136 (S.D.N.Y. 2009); Gipson v. Sw. Bell Tel. Co., No. 08-2017-EFM-DJW, 2008 U.S. Dist. LEXIS 103822, at *4–6 (D. Kan. Dec. 23, 2008).

[24] 253 F.R.D. 354 (D. Md. 2008).

[25] *Id.* at 363 (footnotes omitted) (quoting COOPERATION PROCLAMATION, *supra* note 21, at 1).

I have endorsed and used the Cooperation Proclamation to educate counsel with respect to their discovery obligations. In *Gipson v. Southwestern Bell Telephone Co.*, a case where more than 115 motions and 462 docket entries were filed over the course of less than a year, I noted that many of the motions filed by counsel addressed matters that the parties should have been able to resolve without judicial involvement.[26] After reminding the parties of the Court's goal to administer the Federal Rules of Civil Procedure ("Rules") in a "just, speedy and inexpensive" manner,[27] I then directed counsel to read the Cooperation Proclamation in order to help the parties and counsel understand their discovery obligations.[28]

II. RECENT CHANGES TO THE DISTRICT OF KANSAS ESI GUIDELINES

In an effort to respond to these problems impeding the "just, speedy, and inexpensive determination of every action,"[29] the District of Kansas has recently substantially modified its Guidelines for Cases Involving Electronically Stored Information.[30] As a result of the efforts of a committee, comprised of judges and practicing lawyers[31] appointed by Chief Judge Kathryn H. Vratil, the District's existing ESI guidelines, originally promulgated on February 1, 2008, were expanded from five guideline sections to twenty-six sections.[32] This Article discusses some of the more important changes made to promote competence and cooperation.

A. Title

First, the title of the New Guidelines has been changed from "Guidelines for Discovery of Electronically Stored Information (ESI)" to "Guidelines for Cases Involving Electronically Stored Information [ESI]."[33] This change was made to emphasize that the New Guidelines

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[26] *See Gipson*, 2008 U.S. Dist. LEXIS 103822, at *4.

[27] *Id.* (quoting FED. R. CIV. P. 1).

[28] *Id.*

[29] FED. R. CIV. P. 1.

[30] *Compare* NEW ESI GUIDELINES, *supra* note 3, *with* U.S. DIST. COURT FOR THE DIST. OF KAN., GUIDELINES FOR DISCOVERY OF ELECTRONICALLY STORED INFORMATION (ESI) (2008) [hereinafter OLD GUIDELINES] (evidencing a major revision even if only the number of sections are considered: there are twenty-six in the New Guidelines and just five in the OLD GUIDELINES).

[31] The committee members are Judge Karen Humphreys, Judge David Waxse, Angel Mitchell, George Hanson, and Michael Jones.

[32] *Compare* NEW ESI GUIDELINES, *supra* note 3, *with* OLD GUIDELINES, *supra* note 30.

[33] *Compare* NEW ESI GUIDELINES, *supra* note 3 (brackets in original), *with* OLD GUIDELINES, *supra* note 30.

cover more than e-discovery. One significant change to the guidelines is the addition of provisions detailing what counsel should consider prior to the filing of litigation. These provisions are discussed in more detail below.[34]

B. Introduction

The New Guidelines now include an Introduction section that covers both the purpose of the New Guidelines and the principle of cooperation. Section 1 sets forth the purpose of the New Guidelines:

> The purpose of these guidelines is to facilitate the just, speedy, and inexpensive resolution of disputes involving ESI, and to promote, whenever possible, the resolution of disputes regarding the discovery of ESI without Court intervention. Parties should consider the proportionality principle inherent within the Federal Rules in using these guidelines.[35]

Not only does this new purpose section explicitly remind counsel of the obligations of Rule 1, it also reminds them of the proportionality principle contained in the Rules. One of the conclusions of the Duke Conference was that the concept of proportionality is too often either not followed by counsel or not enforced by the court.[36] Proportionality is discussed in both Rule 26(b)(2)(C) and 26(g)(1)(B)(iii).[37] Specifically, Rule 26(b)(2)(C) requires the court to limit the frequency or extent of discovery if "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."[38]

Rule 26(g) also implicates proportionality by requiring the attorney or the unrepresented party to sign every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection.[39] Rule 26(g) provides that by signing the discovery request, response, or objection, the attorney or party "certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry,"[40] it is "neither unreasonable nor unduly burdensome or expensive, considering the

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[34] *See infra* Part II.D.

[35] NEW ESI GUIDELINES, *supra* note 3, § 1 (citing FED. R. CIV. P. 26(b)(2)(C)(iii), (g)(1)(B)(iii)).

[36] *See* CIVIL LITIGATION CONFERENCE REPORT, *supra* note 1, at 8.

[37] *See* FED. R. CIV. P. 26(b)(2)(C), (g)(1)(B)(iii).

[38] *Id.* 26(b)(2)(C)(iii).

[39] *Id.* 26(g)(1).

[40] *Id.*

needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action."[41]

The intent of the proportionality reference is to remind counsel that one of the best ways to reach a "just, speedy, and inexpensive" determination is to actually consider proportionality in each step of the discovery process.[42] The same message has to also reach the judge that is providing case management. With about one percent of civil cases in federal court going to trial, most of the time and money is being spent in discovery and not trial.[43]

The New Guidelines now have a separate section setting forth the principle of cooperation: "An attorney's representation of a client is improved by conducting discovery in a cooperative manner. The failure of counsel or the parties in litigation to cooperate in facilitating and reasonably limiting discovery requests and responses increases litigation costs and contributes to the risk of sanctions."[44] The New Guidelines then refer to the Cooperation Proclamation,[45] endorsed by eight judges from Kansas,[46] and the article "Cooperation—What Is It and Why Do It?" by David J. Waxse.[47]

C. Definitions

Unlike the former guidelines, the New Guidelines contain a definitions section. For general terms, the New Guidelines recommend

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[41] *Id.* 26(g)(1)(B)(iii).

[42] *See id.*; Jacob Tingen, *Technologies-That-Must-Not-Be-Named: Understanding and Implementing Advanced Search Technologies in E-Discovery*, 19 RICH. J.L. & TECH., no. 1, art. 2, Fall 2012, at 39, http://jolt.richmond.edu/v19i1/article2.pdf.

[43] *See, e.g.*, CIVIL LITIGATION CONFERENCE REPORT, *supra* note 1, at 4, 7; Sheri Qualters, *Two Federal Judges Offer Differing Takes on Declining Civil Trial Numbers*, N.Y. L.J., Sept. 20, 2010, at 2.

[44] NEW ESI GUIDELINES, *supra* note 3, § 2.

[45] COOPERATION PROCLAMATION, *supra* note 21.

[46] The judges that have endorsed the Cooperation Proclamation are the Hon. J. Thomas Marten, U.S. District Court for the District of Kansas, Wichita; the Hon. Kenneth G. Gale, U.S. District Court for the District of Kansas, Wichita; the Hon. Karen M. Humphreys, U.S. District Court for the District of Kansas, Wichita; the Hon. James P. O'Hara, U.S. District Court for the District of Kansas, Kansas City; the Hon. Gerald L. Rushfelt, U.S. District Court for the District of Kansas, Kansas City; the Hon. K. Gary Sebelius, U.S. District Court for the District of Kansas, Topeka; the Hon. David J. Waxse, U.S. District Court for the District of Kansas, Kansas City; and the Hon. Gerald J. Elliott, Johnson County District Court, Olathe. NEW ESI GUIDELINES, *supra* note 3, § 2 n.2.

[47] NEW ESI GUIDELINES, *supra* note 3, § 2 (citing David J. Waxse, *Cooperation—What Is It and Why Do It?*, 18 RICH. J.L. & TECH., no. 3, art. 8, Spring 2012, at 1, http://jolt.richmond.edu/v18i3/article8.pdf).

consulting the current Sedona Conference Glossary[48] and The Grossman-Cormack Glossary of Technology-Assisted Review.[49] The definitions section also sets out a separate section for Form of Production:

> Parties and counsel should recognize the distinction between format and media. Format, the internal structure of the data, suggests the software needed to create and open the file (i.e., an Excel spreadsheet, a Word document, a PDF file). Media refers to the hardware containing the file (i.e., a flash drive or disc).
>
> Electronic documents have an associated file structure defined by the original creating application. This file structure is referred to as the "native format" of the document. Native format refers to the document's internal structure at the time of the creation. In general, a file maintained in native format includes any metadata embedded inside the document that would otherwise be lost by conversion to another format or hard copy. In contrast, a "static format," such as a .PDF or .TIF, creates an image of the document as it originally appeared in native format but usually without retaining any metadata. Counsel need to be clear as to what they want and what they are producing.
>
> Counsel should know the format of the file and, if counsel does not know how to read the file format, should consult with an expert as necessary to determine the software programs required to read the file format.[50]

A separate definitions section is also provided for meta and embedded data. This section defines metadata and embedded data as follows:

> "Metadata" typically refers to information describing the history, tracking, or management of an electronic file. Some forms of metadata are maintained by the system to describe the file's author, dates of creation and modification, location on the drive, and filename. Other examples of metadata include spreadsheet formulas, database structures, and other details which, in a given context, could prove critical to understanding the information contained in the file. "Embedded data" typically refers to draft language, editorial comments, and other deleted or linked matter retained by computer programs.
>
> Metadata and embedded data may contain privileged or protected information. Litigants should be aware of metadata and embedded data when reviewing documents but should refrain from "scrubbing"

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[48] THE SEDONA CONFERENCE, THE SEDONA CONFERENCE GLOSSARY: E-DISCOVERY & DIGITAL INFORMATION MANAGEMENT (Sherry B. Harris et al. eds., 3d ed. 2010) [hereinafter SEDONA CONFERENCE GLOSSARY] *available at* https://thesedonaconference.org//publication/The%2520Sedona%2520Conference%25C2%25AE%2520Glossary.

[49] Maura R. Grossman & Gordon V. Cormack, *The Grossman-Cormack Glossary of Technology-Assisted Review*, 7 FED. CTS. L. REV., no. 1, 2013, at 8.

[50] NEW ESI GUIDELINES, *supra* note 3, § 4 (footnote omitted).

> either metadata or embedded data without cause or agreement of adverse parties.[51]

The metadata section is partially based on *Williams v. Sprint/United Management Co.*,[52] where the court held:

> [W]hen a party is ordered to produce electronic documents as they are maintained in the ordinary course of business, the producing party should produce the electronic documents with their metadata intact, unless that party timely objects to production of metadata, the parties agree that the metadata should not be produced, or the producing party requests a protective order.[53]

D. Prior to the Filing of Litigation

Significant additions to the New Guidelines include areas for counsel to consider prior to the filing of litigation. It is comprised of three sections: identification of potential parties and issues, identification of ESI, and preservation.

Section 6 relates to the identification of potential parties and issues when there is either a reasonable anticipation of litigation or when litigation is imminent.[54] As footnote 7 in the New Guidelines indicates, these alternative triggers are used because the United States Court of Appeals for the Tenth Circuit "has not yet addressed the relevant standard on when parties should take action regarding ESI prior to litigation being initiated."[55] Counsel are urged to keep in mind that other circuits frame the standards differently. Without regard to which trigger is used, Section 6 of the New Guidelines provides as follows if a triggering event has occurred:

> [E]fforts should be made to identify potential parties and their counsel to that litigation to facilitate early cooperation in the preservation and exchange of relevant electronically stored information. To comply with Fed. R. Civ. P. 26(b)(1) scope of discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense," counsel should consider determining the issues that will likely arise in the litigation. They should also consider discussing with opposing counsel which issues are actually in dispute and which can be resolved by agreement. Agreement that an issue is not disputed can reduce discovery costs.[56]

The purpose of this new guideline is to explicitly urge counsel to cooperate, even before litigation has been initiated, as one way to reach a "just, speedy, and inexpensive" determination of the action.

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51 NEW ESI GUIDELINES, *supra* note 3, § 5.

52 230 F.R.D. 640 (D. Kan. 2005).

53 *Id.* at 652 (footnotes omitted).

54 *See* NEW ESI GUIDELINES, *supra* note 3, § 6.

55 *Id.* § 6 n.7.

56 *Id.* § 6.

Another step identified in the New Guidelines, to be taken prior to the filing of litigation, is for counsel to identify the relevant ESI.[57] This requires counsel to become knowledgeable about their client's information management system and its operation. This step was in the previous version of the guidelines.[58] The new portion of this guideline now advises counsel to determine "whether discoverable ESI is being stored by third parties for example in cloud storage facilities or social media."[59]

Section 8 of the New Guidelines relates to preservation, a subject that was not covered extensively in the previous guidelines.[60] The preservation of ESI is clearly one area that has a substantial impact on the "just, speedy, and inexpensive" determination of the action. It has become less expensive to store ESI, but the search costs relate directly to the volume of ESI that has been stored.[61] It is thus important to have a reasonable and proportionate preservation process. In an effort to accomplish that, the New Guidelines provide the following guidance:

> In general, electronic files are usually preserved in native format with metadata intact.
>
> Every party either reasonably anticipating litigation or believing litigation is imminent must take reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control. Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues immediately, and should continue to address them as the case progresses and their understanding of the issues and the facts improves. If opposing parties and counsel can be identified, efforts should be made to reach agreement on preservation issues. The parties and counsel should consider the following:

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57 *See id.* § 7.

58 *See* OLD GUIDELINES, *supra* note 30, § 1.

59 NEW ESI GUIDELINES, *supra* note 3, § 7.

60 *Compare* NEW ESI GUIDELINES, *supra* note 3, § 8 (devoting an entire section to preservation), *with* OLD GUIDELINES, *supra* note 30, § 4(a) (discussing preservation briefly in one subsection).

61 *See* THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 3 (Jonathan M. Redgrave et. al. eds., 2004), *available at* https://thesedonaconference.org/publication/The%20Sedona%20Principles (noting that "there are vastly more electronic documents than paper documents and [that] electronic documents are created at much greater rates than paper documents," causing the amount of discoverable information to increase exponentially); John Didday, Note, *Informed Buyers of E-Discovery: Why General Counsel Must Become Tech Savvy*, 5 HASTINGS SCI. & TECH. L.J. 282, 307 (2013) ("The reason the explosion of document volume is such a problem is that review costs have kept steady while storage and preservation costs have sunk just as quickly as document volumes have increased.").

> (a) The categories of potentially discoverable information to be segregated and preserved;
>
> (b) The "key persons" and likely witnesses and persons with knowledge regarding relevant events;
>
> (c) The relevant time period for the litigation hold;
>
> (d) The nature of specific types of ESI, including email and attachments, word processing documents, spreadsheets, graphics and presentation documents, images, text files, hard drives, databases, instant messages, transaction logs, audio and video files, voicemail, Internet data, computer logs, text messages, or backup materials, and native files, and how it should be preserved.
>
> (e) Data maintained by third parties, including data stored in social media and cloud servers. Because of the dynamic nature of social media, preservation of this data may require the use of additional tools and expertise.[62]

Once again, the goal is for counsel who are technologically competent to cooperate in dealing with the problem of large volumes of ESI to find a process of reaching a "just, speedy, and inexpensive" determination of the action.

E. Initiation of Litigation

The next portion of the New Guidelines relates to the initiation of litigation. Section 9 specifically discusses efforts to narrow the issues after litigation has begun.[63] Counsel are urged to cooperate in an effort to narrow the issues that will require discovery:[64]

> After litigation has begun, counsel should attempt to narrow the issues early in the litigation process by review of the pleadings and consultation with opposing counsel. Through discussion, counsel should identify the material factual issues that will require discovery. Counsel should engage with opposing counsel in a respectful, reasonable, and good faith manner, with due regard to the mandate of Rule 1 that the rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." In addition, counsel should comply with their professional and ethical obligations including candor to the court and opposing counsel. Note that the issues discussed will need to be revisited throughout the litigation.[65]

The current rule on the scope of discovery is Rule 26(b)(1), which provides in part: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—

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62 NEW ESI GUIDELINES, *supra* note 3, § 8 (footnotes omitted).

63 *See id.* § 9.

64 *See id.*

65 *Id.*

including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter."[66] Too often counsel are engaged in a discovery battle on a claim or defense that is not really in dispute. The purpose of this section of the New Guidelines is to urge counsel to attempt to narrow the factual issues that are in dispute and thus eliminate the need to engage in discovery on those issues.

The next section of the New Guidelines suggests that counsel designate an e-discovery liaison in those cases with a substantial amount of ESI.[67] Section 10, entitled, "E-Discovery Liaison," states:

> To promote communication and cooperation between the parties, each party to a case with significant e-discovery issues may designate an e-discovery liaison for purposes of assisting counsel, meeting, conferring, and attending court hearings on the subject. Regardless of whether the liaison is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, he or she should be:
>
> • Familiar with the party's electronic information systems and capabilities in order to explain these systems and answer relevant questions.
>
> • Knowledgeable about the technical aspects of e-discovery, including the storage, organization, and format issues relating to electronically stored information.
>
> • Prepared to participate in e-discovery dispute resolutions.
>
> The attorneys of record are responsible for compliance with e-discovery requests and, if necessary, for obtaining a protective order to maintain confidentiality while facilitating open communication and the sharing of technical information. However, the liaison should be responsible for organizing each party's e-discovery efforts to insure consistency and thoroughness and, generally, to facilitate the e-discovery process.[68]

The purpose of this section is to improve the technological competence of counsel by suggesting the designation of a person who has such competence to assist counsel in the e-discovery process. Some judges are asking counsel to involve such liaisons in case management conferences and hearings on e-discovery disputes.

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66 FED. R. CIV. P. 26(b)(1).

67 *See* NEW ESI GUIDELINES, *supra* note 3, § 10.

68 *Id.*

F. Rule 26(f) Conferences

The next sections of the New Guidelines cover what ESI-related issues counsel should consider and discuss at the Rule 26(f) conference.[69] That Rule requires counsel to confer prior to the scheduling conference and sets out what the parties must consider.[70] Specifically, Rule 26(f)(2) lists what the parties must consider in conferring:

> [T]he nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan.[71]

Rule 26(f)(3) requires that the parties state their views and proposals on the following in their discovery plan:

> (A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;
>
> (B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;
>
> (C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;
>
> (D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order;
>
> (E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and
>
> (F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).[72]

Section 11 of the New Guidelines is an effort to make it easier for counsel to comply with both their Rule 26(f) and Rule 34 obligations. It provides some general guidance for counsel at the Rule 26(f) conference with respect to ESI:

> At the Rule 26(f) conference or prior to the conference if possible, a party seeking discovery of ESI should notify the opposing party of that fact immediately, and, if known at that time, should identify as clearly as possible the categories of information that may be sought. Parties and counsel are reminded that, under Fed. R. Civ. P. 34, if the

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69 *See id.* §§ 11–23.

70 FED. R. CIV. P. 26(f).

71 *Id.* 26(f)(2).

72 *Id.* 26(f)(3).

> requesting party has not designated a form of production in its request, or if the responding party objects to the designated form, then the responding party must state in its written response the form it intends to use for producing ESI. In cases with substantial ESI issues, counsel should assume that this discussion will be an ongoing process and not a onetime meeting.[73]

This section stresses that one of the ESI issues requiring cooperation is the designation of the form of production. Also, one planning conference or meeting may not be enough in cases with substantial ESI issues. When disputes have arisen in the past, I have ordered counsel to meet once more in an effort to resolve their differences, with the additional requirement that counsel make a video recording of the conference. After conferring, they can either submit their agreement on the disputed issue, or, if they are unable to reach an agreement, they can submit the video recording. I have yet to watch a video of a conference.[74]

The next two guidelines are ones that urge cooperation in an effort to achieve a "just, speedy, and inexpensive" determination of the action. Section 12 discusses the issues involved in situations where some of the ESI is not reasonably accessible, as discussed in Rule 26(b)(2)(B).[75] This Rule provides the following specific limitations on ESI:

> A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.[76]

This issue does not seem to generate as many disputes as was anticipated during the revision of the rules as evidenced by there being

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[73] NEW ESI GUIDELINES, *supra* note 3, § 11. For a more detailed description of topics that may need to be discussed, see Craig Ball, *Ask and Answer the Right Questions in EDD*, L. TECH. NEWS (Jan. 4, 2008), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=900005499729&Ask_and_Answer_the_Right_Questions_in_EDD, *reprinted in* NEW ESI GUIDELINES, *supra* note 3, at app. A.

[74] In describing this process in presentations on e-discovery, I explained that I originally did not understand why this worked. After one presentation, a lawyer with a degree in physics told me he knew the reason. He said that lawyers are like particles in physics in that they change when observed.

[75] NEW ESI GUIDELINES, *supra* note 3, § 12.

[76] FED. R. CIV. P. 26(b)(2)(B).

only 120 cases retrieved by Westlaw from all federal cases searching for proportionality and Rule 26(b)(2)(C).[77]

Section 13 of the New Guidelines addresses whether counsel should consider the creation of a shared database and use of one search protocol:

> In appropriate cases counsel may want to attempt to agree on the construction of a shared database, accessible and searchable by both parties. In such cases, they should consider both hiring a neutral vendor and/or using one search protocol with a goal of minimizing the costs of discovery for both sides.[78]

The next New Guideline relates to both cooperation and technical competence. Section 14 addresses removing duplicated data and the "de-NISTing"[79] of files. It provides that "[c]ounsel should discuss the elimination of duplicative ESI and whether such elimination will occur only within each particular custodian's data set or whether it will occur across all custodians, also known as vertical and horizontal views of ESI."[80] The New Guidelines also advise counsel to discuss the "de-NISTing" of files, which is "[t]he use of an automated filter program that screens files against the NIST list of computer file types to separate those generated by a system and those generated by a user."[81] Competent counsel using these methods cooperatively can save both time and money in the e-discovery process.

One of the most important steps in the e-discovery process is the actual search for discoverable ESI. To effectively search, ESI requires both technical competence and cooperation. Section 15 of the New Guidelines addresses search methodologies such as technology assisted review (TAR):

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[77] WESTLAW, http://www.next.westlaw.com (follow "Search" hyperlink and select "Terms & Connectors" hyperlink; then select "All Federal Cases" database; then enter "proportionality" & "26(b)(2)(C)" in the "Search" box) (last visited Oct. 30, 2013).

[78] NEW ESI GUIDELINES, *supra* note 3, § 13 (footnote omitted); *see, e.g.*, EORHB, Inc. v. HOA Holdings LLC, No. 7409-VCL, 2012 WL 4896670, at *1 (Del. Ch. Oct. 15, 2012) (ordering counsel to "retain a single discovery vendor to be used by both sides" and to conduct document review with predictive coding), *modified by* No. 7409-VCL, 2013 WL 1960621, at *1 (Del. Ch. May 6, 2013) (granting the parties' request to be released from the prior order requiring the use of a single discovery vendor and predictive coding for document review).

[79] NIST, which stands for National Institute of Standards and Technology, is a federal agency that works with industries to develop technology measurements and standards. NIST developed a hash database of computer files ("NIST List") to identify files that are system-generated and generally accepted to have no substantive value in most cases. Sedona Conference Glossary, *supra* note 48, at 36.

[80] NEW ESI GUIDELINES, *supra* note 3, § 14.

[81] SEDONA CONFERENCE GLOSSARY, *supra* note 48, at 15.

> If counsel intend to employ technology assisted review (TAR) to locate relevant ESI and privileged information, counsel should attempt to reach agreement about the method of searching or the search protocol. TAR is a process for prioritizing or coding a collection of documents using a computerized system that harnesses human judgments of one or more subject matter expert(s) on a smaller set of documents and then extrapolates those judgments to the remaining document collection.
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> If word searches are to be used, the words, terms, and phrases to be searched should be determined with the assistance of the respective e-discovery liaisons, who are charged with familiarity with the parties' respective systems. In addition, any attempt to use word searches should be based on words that have been tested against a randomly selected sample of the data being searched.
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> Counsel also should attempt to reach agreement as to the timing and conditions of any searches which may become necessary in the normal course of discovery. To minimize the expense, counsel may consider limiting the scope of the electronic search (e.g., time frames, fields, document types) and sampling techniques to make the search more effective.[82]

The next eight sections of the New Guidelines relate to less important issues that should be discussed at the Rule 26(f) conference if applicable to the case. The topics covered are: E-Mail, Deleted Information, Meta and Embedded Data, Data Possessed by Third Parties, Format and Media, Identifying Information, Priorities and Sequencing, and Privilege.[83]

The final area covered by the New Guidelines is the discovery process. Section 24, which is the first section in this area, relates to the timing of discovery and suggests the following sequence: "(a) Mandatory Disclosure," "(b) Search of Reasonably Accessible Information," "(c) Search of Unreasonably Accessible Information," and "(d) Requests for On-Site Inspections."[84]

Section 25 addresses discovery as it pertains to preservation and collection efforts. It states specifically:

> Discovery concerning the preservation and collection efforts of another party, if used unadvisedly, can contribute to unnecessary expense and delay and may inappropriately implicate work product and attorney-client privileged matter. Routine discovery into such

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[82] NEW ESI GUIDELINES, *supra* note 3, § 15. There is no current agreement on what to call the searches that are performed with the assistance of technology. Some currently-used terms include: technology-assisted review (TAR), computer-assisted review (CAR), predictive coding, concept search, and Boolean search. *See* Grossman & Cormack, *supra* note 49, at 6, 10–12, 26, 32.

[83] *See* NEW ESI GUIDELINES, *supra* note 3, §§ 16–23.

[84] *Id.* § 24.

> matters is therefore strongly discouraged and may be in violation of Fed. R. Civ. P 26(g)'s requirement that discovery be "neither unreasonable nor unduly burdensome or expensive." Prior to initiating any such discovery, counsel shall confer with counsel for the party from whom the information is sought concerning: (i) the specific need for such discovery, including its relevance to issues likely to arise in the litigation; and (ii) the suitability of alternative means for obtaining the information. Discovery into such matters may be compelled only on a showing of good cause considering at least the aforementioned factors. Nothing herein exempts deponents on merits issues from answering questions concerning the preservation and collection of their documents, ESI, and tangible things.[85]

This is one more area where cooperation can help us achieve a "just, speedy, and inexpensive" determination of the action.

Section 26, which is the final section of the New Guidelines, discusses the duty to meet and confer when requesting ESI from non-parties under Rule 45.[86] Counsel are utilizing this much more with the increased use of social media. Cases which used to be considered asymmetrical, where an individual sued an organization, are becoming more symmetrical as a result of the huge amount of ESI an individual can create and store on social media like Facebook and Twitter.

CONCLUSION

Litigation today is too expensive and costly due, at least partially, to the volume of ESI and the lack of technical competence and cooperation by counsel. The District of Kansas has recently amended its ESI Guidelines in an effort to address these issues and assist counsel in becoming more technically competent and cooperative in cases involving ESI. Hopefully these efforts will advance the goals of "just, speedy, and inexpensive determination" of litigation.

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[85] *Id.* § 25.

[86] *Id.* § 26.

APPENDIX A

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

GUIDELINES FOR CASES INVOLVING ELECTRONICALLY STORED INFORMATION [ESI][†]

These guidelines are intended to facilitate compliance with the provisions of Fed. R. Civ. P. 1, 16, 26, 33, 34, 37, and 45 relating to the discovery of electronically stored information ("ESI") and the current applicable case law. In the case of any asserted conflict between these guidelines and either the referenced rules or applicable case law, the latter should control.

INTRODUCTION

1. Purpose

The purpose of these guidelines is to facilitate the just, speedy, and inexpensive resolution of disputes involving ESI, and to promote, whenever possible, the resolution of disputes regarding the discovery of ESI without Court intervention. Parties should consider the proportionality principle inherent within the Federal Rules in using these guidelines. *See* Fed. R. Civ. P. 26(b)(2)(C)(iii) and 26(g)(1)(B)(iii).

2. Principle of Cooperation

An attorney's representation of a client is improved by conducting discovery in a cooperative manner. The failure of counsel or the parties in litigation to cooperate in facilitating and reasonably limiting discovery requests and responses increases litigation costs and contributes to the risk of sanctions. For a more complete discussion of this principle, please review the Sedona Conference Cooperation Proclamation[1] endorsed by seven judges[2] from Kansas and "Cooperation—What Is It and Why Do It?" by David J. Waxse.[3]

[†] U.S. DIST. COURT FOR THE DIST. OF KAN., GUIDELINES FOR CASES INVOLVING ELECTRONICALLY STORED INFORMATION [ESI] 1 (2013). The text and footnotes in Appendices "A" and "1," following, are reprinted from the original documents and, therefore, may not be consistent with traditional legal journal styling or Bluebook format.

[1] http://www.thesedonaconference.org/dltForm?did=proclamation.pdf

[2] Hon. Gerald J. Elliott, Johnson County District Court, Olathe
Hon. Kenneth Gale, U.S. District Court for the District of Kansas, Wichita
Hon. Karen M. Humphreys, U.S. District Court for the District of Kansas, Wichita
Hon. J. Thomas Marten, U.S. District Court for the District of Kansas, Wichita
Hon. James P. O'Hara, U.S. District Court for the District of Kansas, Kansas City

DEFINITIONS

3. General

To avoid misunderstandings about terms, all parties should consult the most current edition of The Sedona Conference® Glossary[4] and "The Grossman-Cormack Glossary of Technology-Assisted Review.[5] In addition, references in these guidelines to counsel include parties who are not represented by counsel.

4. Form of Production

Parties and counsel should recognize the distinction between format and media. Format, the internal structure of the data, suggests the software needed to create and open the file (i.e., an Excel spreadsheet, a Word document, a PDF file). Media refers to the hardware containing the file (i.e., a flash drive or disc).

Electronic documents have an associated file structure defined by the original creating application. This file structure is referred to as the "native format" of the document.[6] Native format refers to the document's internal structure at the time of the creation. In general, a file maintained in native format includes any metadata embedded inside the document that would otherwise be lost by conversion to another format or hard copy. In contrast, a "static format," such as a .PDF or .TIF, creates an image of the document as it originally appeared in native format but usually without retaining any metadata. Counsel need to be clear as to what they want and what they are producing.

Counsel should know the format of the file and, if counsel does not know how to read the file format, should consult with an expert as necessary to determine the software programs required to read the file format.

5. Meta and Embedded Data

"Metadata" typically refers to information describing the history, tracking, or management of an electronic file. Some forms of metadata are maintained by the system to describe the file's author, dates of creation and modification, location on the drive, and filename. Other

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Hon. Gerald L. Rushfelt, U.S. District Court for the District of Kansas, Kansas City
Hon. K. Gary Sebelius, U.S. District Court for the District of Kansas, Topeka
Hon. David Waxse, U.S. District Court for the District of Kansas, Kansas City

[3] http://jolt.richmond.edu.v18i3/article8.pdf.

[4] https://thesedonaconference.org/publication/The%20Sedona%20Conference%C2%AE%20Glossary.

[5] Federal Courts Law Review, Vol 7, Issue 1 (2013)

[6] http://www.thesedonaconference.org/dltForm?did=glossary2010.pdf

examples of metadata include spreadsheet formulas, database structures, and other details which, in a given context, could prove critical to understanding the information contained in the file. "Embedded data" typically refers to draft language, editorial comments, and other deleted or linked matter retained by computer programs.

Metadata and embedded data may contain privileged or protected information. Litigants should be aware of metadata and embedded data when reviewing documents but should refrain from "scrubbing" either metadata or embedded data without cause or agreement of adverse parties.

PRIOR TO THE FILING OF LITIGATION

6. Identification of Potential Parties and Issues

When there is a reasonable anticipation of litigation or when litigation is imminent[7], efforts should be made to identify potential parties and their counsel to that litigation to facilitate early cooperation in the preservation and exchange of relevant electronically stored information. To comply with Fed. R. Civ. P. 26(b)(1) scope of discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense," counsel should consider determining the issues that will likely arise in the litigation. They should also consider discussing with opposing counsel which issues are actually in dispute and which can be resolved by agreement. Agreement that an issue is not disputed can reduce discovery costs.

7. Identification of Electronically Stored Information

In anticipation of litigation, counsel should become knowledgeable about their client's information management systems and its operation, including how information is stored and retrieved. Counsel should also consider determining whether discoverable ESI is being stored by third parties for example in cloud storage facilities or social media. In addition, counsel should make a reasonable attempt to review their client's relevant and/or discoverable ESI to ascertain the contents, including backup, archival and legacy data (outdated formats or media).

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[7] The Tenth Circuit has not yet addressed the relevant standard on when parties should take action regarding ESI prior to litigation being initiated but has said action should have been taken when litigation is "imminent" in the general litigation context. Judges in the District of Kansas have used both that standard and the standard of when litigation is "reasonably anticipated" in the context of litigation involving ESI.

8. Preservation

In general, electronic files are usually preserved in native format with metadata intact.

Every party either reasonably anticipating litigation or believing litigation is imminent[8] must take reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control.[9] Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues immediately, and should continue to address them as the case progresses and their understanding of the issues and the facts improves. If opposing parties and counsel can be identified, efforts should be made to reach agreement on preservation issues. The parties and counsel should consider the following:

(a) The categories of potentially discoverable information to be segregated and preserved;

(b) The "key persons" and likely witnesses and persons with knowledge regarding relevant events;

(c) The relevant time period for the litigation hold;

(d) The nature of specific types of ESI, including email and attachments, word processing documents, spreadsheets, graphics and presentation documents, images, text files, hard drives, databases, instant messages, transaction logs, audio and video files, voicemail, Internet data, computer logs, text messages, or backup materials, and native files, and how it should be preserved.

(e) Data maintained by third parties, including data stored in social media and cloud servers. Because of the dynamic nature of social media, preservation of this data may require the use of additional tools and expertise.

INITIATION OF LITIGATION

9. Narrowing the Issues

After litigation has begun, counsel should attempt to narrow the issues early in the litigation process by review of the pleadings and consultation with opposing counsel. Through discussion, counsel should identify the material factual issues that will require discovery. Counsel should engage with opposing counsel in a respectful, reasonable, and good faith manner, with due regard to the mandate of Rule 1 that the

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[8] Ibid. p.2

[9] Counsel should become aware of the current 10th Circuit law defining "possession, custody and control".

rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." In addition, counsel should comply with their professional and ethical obligations including candor to the court and opposing counsel. Note that the issues discussed will need to be revisited throughout the litigation.

10. E-Discovery Liaison

To promote communication and cooperation between the parties, each party to a case with significant e-discovery issues may designate an e-discovery liaison for purposes of assisting counsel, meeting, conferring, and attending court hearings on the subject. Regardless of whether the liaison is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, he or she should be:

- Familiar with the party's electronic information systems and capabilities in order to explain these systems and answer relevant questions.
- Knowledgeable about the technical aspects of e-discovery, including the storage, organization, and format issues relating to electronically stored information.
- Prepared to participate in e-discovery dispute resolutions.

The attorneys of record are responsible for compliance with e-discovery requests and, if necessary, for obtaining a protective order to maintain confidentiality while facilitating open communication and the sharing of technical information.. However, the liaison should be responsible for organizing each party's e-discovery efforts to insure consistency and thoroughness and, generally, to facilitate the e-discovery process.

AT THE RULE 26(F) CONFERENCES

11. General

At the Rule 26(f) conference or prior to the conference if possible, a party seeking discovery of ESI should notify the opposing party of that fact immediately, and, if known at that time, should identify as clearly as possible the categories of information that may be sought. Parties and counsel are reminded that, under Fed. R. Civ. P. 34, if the requesting party has not designated a form of production in its request, or if the responding party objects to the designated form, then the responding party must state in its written response the form it intends to use for producing ESI. In cases with substantial ESI issues, counsel should

assume that this discussion will be an ongoing process and not a onetime meeting.[10]

12. Reasonably Accessible Information and Costs

(a) The volume of, and ability to search, ESI means that most parties' discovery needs will be satisfied from reasonably accessible sources. Counsel should attempt to determine if any responsive ESI is not reasonably accessible, i.e., information that is only accessible by incurring undue burdens or costs. If the responding party is not searching or does not plan to search sources containing potentially responsive information, it should identify the category or type of such information. If the requesting party intends to seek discovery of ESI from sources identified as not reasonably accessible, the parties should discuss: (1) the burden and cost of accessing and retrieving the information, (2) the needs that may establish good cause for requiring production of all or part of the information, even if the information sought is not reasonably accessible, and (3) conditions on obtaining and producing this information such as scope, time, and allocation of cost.

(b) Absent a contrary showing of good cause, e.g., Fed. R. Civ. P. 26(b)(2)(c), the parties should generally presume that the producing party will bear all costs for reasonably accessible ESI. The parties should generally presume that there will be cost sharing or cost shifting for ESI that is not reasonably accessible.

13. Creation of a Shared Database and Use of One Search Protocol

In appropriate cases counsel may want to attempt to agree on the construction of a shared database, accessible and searchable by both parties. In such cases, they should consider both hiring a neutral vendor and/or using one search protocol with a goal of minimizing the costs of discovery for both sides.[11]

14. Removing Duplicated Data and De-NISTing

Counsel should discuss the elimination of duplicative ESI and whether such elimination will occur only within each particular

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[10] For a more detailed description of matters that may need to be discussed, see Craig Ball, *Ask and Answer to* [sic] *Right Questions in EDD*, LAW TECHNOLOGY NEWS, Jan. 4, 2008, accessed on Feb. 1, 2008 at http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1199441131702# and reprinted in these Guidelines with permission at Appendix 1.

[11] Vice Chancellor Travis Laster recently ordered counsel to use the same search protocol in EORHB, Inc., et al v. HOA Holdings, LLC, C.A. No. 7409-VCL (Del. Ch. Oct. 15, 2012). He more recently modified his order. See 2013 WL 1960621 May 6, 2013

custodian's data set or whether it will occur across all custodians, also known as vertical and horizontal views of ESI.

In addition, counsel should discuss the de-NISTing of files which is the use of an automated filter program that screens files against the NIST list of computer file types to separate those generated by a system and those generated by a user. [NIST (National Institute of Standards and Technology) is a federal agency that works with industry to develop technology measurements and standards.] NIST developed a hash database of computer files to identify files that are system generated and generally accepted to have no substantive value in most cases.[12]

15. Search Methodologies

If counsel intend to employ technology assisted review[13] (TAR) to locate relevant ESI and privileged information, counsel should attempt to reach agreement about the method of searching or the search protocol. TAR is a process for prioritizing or coding a collection of documents using a computerized system that harnesses human judgments of one or more subject matter expert(s) on a smaller set of documents and then extrapolates those judgments to the remaining document collection.[14]

If word searches are to be used, the words, terms, and phrases to be searched should be determined with the assistance of the respective e-discovery liaisons, who are charged with familiarity with the parties' respective systems. In addition, any attempt to use word searches should be based on words that have been tested against a randomly selected sample of the data being searched.

Counsel also should attempt to reach agreement as to the timing and conditions of any searches which may become necessary in the normal course of discovery. To minimize the expense, counsel may consider limiting the scope of the electronic search (e.g., time frames, fields, document types) and sampling techniques to make the search more effective.

16. E-Mail

Counsel should attempt to agree on the scope of e-mail discovery and e-mail search protocol. The scope of e-mail discovery may require determining whether the unit for production should focus on the

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[12] http://www.thesedonaconference.org/dltForm?did=glossary2010.pdf

[13] "The Grossman-Cormack Glossary of Technology-Assisted Review.

[14] There is no current agreement on what to call the searches that are performed with the assistance of technology. Some currently used other terms include: (CAR) computer assisted review, predictive coding, concept search, contextual search, boolean search, fuzzy search and others.

immediately relevant e-mail or the entire string that contains the relevant e-mail. In addition, counsel should focus on the privilege log ramifications of selecting a particular unit of production.[15]

17. Deleted Information

Counsel should attempt to agree on whether responsive deleted information still exists, the extent to which restoration of deleted information is needed, and who will bear the costs of restoration.

18. Meta and Embedded Data

Counsel should discuss whether "embedded data" and "metadata" exist, whether it will be requested or should be produced, and how to handle determinations regarding privilege or protection of trial preparation materials.

19. Data Possessed by Third Parties

Counsel should attempt to agree on an approach to ESI stored by third parties. This includes files stored on a cloud server or social networking data on services like Facebook, Twitter, and MySpace.

20. Format and Media

The parties have discretion to determine production format and should cooperate in good faith to promote efficiencies. Reasonable requests for production of particular documents in native format with metadata intact should be considered.

21. Identifying Information

Because identifying information may not be placed on ESI as easily as bates stamping paper documents, methods of identifying pages or segments of ESI produced in discovery should be discussed.[16] Counsel are encouraged to discuss the use of either a digital notary, hash value indices or other similar methods for producing native files.

22. Priorities and Sequencing

Counsel should attempt to reach an agreement on the sequence of processing data for review and production. Some criteria to consider include ease of access or collection, sources of data, date ranges, file types, and keyword matches.

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[15] In re Universal Service Fund Telephone Billing Practices Litigation, 232 F.R.D. 669, 674 (D. Kan. 2005)

[16] For a viable electronic alternative to bates stamps, see Ralph C. Losey, *HASH: The New Bates Stamp*, 12 J. Tech. L. & Pol'y 1 (2007)

23. Privilege

Counsel should attempt to reach an agreement regarding what will happen in the event of inadvertent disclosure of privileged or trial preparation materials.[17] If the disclosing party inadvertently produces privileged or trial preparation materials, it must notify the requesting party of such disclosure. After the requesting party is notified, it must return, sequester, or destroy all information and copies and may not use or disclose this information until the claim of privilege or protection as trial preparation materials is resolved.

(a) To accelerate the discovery process, the parties may establish a "clawback agreement," whereby materials that are disclosed without intent to waive privilege or protection are not waived and are returned to the responding party, so long as the responding party identifies the materials mistakenly produced. Counsel should be aware of the requirements of Federal Rule of Evidence 502(d) to protect against waivers of privilege in other settings.

(b) The parties may agree to provide a "quick peek," whereby the responding party provides certain requested materials for initial examination without waiving any privilege or protection.

Other voluntary agreements should be considered as appropriate. Counsel should be aware that there is an issue of whether such agreements bind third parties who are not parties to the agreements. The Court may enter a clawback arrangement for good cause even if there is no agreement. In that case, third parties may be bound but only pursuant to the court order.[18]

DISCOVERY PROCESS

24. Timing

Counsel should attempt to agree on the timing and sequencing of e-discovery. In general, e-discovery should proceed in the following order.

(a) Mandatory Disclosure

Disclosures pursuant to Fed. R. Civ. P. 26(a)(1) must include any ESI that the disclosing party may use to support its claims or defenses (unless used solely for impeachment). To determine what information must be disclosed pursuant to this rule, counsel should review, with their clients, the client's ESI files, including current, back-up, archival,

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[17] In addition, counsel should comply with current rules and case law on the requirement of creating privilege logs.

[18] See *Rajala v. McGuire Woods, LLP*, No. 08-2638-CM-DJW, 2010 WL 2949582 (D. Kan. July 22, 2010)

and legacy computer files. Counsel should be aware that documents in paper form may have been generated by the client's information system; thus, there may be ESI related to that paper document. If any party intends to disclose ESI, counsel should identify those individuals with knowledge of their client's electronic information systems who can facilitate the location and identification of discoverable ESI prior to the Fed. R. Civ. P. 26(f) conference.

(b) Search of Reasonably Accessible Information

After receiving requests for production under Fed. R. Civ. P. 34, the parties shall search their electronically stored information, other than that identified as not reasonably accessible due to undue burden and/or substantial cost, and produce responsive information in accordance with Fed. R. Civ. P. 26(b).

(c) Search of Unreasonably Accessible Information

Electronic searches of information identified as not reasonably accessible should not be conducted until the initial search has been completed and then only by agreement of the parties or pursuant to a court order. Requests for electronically stored information that is not reasonably accessible must be narrowly focused with good cause supporting the request. See Fed. R. Civ. P. 26(b)(2), Advisory Committee Notes, December 2006 Amendment (good cause factors).

(d) Requests for On-Site Inspections

Requests for on-site inspections of electronic media under Fed. R. Civ. P. 34(b) should be reviewed to determine if good cause and specific need have been demonstrated.

25. Discovery Concerning Preservation and Collection Efforts

Discovery concerning the preservation and collection efforts of another party, if used unadvisedly, can contribute to unnecessary expense and delay and may inappropriately implicate work product and attorney-client privileged matter. Routine discovery into such matters is therefore strongly discouraged and may be in violation of Fed. R.Civ. P. 26(g)'s [sic] requirement that discovery be "neither unreasonable nor unduly burdensome or expensive". [sic] Prior to initiating any such discovery, counsel shall confer with counsel for the party from whom the information is sought concerning: (i) the specific need for such discovery, including its relevance to issues likely to arise in the litigation; and (ii) the suitability of alternative means for obtaining the information. Discovery into such matters may be compelled only on a showing of good cause considering at least the aforementioned factors. Nothing herein exempts deponents on merits issues from answering questions

concerning the preservation and collection of their documents, ESI, and tangible things.

26. Duty to Meet and Confer When Requesting ESI from Nonparties (Fed. R. Civ. P. 45)

Counsel issuing requests for ESI from nonparties should attempt to informally meet and confer with the non-party (or counsel, if represented). During this meeting, counsel should discuss the same issues regarding ESI requests that they would with opposing counsel as set forth in Paragraph 11 above.

July 18, 2013

APPENDIX 1

ASK AND ANSWER THE RIGHT QUESTIONS IN EDD‡

Craig Ball

Sometimes it's more important to ask the right questions than to know the right answers, especially when it comes to nailing down sources of electronically stored information, preservation efforts and plans for production in the FRCP Rule 26(f) conference, the so-called "meet and confer."

The federal bench is deadly serious about meet and confers, and heavy boots have begun to meet recalcitrant behinds when Rule 26(f) encounters are perfunctory, drive-by events. Enlightened judges see that meet and confers must evolve into candid, constructive mind melds if we are to take some of the sting and "gotcha" out of e-discovery. Meet and confer requires intense preparation built on a broad and deep gathering of detailed information about systems, applications, users, issues and actions. An hour or two of hard work should lie behind every minute of a Rule 26(f) conference. Forget "winging it" on charm or bluster and forget "We'll get back to you on that."

Here are 50 questions of the sort I think should be hashed out in a Rule 26(f) conference. If you think asking them is challenging, think about what's required to deliver answers you can certify in court. It's going to take considerable arm-twisting by the courts to get lawyers and clients to do this much homework and master a new vocabulary, but, there is no other way.

These 50 aren't all the right questions for you to pose to your opponent, but there's a good chance many of them are . . . and a likelihood you'll be in the hot seat facing them, too.

1. What are the issues in the case?
2. Who are the key players in the case?
3. Who are the persons most knowledgeable about ESI systems?
4. What events and intervals are relevant?

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‡ Craig Ball, *Ask and Answer the Right Questions in EDD*, L. TECH. NEWS (Jan. 4, 2008), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=900005499729&Ask_and_Answer_the_Right_Questions_in_EDD. This article was originally reprinted and included as Appendix 1 to the New ESI Guidelines and, therefore, is also included here in the reprint of those Guidelines.

5. When did preservation duties and privileges attach?

6. What data are at greatest risk of alteration or destruction?

7. Are systems slated for replacement or disposal?

8. What steps have been or will be taken to preserve ESI?

9. What third parties hold information that must be preserved, and who will notify them?

10. What data require forensically sound preservation?

11. Are there unique chain-of-custody needs to be met?

12. What metadata are relevant, and how will it be preserved, extracted and produced?

13. What are the data retention policies and practices?

14. What are the backup practices, and what tape archives exist?

15. Are there legacy systems to be addressed?

16. How will the parties handle voice mail, instant messaging and other challenging ESI?

17. Is there a preservation duty going forward, and how will it be met?

18. Is a preservation or protective order needed?

19. What e-mail applications are used currently and in the relevant past?

20. Are personal e-mail accounts and computer systems involved?

21. What principal applications are used in the business, now and in the past?

22. What electronic formats are common, and in what anticipated volumes?

23. Is there a document or messaging archival system?

24. What relevant databases exist?

25. Will paper documents be scanned, and if so, at what resolution and with what OCR and metadata?

26. What search techniques will be used to identify responsive or privileged ESI?

27. If keyword searching is contemplated, can the parties agree on keywords?

28. Can supplementary keyword searches be pursued?

29. How will the contents of databases be discovered? Queries? Export? Copies? Access?

30. How will de-duplication be handled, and will data be re-populated for production?

31. What forms of production are offered or sought?

32. Will single- or multipage .tiffs, PDFs or other image formats be produced?

33. Will load files accompany document images, and how will they be populated?

34. How will the parties approach file naming, unique identification and Bates numbering?

35. Will there be a need for native file production? Quasi-native production?

36. On what media will ESI be delivered? Optical disks? External drives? FTP?

37. How will we handle inadvertent production of privileged ESI?

38. How will we protect trade secrets and other confidential information in the ESI?

39. Do regulatory prohibitions on disclosure, foreign privacy laws or export restrictions apply?

40. How do we resolve questions about printouts before their use in deposition or at trial?

41. How will we handle authentication of native ESI used in deposition or trial?

42. What ESI will be claimed as not reasonably accessible, and on what bases?

43. Who will serve as liaisons or coordinators for each side on ESI issues?

44. Will technical assistants be permitted to communicate directly?

45. Is there a need for an e-discovery special master?

46. Can any costs be shared or shifted by agreement?

47. Can cost savings be realized using shared vendors, repositories or neutral experts?

48. How much time is required to identify, collect, process, review, redact and produce ESI?

49. How can production be structured to accommodate depositions and deadlines?

50. When is the next Rule 26(f) conference (because we need to do this more than once)?

BENEFIT CORPORATIONS, INNOVATION, AND STATUTORY DESIGN

J. William Callison[*]

INTRODUCTION

Benefit corporation legislation, presently adopted in nineteen states and the District of Columbia and likely to be adopted in more jurisdictions over the next several years,[1] is intended to address a particular corporate-governance problem.[2] Specifically, and in a somewhat stylized fashion, corporations that are not nonprofit corporations ("for-profit" corporations) are intended to pursue the pecuniary interests of their owners, the shareholders.[3] These pecuniary

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[1] *See* B Lab, *State by State Legislative Status*, BENEFIT CORP. INFO. CTR., http://www.benefitcorp.net/state-by-state-legislative-status (last visited Oct. 27, 2013) (listing the states that have enacted benefit corporation legislation as well as fourteen states that have introduced benefit corporation legislation but have not yet adopted it).

[2] I am assuming for purposes of this Article that the problem is real and not merely perceived. The answer to this question may depend on our view of the nature of the corporation, and is beyond the scope of this Article. Edward Rock notes that two ways of thinking about corporations co-exist uneasily within corporate law: the "entity" model, which views the corporation as a social institution, and the "property" model, which views the corporation as nothing more than the shareholders' property; benefit corporations appear to operate within the "property" model. *See* Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1986–88 (2013); *see also* William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264–66 (1992). Two states have adopted benefit limited liability company statutes. Doug Batey, *Oregon Becomes the Second State to Authorize Benefit LLCs*, LLC LAW MONITOR (June 7, 2013, 2:32 PM), http://www.llclawmonitor.com/2013/06/articles/operating-agreements/oregon-becomes-the-second-state-to-authorize-benefit-llcs/; *see also* H.R. 2296, 77th Legis. Assemb., Reg. Sess. (Or. 2013); MD. CODE ANN., CORPS. & ASS'NS §§ 4A-1101 to -1108 (LEXIS through 2013 Reg. Sess.). In part because I think the concept is oxymoronic, these will not be discussed in this Article.

[3] In *Dodge v. Ford Motor Co.*, the Michigan Supreme Court stated:

> A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.

170 N.W. 668, 684 (Mich. 1919); *see also* Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 164–66 (2008) (arguing that *Dodge* promotes a strained view of corporate purposes). Some promoters of benefit corporation legislation argue that *Dodge* is "good law" and state that "many still maintain" that *Dodge*'s wealth maximization principles have "been widely accepted by courts over an extended period of

interests can take the form of dividends or other distributions, or stock appreciation. Although for-profit corporations can engage in socially beneficial activities, these activities are measured against an overall profit motive. Thus, the socially beneficial activity of using hormone-free pork in burritos may entail greater expense than using hormone-laced pork, but if it creates market for the restaurant, profits are still generated and shareholders generally have no basis for complaint about the increased expense. Call it product differentiation or marketing. In short, in the context of day-to-day business operations, the business judgment rule generally protects managers of for-profit corporations from judicial and shareholder second-guessing of business decisions that are rationally connected to shareholder benefit.[4] However, there must be

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time." William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 825–26 (2012) (quoting STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS § 9.2, at 413 (2002)). William Allen has referred to the shareholder wealth maximization priority as the "property" model of corporate law. Allen, *supra* note 2, at 264–65 (comparing the property model with an entity model that allows the corporation to serve multiple constituencies' interests simultaneously).

Judge Frank Easterbrook and Professor Daniel Fischel have noted that the tension between the shareholder profit maximization norm and shareholder choice has "plagued" corporate law scholars for many years:

> [W]hat is the goal of the corporation? Is it profit, and for whom? Social welfare more broadly defined . . . ? Our response to such questions is: who cares? If the *New York Times* is formed to publish a newspaper first and make a profit second, no one should be allowed to object. Those who came in at the beginning consented, and those who came later bought stock the price of which reflected the corporation's tempered commitment to a profit objective. If a corporation is started with a promise to pay half of the profits to the employees rather than the equity investors, that too is simply a term of the contract.

FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 35–36 (1991). Judge Easterbrook and Professor Fischel respect freedom of contract and believe shareholders should be free to create corporations that respect their choices and values. *Id.* Others express similar contractarian views. *See, e.g.*, Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 577–83 (2003) (arguing that the shareholder wealth maximization norm should be a default rule because parties would choose this rule in a hypothetical bargain, leaving room for contracting away from the default rule); Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1752 (2006) (arguing that flexibility to engage in "private ordering" is a goal in Delaware corporate law); Jonathan R. Macey, *A Close Read of an Excellent Commentary on* Dodge v. Ford, 3 VA. L. & BUS. REV. 177, 179 (2008) (arguing that shareholder profit maximization is only a default rule that shareholders can vary by agreement).

[4] The business judgment rule is "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244, 254 (Del. 2000).

some connection of the business decision to shareholder value, and decisions that lack such a connection are open to attack.[5]

Nonprofit corporations, on the other hand, generally pursue socially beneficial ends without a view toward the profit motive of the pecuniary interest of its members/shareholders. A critical difference between nonprofit corporations and for-profit corporations is that nonprofits do not have shareholders who receive distributions or experience stock appreciation. When a nonprofit corporation has a profit from an activity, the profit is used by the nonprofit and is not distributed to owners.

Benefit corporations are designed to occupy a middle ground. As for-profit corporations, they have shareholders who can (and can be assumed to expect to) obtain the financial benefits of dividends and stock appreciation. However, as corporations that embrace a "public purpose," the benefit corporation's shareholders recognize that producing social good might reduce profitability. Therefore, by electing benefit corporation status, a for-profit corporation's shareholders instruct the board of directors and officers to pursue public good—such as considering the environmental and social impact of corporate activities, even at the expense of profit maximization—and protect them from fiduciary and other claims when they do so.

This Article discusses three major approaches to benefit corporations, which I term the Model Approach, the Delaware Approach, and the Colorado Approach. Part I describes the Model Approach and discusses what I perceive to be the major weaknesses in the Model Approach. Part II describes the Delaware Approach and discusses the major differences between the Delaware Approach and the Model Approach, as well as remaining issues with the Delaware Approach. Part III describes the Colorado Approach, which was jettisoned in the 2013 Colorado legislative session in favor of a modified Delaware Approach statute. In my view, the Colorado Approach addresses most or all of the weaknesses of the Model Approach and should be considered by other states that consider benefit corporation legislation. The description in Part III of the political and legislative process that led to Colorado's rejection of the Colorado Approach is instructive, since it demonstrates

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[5] *See* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 440–43, 457 (2001); Leo E. Strine, Jr., *The Social Responsibility of Boards of Directors and Stockholders in Charge of Control Transactions: Is There Any "There" There?*, 75 S. CAL. L. REV. 1169, 1170 (2002). Lynn Stout argues against this understanding and states that the validity of the shareholder wealth maximization model is not supported by theory or empirical evidence. LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 7–8 (2012). The shareholder benefit issues are particularly pronounced in change-of-control transactions, in which wealth maximization principles are dominant.

the difficulties faced by lawyers and others when they attempt to deviate from Model Approach orthodoxy. Deviance has its costs, and those who seek to move from orthodoxy to what they perceive to be a better structure likely will need to contend with forces of well-financed and well-organized orthodoxy. Finally, the Article concludes by discussing the development of benefit corporation legislation in the context of design. It encourages statutory experimentation rather than blind adherence to what some argue is the "only way" to accomplish benefit corporation legislation.

I. THE MODEL APPROACH

B Lab ("Blab"), of Berwyn, Pennsylvania, has been the leading promoter of benefit corporations and has encouraged various state legislatures, with decent success, to adopt its "model" approach (the "Model Approach" or the "Model") to benefit corporation legislation.

A. Elements of the Model Approach

(a) Under the Model Approach, a "benefit corporation" is a for-profit corporation, formed pursuant to the state's general business corporation law, which has elected to subject itself to the benefit corporation provisions of the Model.[6] The corporation's articles of incorporation must state that it is a "benefit corporation," thereby placing potential investors, creditors, and others who inspect organizational documents on notice of the corporation's status.[7] There are no name requirements, either in the positive sense where benefit corporations must designate themselves as such or in the negative sense where corporations that are not benefit corporations cannot use a name implying benefit corporation status.

(b) If an existing for-profit corporation seeks to become a benefit corporation, or if an existing for-profit corporation seeks to merge into a benefit corporation, shareholders owning at least two-thirds of the interests must approve the election.[8] Similarly, a two-thirds shareholder

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[6] MODEL BENEFIT CORP. LEGISLATION § 101(c) (B Lab 2013) (bracketed material in original), *available at* http://benefitcorp.net/storage/documents/Model_Benefit_Corporation_Legislation.pdf ("Except as otherwise provided . . . [*the . . . business corporation law*] shall be generally applicable to all benefit corporations."); *id.* § 103 (forming a benefit corporation); *id.* § 104 (electing benefit corporation status).

[7] *Id.* § 103.

[8] *Id.* § 104 (requiring "minimum status vote"); *see id.* § 102 (defining "minimum status vote" as two-thirds vote). Here, I note that section 101(d) states that "the articles of incorporation or bylaws of a benefit corporation may not limit, be inconsistent with, or supersede" any other Model provision. *Id.* § 101(d). Thus, if the legislature adopts a two-thirds vote requirement, unlike other shareholder vote items, the election cannot be reduced to, for example, majority vote or increased to unanimous vote. In addition, a

vote is needed to terminate benefit corporation status.[9] Notably, the Model does not contain dissenters' rights or other provisions to protect the interests of non-controlling shareholders who invested in what they believed to be a profit-maximizing entity.[10]

(c) A benefit corporation formed under the Model must have the purpose of "creating general public benefit."[11] In addition to, but not instead of, a general public benefit, the articles of incorporation may identify "specific public benefits that it is the purpose of the benefit corporation to create."[12] Identifying a specific public benefit does not limit a benefit corporation's obligation to create a general public benefit.[13] Thus, general public purpose is superior, and specificity is a subcategory of the general.

"minimum status vote" requires the vote of two-thirds of the shareholders of every class or series, irrespective of their other voting powers. *Id.* § 102.

[9] *Id.* § 105(a). Further, section 105(b) requires that sales, leases, or other dispositions of substantially all of the benefit corporation's assets "shall not be effective unless" approved by shareholders who own at least two-thirds of the interests. *Id.* § 105(b)(3). This two-thirds vote requirement cannot be reduced by the corporation's articles of incorporation or bylaws. *Id.* § 101(d). In some situations this requirement may create business-planning difficulties, and these difficulties may be exacerbated by the fact that a two-thirds vote is required from the shareholders of each class or series of shares, irrespective of their participation in control of other corporate actions. *See id.* § 102 (defining "minimum status vote").

[10] Benefit corporation proponents' position on the dissenters' rights issue is unclear. Although the California benefit corporation statute includes dissenters' rights provisions, CAL. CORP. CODE §§ 14603–14604 (Westlaw through ch. 130, 2013 Reg. Sess.), Blab generally has not promoted dissenters' rights because electing corporations may not have liquid capital to pay dissenters and because any payment would deprive the corporation of operating capital for its business and social good, *see* WILLIAM H. CLARK, JR. & LARRY VRANKA, THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IT IS THE LEGAL FORM THAT BEST ADDRESSES THE NEEDS OF SOCIAL ENTREPRENEURS, INVESTORS, AND, ULTIMATELY, THE PUBLIC 27 (Jan. 18, 2013), *available at* http://benefitcorp.net/storage/documents/Benecit_Corporation_White_Paper_1_18_2013.pdf. Notwithstanding liquidity issues, state legislatures should include, and some have included, dissenter provisions in their benefit corporation legislation. *See, e.g.*, MASS. GEN. LAWS chs. 156D, § 13.02(a), 156E, § 8(c) (Westlaw through ch. 84, 2013 1st Ann. Sess.) (entitling shareholders of a corporation that becomes a benefit corporation through merger, conversion, or share exchange to an appraisal and payment of the fair value of their shares); S.C. CODE ANN. § 33-38-600 (Westlaw through 2012 Reg. Sess.) (entitling shareholders to dissent from and obtain the fair value of their shares in the event of the election of benefit corporation status). Alternatively, the election of benefit corporation status should require unanimous shareholder consent. *See, e.g.*, VA. CODE ANN. § 13.1-785 (LEXIS through 2013 Reg. Sess.) (requiring unanimous consent by all shareholders entitled to vote when amending articles of incorporation to make the corporation a benefit corporation).

[11] MODEL BENEFIT CORP. LEGISLATION § 201(a) (B Lab 2013).

[12] *Id.* § 201(b).

[13] *Id.*

(d) "General public benefit," to be pursued by all benefit corporations using the Model Approach, is defined as "[a] material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation."[14] There is no clarification about the hierarchy of benefit purposes served by the corporation.[15] A comment to the Model states: "By requiring that the impact of a business on society and the environment be looked at 'as a whole,' the concept of general public benefit requires consideration of all of the effects of the business on society and the environment."[16]

(e) A "third-party standard" is a "recognized standard for defining, reporting, and assessing corporate social and environmental performance."[17] A third-party standard must be developed by an independent organization, and it must be credible and transparent.[18] The Model attempts to define each of these characteristics, but it does not prescribe any content for the standards. Furthermore, it fails to state how or by whom standards are applied.[19] Neither the government nor the standard-setter is given any enforcement powers.

(f) The creation of general public benefit and any specific public benefit "is in the best interests of the benefit corporation."[20] Directors "shall" (i.e., must), in discharging their duties and in considering the corporation's best interests, "consider the effects of any action or inaction upon": (i) shareholders, (ii) employees and the workforce of the

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[14] *Id.* § 102. This seems to leave open the question of whether, for example, a corporation whose principal business is brewing and distributing beer has a "material positive impact" on society and the environment. Perhaps "positive impact" is in the eyes of the beholder, but there might be some argument that the producer of alcoholic beverages delivered in cans and bottles that litter the highways does not create a material positive impact on either society or the environment. But then, perhaps the constituencies served by craft-type brewing operations neither drink while driving nor dispose of delivery devices in environmentally harmful ways.

[15] *See id.* § 301(a)(3) (stating that priority need not be given to any particular interest).

[16] *Id.* § 102 cmt.

[17] *Id.* § 102. Note that the Model does not refer only to business operations but requires the consideration of existential questions like the nature of the corporation's business itself. Some corporations likely will shy away from benefit corporation status due to an ongoing need to consider whether, for example, making salad dressing or running a ski resort or brewing beer or manufacturing high-fat ice cream has a material positive impact on society and the environment, taken as a whole.

[18] *Id.*

[19] The author has reviewed numerous standards offered by Blab as acceptable "third-party standards" and, at the time of review, found all of them wanting in at least some respect.

[20] *Id.* § 201(c).

corporation, and its subsidiaries and suppliers, (iii) customers' interests "as beneficiaries of the general public benefit," (iv) societal and community factors (including those of all communities where the corporation, its suppliers, or its subsidiaries have offices or facilities), (v) both the local and global environment, (vi) the corporation's short-term and long-term interests, including whatever benefits that may accrue from "long-term plans and the possibility that these interests may be best served" by the corporation's continued independence,[21] and (vii) the corporation's ability to achieve its general public benefit purpose as well as its specific public benefit purpose, if any.[22] There is no hierarchy to or prioritization of the interests that directors must consider.[23] In addition, under the Model, directors may consider "other pertinent factors or the interests of any other group that they deem appropriate."[24] Further, the Model provides that directors are not "personally liable for monetary damages for" any action taken as a director or the failure of the benefit corporation to create public benefit,[25] and that directors do not have liability to beneficiaries of the corporation's general public benefit purpose or specific public benefit purpose arising from the person's status as a beneficiary.[26]

(g) "Benefit enforcement proceedings" may be brought directly by the corporation or derivatively by (i) shareholders, (ii) a director, (iii) a person or group owning five percent or more of equity interests in the corporation's parent corporation (subsidiaries/parent corporations are defined using a fifty percent ownership standard), or (iv) other persons indicated in the corporation's articles of incorporation or bylaws.[27] Unless otherwise provided in the articles or bylaws, benefit corporation directors do not have duties to beneficiaries of the public purpose who are not listed above.[28] Thus, for example, customers, employees of

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[21] The breadth of this factor likely allows many forms of anti-takeover provisions based on the directors' perception of the corporation's long-term interests. It thereby may gut the shareholder protections contained in much recent corporate case law.

[22] *Id.* § 301(a)(1).

[23] *Id.* § 301(a)(3) ("[Directors] need not give priority to a particular interest or factor . . . over any other interest or factor unless the benefit corporation has stated in its articles of incorporation its intention to give priority to certain interests or factors related to its accomplishment of its general public benefit purpose or of [any] specific public benefit purpose . . . ."). It appears that a benefit corporation cannot indicate a priority for shareholder interests.

[24] *Id.* § 301(a)(2).

[25] *Id.* § 301(c).

[26] *Id.* § 301(d).

[27] *Id.* § 305(c); *see also id.* § 102.

[28] *Id.* § 301(d).

suppliers, and representatives of impacted communities or of the environment cannot sue.[29]

A "benefit enforcement proceeding" is a claim or action for "failure of a benefit corporation to *pursue or create* general public benefit or a specific public benefit . . . set forth in its articles," or for violation of any statutory obligation, duty, or standard.[30] Thus, it is the clear intent of the Model to enable fiduciary duty litigation not only against directors who fail to meet their obligation to consider the effects of their actions in the statutorily-listed ways, but also against directors whose actions fail to create general public benefit. Other than in a benefit enforcement proceeding, no person can assert a claim against the benefit corporation and its directors for failure to pursue or create benefit or violation of a standard of conduct under the Model.

(h) The board of directors of a publicly traded benefit corporation must include an independent "benefit director."[31] The benefit director must prepare an annual opinion concerning (i) whether the corporation acted in all material respects according to its general public benefit purpose and its specific public benefit purpose, if any, (ii) whether directors and officers complied with their obligations to consider the best interests listed in the Model, and (iii) a description of any ways in which the corporation or its directors or officers failed to comply.[32]

(i) Benefit corporations must prepare an "annual benefit report" meeting numerous requirements, including a narrative description of the ways the corporation sought general public benefit (and, if applicable, special public benefit) and the extent to which it was created, circumstances hindering the creation of public benefit, and the process

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[29] This clearly tilts the playing field in favor of the set of interests represented by those who own corporate stock (by issuance or acquisition) and away from those representing other interests.

[30] *Id.* § 102 (emphasis added). The proceeding is direct when brought by the corporation and derivative when brought by directors or shareholders. *See id.* § 305(c). All procedural aspects of derivative litigation will presumably be applicable, including demands for corporate action and the potential for a special litigation committee to consider whether pursuing the litigation is in the corporation's best interests. When drafting state-specific legislation, experience shows that it is necessary to sculpt the Model's "benefit enforcement proceedings" language to the state's derivative litigation statutes. The Model fails to do this. In my view, the derivative litigation issues will likely be complex and thereby will weaken the benefit corporation concept.

[31] *See id.* § 302(a) (stating that publicly traded benefit corporations *shall* include a benefit director, while non-publicly traded benefit corporations *may* include a benefit director); *see also id.* § 102.

[32] *Id.* § 302(c). My experience with the Colorado legislative process is that, when pushed, the Blab proponents are willing to eliminate the Model's benefit director requirement.

and rationale for choosing or changing the third-party standard used.[33] The narrative must also include an assessment of the corporation's overall social and environmental performance against a third-party standard, the name and address of the benefit director, the compensation paid to each director, the benefit director's opinion, and a statement of certain relationships with the third-party standard provider.[34] The Model does not state how the benefit report should assess corporate performance. The report (along with the benefit director opinion) must be provided to each shareholder, posted on the "public portion" of its Internet website (or made available to any person requesting it), and filed with the state's secretary of state or other filing official.[35]

(j) Various similar rules apply to officers.[36]

It should be clear from the foregoing that benefit corporation status under the Model involves a large and complex superstructure that cannot be diminished by agreement among the shareholders or otherwise. Assuming that there are benefits to benefit corporation status, they come with large structural and other costs.

B. Problems with the Model Approach

In a previous article, I identified four large problems with the Model Approach's structure, which I termed the "Illiberalism Problem," the "Bipolarity Problem," the "Fiduciary Uncabining Problem," and the "Greenwash/Greenmail Enforcement Problem."[37]

1. The Illiberalism Problem

The "Illiberalism Problem" stems from the Model Approach's requirement that all benefit corporations fit into the box of "general public purpose" rather than allowing the shareholders to choose one or more specific public benefits to be pursued by the corporation.[38] "General

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[33] *Id.* § 401(a)(1).

[34] *Id.* § 401(a)(2)–(6).

[35] *Id.* § 402. Director compensation and proprietary information can be eliminated from public reports. *Id.* § 402(d). One wonders whether almost all information can be delineated as proprietary information.

[36] *See id.* §§ 303–304.

[37] J. William Callison, *Putting New Sheets on a Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, the Dangers Created, and Suggestions for Change*, 2 AM. U. BUS. L. REV. 85, 98 (2012); *see also* J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 27–52 (2012) (discussing obstacles to implementation of and imperfections in existing benefit corporation and social enterprise related statutes).

[38] *See* Callison, *supra* note 37, at 98–104.

public benefit" is a "state-authorized conception[] of the 'good' "[39] (namely, "a material positive impact on society and the environment, taken as a whole, . . . from the business and operations of a benefit corporation") as measured against a third-party standard.[40] The Model starts down a liberal, choice-inducing path by allowing shareholders to choose to pursue public goods other than wealth maximization.[41] However, it then eliminates further shareholder choice by requiring general public benefit.[42] Rather than allowing shareholders the freedom to use their corporation to pursue their own conceptions of the "good" and their own self-defined ends, the Model Approach forces all electing corporations to pursue broad conceptions of the "good" assessed against a legislatively-endorsed third-party standard.[43] For example, the shareholders of a corporation may seek to locate corporate headquarters in a small Colorado town in order that employees can walk or bicycle to work (proximity being a proxy for community) and to use ten percent of corporate profits to assist in technology education in the town's public schools. If the corporation were to become a benefit corporation using the Model Approach, it would also need to consider the effects of any action or inaction on global environmental issues, customer interests, supplier interests, the interests of all communities in which the corporation's suppliers have offices and facilities (making the purchase of toilet paper more difficult, perhaps), the corporation's long-term interests, including the possibility that those interests may best be served by the corporation's independence, and so forth and so on. That is a mighty load to drag when the public goods sought are technology, education, and employee participation in the community.

Finally, by compelling assessment of public good against a third-party standard, the Model Approach likely militates in favor of politically correct approaches and against corporations that cannot find a credible independent organization under the auspices of which public good can be measured. Trotskyites and Social Darwinians perhaps need not apply, and society is poorer for that. Liberalism is inherently nonpartisan and recognizes that society has no way to evaluate opinions other than by allowing free actors to express them, and any third-party-imposed limitations on, or expansions of, "public good" are illiberal and undesirable.

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39 *See id.* at 98.

40 *See id.* at 94.

41 *See* MODEL BENEFIT CORP. LEGISLATION § 201 (B Lab 2013).

42 *See id.* § 201(a).

43 *See id.* §§ 102, 401(a)(2).

2. The Bipolarity Problem

The "Bipolarity Problem" compounds the Illiberalism Problem by dividing corporations into two categories: benefit corporations that must act for "general public benefit" and all other corporations that do not elect benefit corporation status and impliedly must act only in ways that relate to shareholder profit maximization.[44] For non-electing corporations, the existence of the benefit corporation alternative may weaken the promotion of socially responsible decision-making by corporate boards, the directors of which do not want to be brought into litigation or test the protections of the business judgment rule. Corporate governance concepts are, and should be, more nuanced than the two baskets embodied in the Model Approach.

In addition, the Model disables corporations that want to pursue substantial public benefits without subscribing to the "general public benefit" standard or absorbing the significant costs built into the Model. In this view, benefit corporation legislation should be enabling and should allow all corporations that seek substantial, long-term public goods to come under its umbrella. By leaving some corporations out in the fiduciary-duty rain, the Model Approach does not allow benefit corporations to accomplish all that they should.

3. The Fiduciary Uncabining and Fiduciary Logjam Problems

The Model requires directors and officers to consider an enormous number of factors and interests in connection with all corporate actions and inactions.[45] Many of the interests are unspecified (and probably not thought of) by the shareholders who elect benefit corporation status. "General public benefit" is a mish-mash that lacks any specification of fiduciary duty limits and contains few restrictions to hamper the freedom of self-interested directors to act in ways that harm shareholder interests.[46] The door is opened for directors who act in self-interested fashion to point to some nebulous public benefit justification.[47]

Further, shareholders hire and fire directors, and it is likely that when private shareholder benefit and broader public benefit collide, many directors will "follow the money" and align with shareholder interests. Of the groups that the Model states that directors shall consider the effects of corporate actions and inactions on, it lists shareholders first, and then lists broadly stated public goods.[48] Indeed,

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44 *See* Callison, *supra* note 37, at 104–07.

45 *See* MODEL BENEFIT CORP. LEGISLATION §§ 301(a)(1)–(2), 303(a) (B Lab 2013).

46 Callison, *supra* note 37, at 108.

47 *See* Murray, *supra* note 37, at 28.

48 *See* MODEL BENEFIT CORP. LEGISLATION § 301(a)(1) (B Lab 2013).

since shareholders are likely the main protagonists of benefit enforcement proceedings, in cases of conflict, the pursuit of "general public benefit" may be an illusory goal.

Professor Mark Loewenstein points to a corollary issue of social psychology and director stalemate.[49] I find this argument compelling, and it dictates in favor of allowing specific public benefits chosen by the shareholders, rather than general public benefits.

4. The Greenwash/Greenmail Enforcement Problem

The ease with which a corporation can become a benefit corporation (election in and inclusion of two words in its articles of incorporation), combined with the lack of any significant non-shareholder enforcement authority, opens the door to significant greenwashing problems.[50] In addition, the Model Approach contains no provisions to prevent regular for-profit corporations from adopting the benefit corporation name. Thus, some corporations that fail to pursue "general public benefit" can hold themselves out as benefit corporations and, assuming that the brand has value, capture the benefit without the cost.

In a related vein, the Model Approach gives shareholders the power to institute benefit enforcement proceedings and allege that the corporation and its directors did not appropriately consider public benefits when acting or failing to act.[51] This empowers shareholders as nags whenever they are unhappy with the corporation's activities. It also allows shareholder greenmail,[52] where claims are made in anticipation of settlement. Time will tell whether either of these obvious risks will come to pass.

II. THE DELAWARE APPROACH

In 2013, after studying the Model Approach and responding to various criticisms of it, the Delaware Bar Association's Corporation Law Section released a version of benefit corporation legislation that is

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[49] Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007, 1030–33, 1036 (2013) (concluding that, considering the large number of factors that directors of benefit corporations must consider under the Model, directors are charged with an impossible task, and the quality of their decision-making, and indeed their ability to make decisions at all, will suffer).

[50] Greenwashing is "the phenomenon of businesses seeking to portray themselves as being more environmentally and socially responsible than they actually are." *See* MODEL BENEFIT CORP. LEGISLATION § 102 cmt.

[51] *Id.* § 305.

[52] Greenmail occurs when, seeking to be "bought off through higher profit distributions or through adherence to their idiosyncratic conception of the good," a benefit corporation's shareholders bring benefit enforcement proceedings alleging failure to adequately pursue general public benefit. *See* Callison, *supra* note 37, at 111.

significantly different from the Model Approach (the "Delaware Approach"). The Delaware Approach was enacted in Delaware, without change from the legislature, on July 17, 2013.[53] Colorado, however, was the first state to enact the Delaware Approach, though with some modifications, in May 2013, with an effective date of April 1, 2014.[54]

A. Elements of the Delaware Approach

(a) The name of the entity is a "public benefit corporation."[55]

(b) A public benefit corporation is a "for-profit corporation . . . that is intended to produce . . . public benefits and to operate in a responsible and sustainable manner."[56]

(c) "Public benefit" is defined as "a positive effect (or reduction of negative effects) on [one] or more categories of persons, entities, communities or interests . . . including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature."[57]

(d) To become a public benefit corporation the certificate of incorporation must (i) "[i]dentify within its statement of business or purpose . . . [one] or more specific public benefits to be promoted," and (ii) "[s]tate within its heading that it is a public benefit corporation."[58] There is no "general public benefit" concept in the Delaware Approach. This is a major change from the Model Approach.

(e) The name of the public benefit corporation must contain the words "public benefit corporation" or the designations "P.B.C." or "PBC."[59]

(f) Also, "a public benefit corporation shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the . . . public benefits identified in its certificate of incorporation."[60]

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53 *See* 79 Del. Laws ch. 122 (LEXIS 2013).

54 *See* COLO. REV. STAT. § 7-101-501 to -509 (LEXIS through 2013 1st Reg. Sess.); H.R. 1138, 69th Gen. Assemb., 1st Reg. Sess. (LEXIS Colo. 2013) (providing date of enactment).

55 DEL. CODE ANN. tit. 8, § 362(a) (LEXIS through 79 Del. Laws ch. 173).

56 *Id.*

57 *Id.* § 362(b) (LEXIS).

58 *Id.* § 362(a) (LEXIS).

59 *Id.* § 362(c) (LEXIS).

60 *Id.* § 362(a) (LEXIS).

(g) Ninety percent stockholder approval is required for a corporation that is not a public benefit corporation to become a public benefit corporation.[61] Dissenters' rights provisions are applicable for shareholders who do not vote in favor of the change.[62] Further, election out of public benefit corporation status requires a two-thirds stockholder vote.[63]

(h) The directors of a public benefit corporation shall manage or direct its business in a manner that "balances" three considerations: the stockholders' pecuniary interests, "the best interests of those materially affected by the corporation's conduct, and the specific . . . public benefits identified in its certificate of incorporation."[64] Directors do not have any duty to any person on account of that person's interest in the specific public benefits identified in the certificate or due to any interest that is materially affected by the corporation's conduct.[65] Further, with respect to any decision implicating the tripartite balancing standard, directors are deemed to satisfy their fiduciary duties to stockholders and the corporation if the decision is informed, disinterested, and not one such that no ordinary person of sound judgment would approve.[66] Finally, the certificate of incorporation may provide protective language that a disinterested director's failure to satisfy the tripartite decision-making standard shall not constitute an act or omission that is not in good faith or is a breach of the duty of loyalty.[67]

(i) A public benefit corporation shall, at least every two years, provide its stockholders with a statement concerning its promotion of the public benefits specified in the certificate and the best interests of those materially affected by the corporation's conduct.[68] The Delaware Approach contains specific requirements for the stockholder statement.[69] However, there is no requirement for public dissemination of the statement or for use of any third-party standard or certification addressing the corporation's conduct. The certificate may require public dissemination or use of a third-party standard if the stockholders so choose.[70]

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61 *Id.* § 363(a) (LEXIS). Colorado went with a two-thirds shareholder vote. *See* COLO. REV. STAT. § 7-101-504(1) (LEXIS through 2013 1st Reg. Sess.).

62 DEL. CODE ANN. tit. 8, § 363(b) (LEXIS through 79 Del. Laws ch. 173).

63 *Id.* § 363(c) (LEXIS).

64 *Id.* § 365(a) (LEXIS).

65 *Id.* § 365(b) (LEXIS).

66 *Id.*

67 *Id.* § 365(c) (LEXIS).

68 *Id.* § 366(b) (LEXIS).

69 *See id.* § 366(b)(1)–(4) (LEXIS).

70 *Id.* § 366(c)(2)–(3) (LEXIS).

(j) Stockholders meeting a two percent ownership requirement may maintain a derivative suit to enforce the directors' duties.[71]

B. Major Differences Between the Delaware and Model Approaches

The Delaware Approach is conspicuously different from the Model Approach. First, where the Model requires all benefit corporations to pursue "general public benefit,"[72] the Delaware Approach eschews the "general public benefit" requirement in favor of specific public benefits set forth in the certificate of incorporation.[73] Second, while the Model requires directors to "consider" a series of items in connection with any action or inaction,[74] the Delaware Approach sets forth a "balancing" requirement whereby directors must manage or direct the corporation's business in a manner that balances the shareholders' pecuniary interests, the specific public benefits set forth in the certificate, and the best interests of "those" materially affected by the corporation's conduct.[75] Although judicial authority and customary practice will need to develop, "consider" seems more active ("Did you consider these things when acting?") than "balancing" ("Did you balance interests when you acted?"). Third, the Delaware Approach contains specific director protections, whereby directors are *assumed* to meet their fiduciary obligations, and it allows public benefit corporations to provide protections regarding the directors' obligations to act in good faith.[76] Fourth, the Delaware Approach contains naming requirements lacking in the Model.[77] Fifth, the Delaware Approach does not require public reporting unless the corporation elects to do so.[78] Sixth, the Delaware Approach increases the shareholder election requirements to ninety percent[79] and provides for dissenters' rights,[80] making it more difficult

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71 *Id.* § 367 (LEXIS).

72 MODEL BENEFIT CORP. LEGISLATION § 201(a) (B Lab 2013).

73 *See* DEL. CODE ANN. tit. 8, § 365(a) (LEXIS through 79 Del. Laws ch. 173).

74 *See* MODEL BENEFIT CORP. LEGISLATION § 301(a)(1) (B Lab 2013).

75 DEL. CODE ANN. tit. 8, § 365(a) (LEXIS through 79 Del. Laws ch. 173).

76 *See id.* § 365(c) (LEXIS) (setting forth a presumption that directors have met their fiduciary duties of good faith and loyalty and allowing corporations to include section 102(b)(7) provisions as well as indemnification and insurance provisions).

77 *See id.* § 362(c) (LEXIS).

78 *Compare id.* § 366(c)(2) (LEXIS) (stating that a public benefit corporation *may* require public disclosure of a statement of the corporation's promotion of the public benefit), *with* MODEL BENEFIT CORP. LEGISLATION § 402(b)–(c) (B Lab 2013) (*requiring* the posting of benefit reports on the public portion of the benefit corporation's website, or, if the benefit corporation does not have a website, the furnishing of copies of benefit reports to any person requesting copies).

79 *Compare* DEL. CODE ANN. tit. 8, § 363(a) (LEXIS through 79 Del. Laws ch. 173) (requiring ninety percent approval to elect public benefit corporation status), *with* MODEL

for existing corporations to force benefit corporation status on reluctant shareholders. Seventh, the Delaware Approach contains tighter standing requirements for benefit enforcement proceedings.[81] Finally, the Delaware Approach lacks key elements of the Model Approach, including mandatory third-party standards, independent benefit directors, opinions by independent benefit directors, and benefit officers.[82]

The Model Approach and the Delaware Approach, while containing some similar elements, are very different. In my view, Delaware took significant strides to eliminate or mitigate many of the problems with the Model identified above, particularly the Illiberalism Problem. Anyone working with benefit corporation legislation would be well-advised to consider jettisoning the Model Approach in favor of a Delaware-Approach-based statute. As discussed below, Colorado did just that and became the first state to enact the Delaware Approach.[83] Despite its advantages over the Model Approach, however, the Delaware Approach retains some issues, which are described next.

C. Some Remaining Issues in the Delaware Approach

The Delaware Approach requires directors to "balance" shareholder pecuniary interests, the corporation's specific public benefits, and the best interests of those materially affected by the corporation's conduct.[84] Although a balancing requirement seems less onerous than a requirement that directors "consider" a complex list of things in connection with corporate actions and inactions, the practical meaning of "balance" is unclear. Also, the meaning of "those" who are materially affected by the corporation's conduct is uncertain. A dictionary definition

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BENEFIT CORP. LEGISLATION § 104(a) (B Lab 2013) (requiring two-thirds approval to elect benefit corporation status), *and id.* § 102 (defining "minimum status vote").

[80] *See* DEL. CODE ANN. tit. 8, § 363(b) (LEXIS through 79 Del. Laws ch. 173).

[81] *Compare id.* § 367 (LEXIS) (giving standing to bring a derivative lawsuit only to stockholders owning individually or collectively at least two percent of the corporation's shares, or if the shares are listed on a national securities exchange, the lesser of two percent of the shares or at least two million dollars in market value), *with* MODEL BENEFIT CORP. LEGISLATION § 305(c) & cmt. (B Lab 2013) (expanding the categories of those who may bring derivative suits to include not only those with two percent ownership, but also directors, five percent owners of a parent organization, and others granted standing by the bylaws or articles of incorporation).

[82] *Cf.* MODEL BENEFIT CORP. LEGISLATION § 302(a)–(b) (B Lab 2013) (establishing an independent benefit director); *id.* § 302(c) (describing the annual opinion statement required of benefit directors); *id.* § 304 (permitting the designation of a benefit officer and describing his or her functions); *id.* § 401(a)(2) (requiring an assessment of the corporation's performance against a third-party standard).

[83] *See infra* Part III.

[84] DEL. CODE ANN. tit. 8, § 365(a) (LEXIS through 79 Del. Laws ch. 173).

of "those" is the plural of that.[85] A definition of "that" is "the person, thing, or idea indicated, mentioned, or understood from the situation."[86] Thus, "those," as used in the Delaware Approach, probably means the persons, things, or ideas materially affected by the benefit corporation's conduct. Causation and proximate causation ideas abound. For instance, a benefit corporation uses electricity; electricity can be produced from solar panels or coal-fired plants; burning coal creates CO2; CO2 causes global warming; global warming can swamp Pacific islands and reduce polar bear habitat. Must a director balance the interests of Pacific islanders and polar bears along with the shareholders' pecuniary interests and the specific benefits elected by the shareholders when deciding how the corporation should act? And, if so, what does it mean to balance? My suspicion, given that shareholder pecuniary interests and specific benefits are far more particular than the interests of "those" who are materially affected, is that in practice the specific interests will dominate over the general, and courts will accept this fact.

A similar question arises from the Delaware Approach's definition of "public benefit corporation" as a for-profit corporation that is "intended to produce" public benefits and to operate in a "responsible and sustainable" manner.[87] How does one balance "intent" and actions? What does it mean to "produce" public benefits? "Responsible" meaning exactly what? "Sustainable" in what sense—sustaining the entity, environmentally sustainable, both?

Finally, I do not think that the Delaware Approach sufficiently addresses the Bipolarity Problem or the Fiduciary Uncabining Problem, discussed above.[88]

III. THE COLORADO APPROACH

Although Colorado enacted a modified Delaware Approach in 2013, enactment came only after a three-and-a-half-year, fairly acrimonious debate between Blab-backed supporters of the Model Approach and the Corporate Laws Drafting Committee under the Colorado Bar Association (the "CBA"). This debate is discussed in greater detail below. During the course of discussions, and in an attempt to be proactive supporters of a workable benefit corporation bill rather than reactive opponents of the Model Approach, the CBA proposed alternative legislation.[89] Although it

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[85] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1301 (11th ed. 2003).

[86] *Id.* at 1294.

[87] *See* Del. Code Ann. tit. 8, § 362(a) (LEXIS through 79 Del. Laws ch. 173).

[88] *See supra* Part I.B.2–3.

[89] For the alternative legislation (in other words, the "Colorado Approach"), see H.R. 1138, 69th Gen. Assemb., 1st Reg. Sess. (as introduced in Colo. House, Jan. 18, 2013).

did not pass for political reasons, in my view the Colorado Approach works better than either the Model Approach or, although less so, the Delaware Approach. It should be considered in other states.

A. Elements of the Colorado Approach

(a) The Colorado Approach allows for-profit corporations to become benefit corporations by selecting either general public benefit (á la the Model Approach) or specific public benefit (á la the Delaware Approach), or both.[90] The Colorado Approach neither mandates nor prohibits a general public benefit approach but leaves the decision to the corporation and its shareholders.[91]

(b) In general, under the Colorado Approach, if a benefit corporation elects "general public benefit," the other elements of the Model Approach are mandatory and apply to the benefit corporation. On the other hand, if the corporation elects to pursue one or more specific public benefits, virtually none of the Model Approach's mandates are forced on the corporation. Instead, the Model Approach concepts are precatory, and the shareholders can elect which Model elements, if any, to include in their corporate structure. For example, if they seek to apply some third-party standard, shareholders can elect this.[92] If they seek benefit directors, they can create them. If they want the corporation to have periodic benefit reporting, they can require it.[93] If they want public reporting, they can say so.[94]

The basic theme of the Colorado Approach is shareholder choice. The drafters recognized that the cost of benefit corporation status (in other words, potentially reduced profitability) is borne by the shareholders and, therefore, that it is the shareholders and not the legislature or a Berwyn, Pennsylvania-based entity that should establish the terms. At the same time, the drafters recognized that there might be some constituency of corporations that seek the more rigorous, expensive, and harsh rules of the Model Approach. In keeping with the concept of choice, the Colorado Approach fully enables those for-profit corporations who seek the Model Approach. The drafters believed they were merging dueling concepts of benefit corporations, and I believe that the Colorado Approach is the best proposed to date.

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90 *See id.* § 7-101-507(2).

91 *See id.*

92 *See id.* § 7-101-511(1)(a)(II) (allowing, but not requiring, the application of a third-party standard).

93 *See id.* § 7-101-511(1)(a) (allowing, but not requiring, periodic benefit reporting).

94 *See id.* § 7-101-511(1)(b)–(d) (allowing, but not requiring, public reporting).

B. What Happened in Colorado . . .[95]

In September 2009, a Blab representative approached the Colorado Bar Association Business Law Section's committee (the "Committee") that was considering modifications to the fiduciary duties portion of the Colorado Business Corporations Act. The representative invited Colorado to introduce benefit corporation legislation and thereby become the first state with benefit corporations. The then-current version of the Model Approach was proposed. After extensive discussion, the Committee demurred because it saw many of the issues with the Model discussed above. Further, the Committee decided that it would consider both the need for, and, if need existed, a proper statute to implement benefit corporation legislation at a later date. The Committee's major positions were that benefit corporation legislation should be flexible, should provide protections against misuse, and should not constitute a marketing device for one or a few certifying agencies like Blab.

No bill was introduced in 2010. In 2011, Blab, working with its Colorado supporters, introduced the Model without input from the Committee, which again found it wanting.[96] First, the Model was not linguistically adapted to Colorado's corporate laws; second, it continued to have all of the problems that led the Committee to reject it two years earlier; third, it lacked basic shareholder protections, such as dissenters' rights; and, fourth, the Committee believed it possible to draft a cogent bill that would work for numerous Colorado corporations and not just those that wanted to force "general public benefit," third-party assessment, benefit director, benefit reporting, and other concepts on a few electing corporations.

Members of the Committee worked with the sponsors and Blab supporters to fix the perceived infirmities of the 2011 bill, and a compromise was reached in early spring of 2011. Subsequently, and without further discussion, the Senate sponsor withdrew the compromise bill. It is believed that Blab, through one or two of its Colorado supporters that were politically well-connected, accomplished this because the Colorado compromise differed in significant ways from the

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[95] This account is based on the author's experience with and observations of the Colorado legislative process. For additional accounts covering benefit corporation legislation in Colorado, see Herrick K. Lidstone, Jr., *Entity Legislation Update from the Executive Council, Business Law Section*, COLO. B. ASS'N BUS. L. NEWSL., Feb. 2011, at 1, *available at* http://denbar.org/repository/Newsletter%20--%20February%2025,%202011.pdf (describing briefly the status of legislation in 2010 and 2011); Herrick Lidstone, *Public Benefit Corporations in Colorado: Background*, THERACETOTHEBOTTOM.ORG (May 16, 2013, 7:00 AM), http://www.theracetothebottom.org/home/public-benefit-corporations-in-colorado-background.html (discussing benefit corporation legislation in Colorado).

[96] *See* S. 5, 68th Gen. Assemb., 1st Reg. Sess. (LEXIS Colo. 2011).

Blab-supported Model Approach. If one wants states to adopt a particular statute, it may be strategically and tactically desirable to prevent consideration of alternative statutes adopted in other states.

Then came 2012. In January 2012, it became clear that Blab and its supporters were going to introduce the Model again, and they did so without any further discussion with or input from the Committee or anyone else.[97] There had been no conversation during the period following withdrawal of the 2011 bill. Take it or leave it. Also, 2012 was an election year, the Colorado Senate had a Democratic-party majority, and the Colorado House had a Republican-party majority. The two legislative sides did not work well together, and animosity was increased because significant members of the Colorado House and Senate were running for national and other offices. The political stakes were high, and legislative comity was low.

The Committee, with the backing of the CBA Business Law Section and the CBA, decided that in a take-it-or-leave-it world, the only route was to attempt to kill the Model bill in the legislature. It set out to do so and was successful, primarily by focusing on obtaining the Colorado House's rejection of the Model-based legislation. After hearings, the Model passed the Colorado Senate. On the last day of the session, knowing that the bill was not going to the floor before the constitutionally-required midnight end of the general legislative session due to a very divisive and hotly contested civil unions bill, the Republicans allowed the Model to pass the House Committee. The bill died as expected without coming to the House floor for a vote. Colorado Governor John Hickenlooper then called for a special legislative session to act on the same-sex civil unions legislation (which did not pass in 2012) and several other bills, including the benefit corporation legislation. The benefit corporation bill then passed the Senate again, and, in a face-saving measure because of certain defeat in House Committee, was tabled by the House sponsor before hearings were held in House Committee. Thus, benefit corporation legislation was not enacted in Colorado in 2012.

Because the CBA Committee believed that a benefit corporation statute was desirable, that some benefit corporation legislation was inevitable, and that pushing for workable legislation was a far better use of energy than reacting against undesirable legislation, beginning in spring 2013, the Committee began drafting its own bill, which resulted in the Colorado Approach discussed above.

In November 2012, the Democrats established control of both the Colorado House and Senate, and the CBA obtained Democratic-party

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[97] *See* S. 182, 68th Gen. Assemb., 2d Reg. Sess. (Colo. 2012).

sponsors for the Committee's bill. After considerable discussion with leadership and others, and with some opposition from Blab's Model Approach sponsors and small modifications to the CBA bill, the Committee's bill passed the Colorado House on a party line vote, with all Democratic-party representatives voting "yea" and all Republican-party representatives voting "nay."

When the CBA alternative came to the Colorado Senate, it was clear that there was limited but powerful Democratic opposition to the bill. Fortunately, the Delaware drafting committee had released legislation containing the Delaware Approach immediately before the Colorado Senate opposition was clarified. Blab, also recognizing the political power of the Delaware corporate laws committee, and, in my view, seeking to co-opt the inevitable Delaware Approach as a victory for benefit corporations, announced its full-throated support for the Delaware Approach. The CBA Committee decided that the Delaware Approach was far superior to the Model Approach and therefore negotiated a "strike-below," replacing the bill embodying the Colorado Approach with a near-clone of the Delaware Approach.

Blab then took the profound position that "Colorado is not Delaware" and insisted on public reporting requirements. Recognizing the infirmity of the proposed reporting language, the CBA Committee acquiesced and called it a day, and a modified Delaware Approach bill passed the Senate, was adopted by the House, and was signed by the Governor.[98]

There are several morals to this story. First, do not buck a well-financed trend unless you are willing to enter a black hole that sucks out time. Second, work the politics, work the politics, and work the politics. Third, be clear and concise in the analysis of problems and repairs. Fourth, recognize that what Blab really cares about is the name "benefit corporation," even though it is a major stretch to see how it has appropriated the name. In the end, Colorado lawyers were not willing to create yet another form of business entity to allow specific public benefit under a different name. Further, some Colorado lawyers assumed that because Blab cared so much about the "benefit corporation" name, it has some goodwill value that should not be a legislative grant to Blab and its supporters.

CONCLUSION

Tim Brown's book, *Change by Design*, concludes with the following observations:

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[98] *See* H.R. 1138, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013) (enacted).

> Active participation in the process of creation is our right and our privilege. . . .
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> . . . .
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> . . . What [certain great designers] shared was optimism, openness to experimentation, a love of storytelling, a need to collaborate, and an instinct to think with their hands—to build, to prototype, and to communicate complex ideas with masterful simplicity.[99]

Legal scholars have discussed concepts of innovation and state competition, effectively a design charette, in the corporate law context.[100] In my view, a major impediment to the development and use of benefit corporations has been the friction, induced by Blab and its supporters, between forward-looking, active and creative design on a state level and a rigid orthodoxy embodied in a politically correct Model Approach from which there can be no meaningful deviation. In a nutshell, this is the lesson from Colorado, in which Blab actively prevented a thoughtful alternative approach to benefit corporations from becoming law. It is also the lesson from Delaware, in which the corporate drafting committee had a direct path to legislative enactment and Blab could not create large obstacles. As I have noted above, there are significant problems with the Model Approach, many of which have been alleviated in the Delaware Approach, and many more of which might have been alleviated by the Colorado Approach.

If benefit corporation legislation were to proceed like limited liability company legislation proceeded in the 1990s, namely, by pragmatically embracing alternative approaches and by an amendatory process whereby states accept and adopt viable and useful alternatives,

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[99] TIM BROWN WITH BARRY KATZ, CHANGE BY DESIGN: HOW DESIGN THINKING TRANSFORMS ORGANIZATIONS AND INSPIRES INNOVATION 241–42 (2009). Larry Ribstein and Bruce Kobayashi argued that there can be reasons to avoid enforced uniformity, as opposed to state experimentation, since "uniform" proposals may not produce efficiency and may not even produce a higher level of uniformity. Bruce H. Kobayashi & Larry E. Ribstein, *The Non-Uniformity of Uniform Laws*, 35 J. CORP. L. 327, 328–29 (2009); Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 132–33 (1996); Larry E. Ribstein & Bruce H. Kobayashi, *Uniform Laws, Model Laws and Limited Liability Companies*, 66 U. COLO. L. REV. 947, 948–50 (1995). Lyman Johnson makes arguments for pluralism in the benefit corporation arena, although he does not go so far as encouraging "allowing 1,000 flowers to bloom." Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 279–81 (2013).

[100] *See, e.g.*, Roberta Romano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209, 210 (2006) (concluding that the metaphor of the "states as a laboratory" has worked reasonably well in the corporate law arena and that the observed corporate law-making pattern is a dynamic process in which legal innovations arise from multiple sources, fostering a time of experimentation that tends to coalesce into a statutory formulation that is then adopted by a majority of the states).

the benefit corporation movement would be better served in the long run. To the extent rigid orthodoxy controls the day, the fact that states adopt a flawed Model Approach that satisfies the desires of only a few will mean continued paltry real-world use of benefit corporations and a large opportunity squandered in a "tale [t]old by an idiot, full of sound and fury, [s]ignifying nothing."[101]

[101] WILLIAM SHAKESPEARE, MACBETH act 5, sc. 5.

THE EPISTEMOLOGY OF *TWOMBLY* AND *IQBAL*

Kiel Brennan-Marquez[*]

INTRODUCTION

Plausibility pleading—inaugurated in *Twombly*,[1] extended by *Iqbal*[2]—has incited a revolution in pretrial practice. The idea is simple enough: Instead of letting a claim survive dismissal simply because its theory is sound and illegal behavior *might* have occurred,[3] judges should

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[1] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547 (2007).

[2] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1940 (2009).

[3] This was the pleading standard that reigned—formally, at least—until *Twombly* came down in 2007. *See* Conley v. Gibson, 355 U.S. 41, 47 (1957). In the words of the *Conley* Court,

> The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

Id. (citing Fed. R. Civ. P. 8(a)(2)). How federal judges actually implemented the *Conley* standard is a separate matter, *infra* note 6–7 and accompanying text, but its formal contours remain as described. For an exemplary genealogy of notice pleading to plausibility pleading, see Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1624–34 (2011). *See also* Nicholas Tymoczko, Note, *Between the Possible and the Probable: Defining the Plausibility Standard After* Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal, 94 MINN. L. REV. 505, 530–39 (2009). The theory behind *Conley* is simple: At the pleading stage, a plaintiff should only have to theorize a claim for relief. To actually prove that claim is a factual endeavor, which may—and should—wait until both parties are given an opportunity to investigate, take part in discovery, and dispute the evidence. *See Conley*, 355 U.S. at 47–48. This, indeed, is exactly what commentators have celebrated about "possibility" pleading. *See, e.g.*, Andrew I. Gavil, *Civil Rights and Civil Procedure: The Legacy of* Conley v. Gibson, 52 HOW. L.J. 1, 4 (2008). The *Conley* Court

> embraced the "no set of facts" standard, which had already been developed in the lower courts and by commentators, at a moment in time when . . . those without power sought access to justice through the courts. For the disenfranchised, judicial intervention was the best strategy for advancement and the Court understood that permissive pleading standards facilitated access to equal justice.

Id.

have latitude, up front, to interrogate a complaint's factual allegations.[4] If (1) those allegations lead as naturally to an inference of legal behavior as they do an inference of illegal behavior or (2) the inference of legal behavior is more natural, then the claim should be dismissed.[5]

Twombly and *Iqbal* have inspired a maelstrom of commentary, the bulk of which spans three questions. First: Does plausibility pleading genuinely part ways from *Conley*'s "no set of facts" standard,[6] or does it simply explicate a longstanding de facto practice within the federal courts?[7] Second: What is the normative valence of plausibility—does it overhaul a system rife with frivolous claims, or does it unduly bar deserving plaintiffs from redress?[8] And third: What has been the empirical impact of plausibility pleading?[9]

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[4] "The fact that the allegations undergirding a claim could be true is no longer enough to save a complaint from being dismissed; the complaint must establish a nonnegligible probability that the claim is valid." 630 F.3d 622, 629 (7th Cir. 2010).

[5] *See, e.g.*, Stephen R. Brown, *Reconstructing Pleading:* Twombly, Iqbal, *and the Limited Role of the Plausibility Inquiry*, 43 AKRON L. REV. 1265, 1274–78 (2010) [hereinafter Brown, *Reconstructing Pleading*]; A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 13–18 (2009).

[6] *Conley*, 355 U.S. at 45, 47. For an example of the view that *Twombly* and *Iqbal* represent a break from previous understandings of Rule 8, see William Kolasky & David Olsky, Bell Atlantic Corp. v. Twombly*: Laying* Conley v. Gibson *to Rest*, 22 ANTITRUST 27, 27 (2007). *See also* John P. Sullivan, Twombly *and* Iqbal*: The Latest Retreat from Notice Pleading*, 43 SUFFOLK U. L. REV. 1, 56–61 (2009) (arguing that the principles in *Iqbal* will not reach uniform and consistent results); *cf.* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003) (arguing that even before the *Twombly* ruling, "[f]rom antitrust to environmental litigation, conspiracy to copyright, substance specific [sic] areas of law are riddled with requirements of particularized fact-based pleading").

[7] For the view that *Twombly* is contiguous with previous understandings of Rule 8, see Andrew Blair-Stanek, Twombly *is the Logical Extension of the* Mathews v. Eldridge *Test to Discovery*, 62 FLA. L. REV. 1, 4 (2010); Daniel R. Karon, *"'Twas Three Years After* Twombly *and All Through the Bar, not a Plaintiff was Troubled from Near or from Far"—the Unremarkable Effect of the U.S. Supreme Court's Re-Expressed Pleading Standard in* Bell Atlantic Corp. v. Twombly, 44 U.S.F. L. REV. 571, 572 (2010); Karen Petroski, Iqbal *and Interpretation*, 39 FLA. ST. U. L. REV. 417, 434 (2012); Brook Detterman, Note, *Rumors of* Conley's *Demise Have Been Greatly Exaggerated: The Impact of* Bell Atlantic Corporation v. Twombly *on Pleading Standards in Environmental Litigation*, 40 EVNTL. L. 295, 296 (2010); Daniel W. Robertson, Note, *In Defense of Plausibility:* Ashcroft v. Iqbal *and What the Plausibility Standard Really Means*, 38 PEPP. L. REV. 111, 132 (2010) (arguing that plausibility analysis is no more than an "explicat[ion]" of Rule 8 practice).

[8] The large bulk of commentary on *Iqbal* and *Twombly* has been critical. *See, e.g.*, Edward A. Hartnett, *Taming* Twombly, *Even After* Iqbal, 158 U. PA. L. REV. 473, 474 (2010) [hereinafter *Taming* Twombly]; Kenneth S. Klein, Ashcroft v. Iqbal *Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261, 262 (2009) (arguing, with not too fine a point, that *Iqbal* runs afoul of the Seventh Amendment guarantee of a jury trial); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 15–16 (2010); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 433 (2008) ("[T]he *Twombly* decision

has dealt what may be a death blow to the liberal, open-access model of the federal courts espoused by the early twentieth century law reformers."); Steve Subrin, Ashcroft v. Iqbal*: Contempt for Rules, Statutes, the Constitution, and Elemental Fairness*, 12 NEV. L.J. 571, 571 (2012) (calling *Iqbal* an "embarrassment"); *cf.* Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 54, 65–66 (2010) (making the larger point that factual sufficiency or insufficiency, whether under the guise of "plausibility," is conceptually misaligned with the question of merit, casting doubt on any pleading, as opposed to notice, standard).

Some commentators, however, take a more positive view. *See, e.g.*, Michelle Kallen, *Plausible Screening: A Defense of* Twombly *and* Iqbal*'s Plausibility Pleading*, 14 RICH. J.L. & PUB. INT. 257, 258 (2010) (arguing that plausibility pleading is responsive to the reality of how litigation has changed since the Federal Rules were first adopted); Mark Moller, *Procedure's Ambiguity*, 86 IND. L.J. 645, 646–48 (2011) (arguing that plausibility pleading, by allowing lower courts to leave their decisions opaque, can be said to facilitate political and ideological pluralism across the federal judicial system); Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of* Twombly *and* Iqbal, 33 HARV. J.L. & PUB. POL'Y 1107, 1109–10 (2010) (arguing that heightened pleading serves an important purpose in the age of massive, costly litigation); Suja A. Thomas, *Oddball* Iqbal *and* Twombly *and Employment Discrimination*, 2011 U. ILL. L. REV. 215, 216–18 (2011) (arguing, *inter alia*, that the tradeoffs of plausibility pleading are justified in the antitrust setting, but they are not necessarily justified in the setting of discrimination law); *see also* Brian T. Fitzpatrick, Twombly *and* Iqbal *Reconsidered*, 87 NOTRE DAME L. REV. 1621, 1622 (2012) (arguing, *inter alia*, that the Court's motives in *Twombly* and *Iqbal* "were pure, even if its methods were not").

Recently, there has been a surge of "*Iqbal* redemption" scholarship as well: Articles that respond to the enduring reality of plausibility pleading by crafting concrete proposals to optimize its function—or, depending on how one sees it, to minimize its damage. *See, e.g.*, Edward A. Hartnett, *Taming* Twombly*: An Update After* Matrixx, 75 LAW & CONTEMP. PROBS. 37, 37–39 (2012) [hereinafter *An Update After* Matrixx] (arguing that *Iqbal* is very unlikely to be overturned and exploring "accomodationist" strategies); Joseph A. Seiner, *After* Iqbal, 45 WAKE FOREST L. REV. 179, 180–81 (2010) (formulating proposals for dealing with Title VII discriminatory intent claims within *Iqbal*'s confines).

[9] On this front, the empirical literature corroborates what many of the theoretical articles predicted: Rule 12(b)(6) dismissals have increased since *Iqbal* came down. The extent of the increase is a matter of some dispute, but virtually everyone agrees that a general surge has transpired. *See* Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 624 (2010) (finding that "after *Iqbal*, [district courts] appear to be granting 12(b)(6) motions at a significantly higher rate than they did under *Conley*"); Patricia Hatamyar Moore, *An Updated Quantitative Study of* Iqbal*'s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 604–05 (2012) (reiterating the results of her previous study—namely, that *Iqbal* has inspired a surge in 12(b)(6) motions—and finding, in light of new evidence, that this effect is also apparent with respect to dismissals without leave to amend); Kendall W. Hannon, Note, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1835–36 (2008) (finding that 12(b)(6) motions increased from 36.8% granted under *Conley* to 39.4% granted under *Twombly*). The empirical effects cannot be contained, moreover, to the impact on 12(b)(6) grants alone. Data suggests that the specter of *Iqbal* has also had a chilling effect before the 12(b)(6) stage. *See* Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L.J. 2270, 2275–76 (2012) (exploring the effects of plausibility on "plaintiff selection effects," and arguing that empirical findings about

Lost in the shuffle—astonishingly, given the sheer volume of commentary[10]—is the antecedent question of how plausibility analysis actually works. Most scholars have simply let this question pass by.[11] And among those who have taken it up, the results largely amount to exercises in renaming,[12] or conceptual somersaults that beg the core

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increased 12(b)(6) grants substantially underrepresent the impact of *Twombly* and *Iqbal*). Nor have the effects been uniform across all legal sub-fields. The impact in civil rights litigation, particularly (but certainly not only) with respect to disability issues, has been comparatively severe. *See* Raymond H. Brescia, *The* Iqbal *Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 260–61, 268 (2012) (finding that 12(b)(6) grants in cases alleging employment and housing discrimination have increased by 18% since the pre-*Twombly* period); Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95, 117–18 (2010) (finding that district courts granted 12(b)(6) motions on ADA claims rose by 10.4% after *Twombly*); *cf.* Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6):* Twombly, Iqbal, *and The Paradox of Pleading*, 62 STAN. L. REV. 905, 920 (2010) (arguing, for conceptual reasons, that plausibility has posed particular issues for civil rights suits). Furthermore, commentators that have taken a more "soft empirical" approach to the question, examining a wide swath of opinions to see how *Twombly* and *Iqbal* are invoked, have also concluded that plausibility provides cover for greater dismissal rates. *See* Colleen McNamara, Note, Iqbal *as Judicial Rorschach Test: An Empirical Study of District Court Interpretations of* Ashcroft v. Iqbal, 105 NW. U. L. REV. 401, 403 (2011) (calling plausibility a "judicial Rorschach test" that allows "individual judge[s] [to use] the Court's dicta to craft the pleading standard that the judge feels to be most appropriate"); Ryan Mize, Note, *From Plausibility to Clarity: An Analysis of the Implications of* Ashcroft v. Iqbal *and Possible Remedies*, 58 U. KAN. L. REV. 1245, 1257 (2010) ("Some courts interpret current pleading doctrine as plainly mandating heightened pleadings, while others note a tension between the latter and notice pleading, and still others continue to endorse the traditional liberal standard."); Michael O'Neil, Note, Twombly *and* Iqbal*: Effects on Hostile Work Environment Claims*, 32 B.C. J.L. & SOC. JUST. 151, 153–55 (2012) (delineating two strands of reception among lower courts, and arguing that the more stringent strand will result in greater dismissal rates in hostile work environment claims).

[10] As of this writing, a Westlaw search for law review publications that have "*Iqbal*" in the title yields 182 results. *Cf.* Jeffrey J. Rachlinski, *Why Heightened Pleading—Why Now?*, 114 PENN. ST. L. REV. 1247, 1247 (2010) (referring to *Iqbal* as the "case that launched a thousand law review articles"). Make no mistake, my purpose in emphasizing the volume of commentary is not pejorative. It seems only fitting that the two cases being cited most frequently by federal courts—*Iqbal* and *Twombly*—would also be the subject of the most copious scholarly attention. *See* Louis Kaplow, *Multistage Adjudication*, 126 HARV. L. REV. 1179, 1181–83 (2013) (showing the discussions that came about in reaction to the two cases); Rosalie B. Levinson, *The Many Faces of* Iqbal, 43 URB. LAW. 529, 529 (2011) (showing that within a matter of months thousands of federal courts had cited to *Iqbal*); Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After* Bell Atlantic Corp. v. Twombly, 41 SUFFOLK U. L. REV. 851, 852 (2008) (showing that Twombly had "massive implications for civil litigation").

[11] The normative vein of analysis, for example, has all but sidestepped this question. *See supra* note 8. And the empirical literature, of course, has no need to answer this question. *See supra* note 9.

[12] Numerous articles—many quite prominent—have sought to reconstruct the standards set forth in *Twombly* and *Iqbal*. For the most part, these efforts have failed to

question rather than resolving it.[13] Against this inauspicious backdrop, however, two contending accounts of plausibility have emerged: (1) the "conclusoriness" account, articulated by a handful of scholars, and elaborated most carefully in Alex Steinman's well-known article, *The Pleading Problem*;[14] and (2) the "factual specificity" account, theorized

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move beyond the hollowness of the Court's own formulations. For example, Robert Bone has argued that plausibility involves reference to "baseline[s] of conduct." *See* Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 884–85 (2009). An allegation is plausible, on this view, if it deviates from baseline assumptions about legal conduct in the world. *Id.* at 885–86. Similarly, Benjamin Spencer construes plausibility as a "presumption" of non-wrongdoing. Spencer, *supra* note 5, at 14–15. On this account, plausibility determinations stem from a judge's decision about whether the alleged facts convey "some sense of specific wrongdoing in the eyes of the law," the presumption being that they do not. *Id.* Both accounts fall prey to the same trap. They simply restate the benchmarks of plausibility—or state them more elaborately—without unpacking what those benchmarks actually require. For an excellent statement of this critique, see Stephen R. Brown, *Correlation Plausibility: A Framework for Fairness and Predictability in Pleading Practice After* Twombly *and* Iqbal, 44 CREIGHTON L. REV. 141, 163 (2010) [hereinafter Brown, *Correlation Plausibility*] (summarizing Bone's and Spencer's frameworks as variations on the theme of "I-know-it-when-I-see-it," an approach that may describe plausibility analysis accurately, but that certainly fails to unpack what plausibility determinations mean). Perhaps the most startling example of the "restatement" genre is Charles Campbell's argument—spanning fifty pages—that plausibility pleading requires plaintiffs to adduce facts that lead to "direct or inferential allegations respecting all the material elements necessary to sustain a recovery under *some* viable legal theory." Charles B. Campbell, *A "Plausible" Showing After* Bell Atlantic Corp. v. Twombly, 9 NEV. L.J. 1, 22 (2008) (*quoting* Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984)). Too true—for that is the definition of "pleading." At the twilight of elegance, the delight of redundancy holds fast.

[13] *See, e.g.*, Brown, *Correlation Plausibility*, *supra* note 12. Brown's theory—"correlation plausibility"—sees plausibility as a matter of drawing "correlations" between "the sensory-perceptible allegations in the complaint" and "the unalleged element." *See id.* at 165–71. Brown is right: Plausibility *does* involve such correlation-drawing. But this formulation does not resolve the indeterminancy of the plausibility standard. It exactly recapitulates it. One of the main purposes of the *Twombly* opinion was precisely to distinguish among three *different* modes of "correlation-drawing" between factual scenarios and legal harms: possibility, plausibility, and probability. *Infra* Part I. Brown's account, by emphasizing the importance of "correlation-drawing" as such, ends up leaving the crucial second-order question untouched: What *kinds* of correlations need to be drawn? To simply point out that plausibility analysis rests on perceived correlations between factual scenarios and legal harms does not resolve the question of what plausibility requires. It precisely *begs* that question. Put otherwise, the obstinate mystery of plausibility analysis is not *whether* it requires "correlation-drawing" in Brown's sense; the Court has spelled that out plainly enough. The mystery is, what *kind* of "correlation-drawing" it requires. To answer that question, we need an account of what sets plausibility apart from its conceptual siblings, namely, possibility and probability. (To be clear, I deeply respect Brown's account. It is *nearly* correct. But, the devil resides, as ever, in the minutiae.).

[14] Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1298 (2010). It bears note, up front, that others have shared Steinman's insight regarding the role of "conclusoriness" inquiry under the *Iqbal* Court's construction of plausibility. *See infra* Part II.A. Stephen Brown, for example, has delineated a virtually identical theory of

most systematically in Luke Meier's more recent contribution, *Why* Twombly *is Good Law (but Poorly Drafted) and* Iqbal *Will Be Overturned.*[15]

Although both of these accounts get a lot right—and I strive to pay them credit where due[16]—neither offers a fully persuasive account of plausibility's analytic shape. The problem is simple: Scholars have not attended to the specific cognitive operation that plausibility analysis requires. That operation, in the jargon of epistemology, is "abduction," the process of selecting which among multiple hypotheses most perspicuously predicts the limited universe of known facts.[17] In this respect, plausibility analysis requires judges to evaluate "what . . . is 'natural' [and what] is not,"[18] an inquiry veering "outside the formal rule

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plausibility. Where Steinman discerns two steps, Brown discerns three, but the conceptual thrust—distinguishing conclusoriness inquiry from plausibility inquiry, and casting the former as primary with respect to the latter—is the same. Brown, *Reconstructing Pleading*, *supra* note 5, at 1283–84; *see also* Charles B. Campbell, *Elementary Pleading*, 73 LA. L. REV. 325, 359–60 (2013) (outlining a "three-step process" for analyzing the "sufficiency of a claim for relief"). Edward Hartnett has also traced similar grooves, writing that

> What emerges from *Twombly* and *Iqbal*, then, is a two-step process for adjudicating a 12(b)(6) motion. First, identify allegations that are not subject to the presumption of truth, typically because they simply allege the conclusion that the pleader wishes the court to make regarding an element of the claim. Second, determine whether the allegations that are assumed to be true plausibly suggest an entitlement to relief.

Taming Twombly, *supra* note 8, at 494. In what follows, I opt to focus on Steinman's formulation of the "two-step" view because it provides the most systematic account and because it has received the most attention.

[15] Luke Meier, *Why* Twombly *is Good Law (but Poorly Drafted) and* Iqbal *Will Be Overturned*, 87 IND. L.J. 709, 711–12 (2012).

[16] *Infra* Part II.

[17] *See infra* note 52 and accompanying text. This account is indebted, in certain ways, to Stephen Brown's theory of "correlation plausibility." *See* Brown, *Correlation Plausibility*, *supra* note 12, at 170. His is the only piece on *Twombly* and *Iqbal*, of which I am aware, that picks up on the hypothesis-selection aspect of plausibility analysis. He does not name it as such, nor does he analyze it in architectonic detail. But the basic intuition is certainly present in his analysis. *See id.* at 167–70.

Nonetheless, two important variables (in addition to its analytical under-determination, *see supra* note 13) set Brown's account apart from mine. The first is that he slips into the language of probability, and thus fails to keep focus on the distinction between what is likely and what is plausible. *See id.* at 170 (arguing that *Twombly* was probably dismissed because the correlation between parallel behavior and collusion is low, a conclusion derived from the proposition that firms only "rarely" collude). The second is that his work vacillates between positive and normative poles. At times, the project seems to be expounding on the Court's words; at others, Brown describes the purpose of his intervention as "reducing subjectivity" in pleading analysis. *Id.* at 180. It is not clear, throughout, how these poles relate.

[18] *Taming* Twombly, *supra* note 8, at 500.

making process,"[19] and one that necessarily "involves . . . normative judgment."[20] Abduction differs subtly, but importantly, from "induction," the process of assessing the truth or falsity of an already-selected hypothesis.[21] The distinction between these two operations—a matter of essence, not degree—is important for grasping the architecture of plausibility analysis because it is crucial for evaluating what it means for a proposition to be *plausible* as opposed to "probable." The abduction-induction distinction also helps to explain why commentary on *Twombly* and *Iqbal* has been so disappointing. Bereft of a descriptive anchor, normative projects have tripped out of the gate.[22]

Once the centrality of "abduction" comes to the surface—and plausibility is distinguished from its conceptual sibling, probability—it becomes clear that *Twombly* and *Iqbal* are far from the bedfellow pair that most scholars have assumed.[23] In *Twombly*, plausibility analysis

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[19] Bone, *supra* note 12, at 894.

[20] *Id.* at 887; *see also* David L. Noll, *The Indeterminacy of* Iqbal, 99 GEO. L.J. 117, 138–41 (2010) (noting that *Iqbal* has introduced an indeterminacy at the heart of pleading law by allowing judges to look to extra-legal content). No lesser authority than Justice John Paul Stevens picked up on this theme in his dissent from *Twombly*, which expressed concern that plausibility pleading would have the effect of "invit[ing] lawyers' debates over economic theory to conclusively resolve antitrust suits in the absence of any evidence." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 595 (2007) (Stevens, J., dissenting); *cf.* Karen Petroski, Iqbal *and Interpretation*, 39 FLA. ST. U. L. REV. 417, 434 (2012) (arguing that plausibility analysis is actually derivative of a deeper structure of interpretation, and that it is therefore impossible to eliminate).

[21] This distinction is familiar, for example, at the level of trial practice. Both abduction and induction are required to shape a persuasive factual narrative, but they play very different roles. Abduction allows lawyers and judges to formulate "theories of the case," that is, suppositions about what legal hypothesis best encompasses the posited facts. One theory of the case can be rebutted by another. For example, opposing counsel at trial might attempt to reinterpret the adduced facts in support of alternate theory ("The prosecution would have you believe that the defendant killed his brother in cold blood; but in fact, the defendant was nowhere near the scene of the crime."), or a judge at oral argument might push the advocate to explain why her view of the case makes the most sense ("But counselor, why is this a case about the fighting words doctrine, as opposed to time, place, and manner restrictions?"). If that is abduction, then induction is what lawyers and judges engage in to test the veracity of a given theory of the case. With a hypothesis in tow of what we suspect took place, now the facts must be adduced. Pleading can be broken down into equivalent stages: formulating a theory of the case, and testing its preliminary veracity.

[22] *Supra* note 12 and accompanying text.

[23] If anything, "most" is an understatement. In truth, it is only Luke Meier's article—analyzed at length below—that makes a serious effort to distinguish *Twombly* and *Iqbal*. Meier, *supra* note 15, at 710–11 (stating that the cases "have dissimilar analytical foundations"). The assumption of continuity between the two cases has been a defining feature of both the empirical and conceptual work. That being said, some have claimed that *Iqbal* was wrongly decided on plausibility grounds—most notably, Justice Souter in his dissenting opinion in *Iqbal*. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1958 (2009) (Souter, J.,

inspired the Court to draw on economic-theoretical insights about how firms behave in certain business environments.[24] In *Iqbal*, by contrast, the same mode of analysis provided the Court with cover to make ideologically charged judgments about the way that high-ranking officials wield power.[25] At a high echelon of abstraction, these operations are identical: Both use extra-legal knowledge to parse legal allegations. But on a more granular level, in terms of the type of extra-legal knowledge they employ, the identity between the cases vanishes. In fact, all similarity between them vanishes. They become diametrical.

Where the *Twombly* Court bridged disciplines, infusing its antitrust analysis with well-established, and falsifiable, scholarly findings,[26] the *Iqbal* Court drew from the bottomless and more obscure well of "common sense."[27] Evaluating the allegation that John Ashcroft and Eric Mueller architected an intentionally discriminatory detention program immediately after September 11th, Justice Kennedy pronounced—without citation and virtually without explanation—that the fact that Arab Muslims were disproportionately detained was merely consistent with the hypothesis of intentional discrimination; it did not "plausibly establish" that hypothesis.[28] Indeed, to Justice Kennedy's mind, it came "as no surprise" that the detention program "produce[d] a disparate, incidental impact on Arab Muslims," since "Arab Muslim[s]" comprised the "large part of" Osama Bin Laden's "disciples."[29] One need not roam too far to the political Left to feel a jolt of alarm at this sanguine vision of executive power.[30] Putting ideological disputes to one side, the more important point is that this vision is underwritten by nothing. What

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dissenting). But this critique leaves the basic premise of continuity unscathed; it goes only to the case's outcome, not to its conceptual underpinnings.

[24] *Twombly*, 550 U.S. at 567–69.

[25] Justice Kennedy has famously referred to this process as "common sense." *Iqbal*, 129 S. Ct. at 1950–51; *see also* Henry S. Noyes, *The Rise of the Common Law of Federal Pleading:* Iqbal, Twombly, *and the Application of Judicial Experience*, 56 VILL. L. REV. 857, 858–59 (2012) (analyzing the implications of the *Iqbal* Court's invocation of "common sense" and "judicial experience," and arguing that they open up into a "common law of federal pleading," which will evolve over time).

[26] *Twombly* originated in antitrust law, a legal field that grafts economic theory into its basic doctrinal structure, so it only stands to reason that economic theory would inform the pretrial stage of antitrust claims as well. I develop this point in more detail below. *See infra* note 129 and accompanying text; *see also* ROBERT H. BORK, THE ANTITRUST PARADOX 91 (1978); RICHARD A. POSNER, ANTITRUST LAW 1–2 (2d ed. 2001).

[27] *Iqbal*, 129 S. Ct. at 1950.

[28] *Id.* at 1951.

[29] *Id.*

[30] *See* THE FEDERALIST NO. 51, at 257 (James Madison) (Lawrence Goldman ed., 2008).

began in *Twombly* as deference to extra-legal expertise in *Iqbal* transubstantiated into naked reliance on intuition.

This snapshot, in a sense, embeds the whole of my claim. Instead of grouping *Twombly* and *Iqbal* together, I aim precisely to put distance between the cases. In spite of the abstract form this effort takes, my ambition is highly pragmatic. Instead of offering an ideal theory of how pleading *should* operate, I hope to improve the way pleading, in the wake of *Iqbal*, actually *does* operate.[31] In this respect, my analysis departs in the same "accommodationist" spirit as Professor Edward Hartnett: I, too, believe that for better or worse, the best strategy for dealing with *Twombly* and *Iqbal* is appeasement "rather than battle."[32] And I, like Hartnett, also take a tepidly "optimistic" view of the situation.[33] Plausibility analysis may be here to stay, but its more conspicuous externalities can certainly be mitigated.

A few years ago, Hartnett kicked off the mitigation effort by outlining a host of strategies, aimed at both litigators and trial judges, to maximize opportunities for discovery within the bounds set out by *Iqbal* and *Twombly*.[34] My proposal is distinct and complementary: We should demarcate more carefully what factual materials "count," or ought to count, toward plausibility determinations in specific doctrinal settings. This question, however, cannot be properly addressed until we resolve some first-order questions about the architecture of plausibility analysis—the purpose of my work here. I seek to theorize how extra-

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[31] Many commentators have come up with creative and thought-provoking frameworks to displace plausibility. *See, e.g.*, Brown, *Correlation Plausibility*, *supra* note 12, at 165–67 (proposing a "correlation plausibility" regime that would make the operative question whether the alleged facts "correlate," in practice, with the legal harm being pled); Spencer, *supra* note 8, at 489–90 (proposing a "functional pleading" regime that would require plaintiffs, first, to give notice of the allegation to defendants and, second, to "frame" the issue for the court); Steinman, *supra* note 14, at 1334 (proposing a "plain pleading" regime that would require plaintiffs to adduce a sufficiently robust "transactional narrative," that is, to "identify *what* is alleged to have happened," as opposed to providing direct evidentiary support for the claims). Other commentators have simply called for a restoration of the old order. *See, e.g.*, Miller, *supra* note 8, at 96 (arguing for the resurrection of *Conley*). These efforts, one and all, inflect prayers toward an imaginary idol, for the Court has shown no intention of embarking on a reform effort any time soon. In fact, the Court has recently demonstrated a desire to entrench the core holding of *Iqbal*. *See* Matrixx Initiatives, Inc. v. Siracusano, 131 S. Ct. 1309, 1323–25 (2011) (holding that plaintiffs alleged a plausible claim that disclosures were material in a securities fraud lawsuit); Skinner v. Switzer, 131 S. Ct. 1289, 1293, 1296 (2011) (rehearsing the language of plausibility in the context of a Section 1983 claim). More notably still: These decisions were authored by liberal members of the Court. *See An Update After* Matrixx, *supra* note 8, at 38 n.8 (2012).

[32] *See An Update After* Matrixx, *supra* note 8, at 37.

[33] *Id.*

[34] *Taming* Twombly, *supra* note 8, at 503–16.

legal knowledge underpins plausibility analysis, so that litigators and judges can get a better sense of what extra-legal knowledge should be incorporated into pretrial practice.

This approach, even if adopted wholeheartedly, would not eliminate interpretive latitude outright—pleading necessarily involves practical judgment, and it is fated to remain more art than science. But my approach would suffuse plausibility analysis with a manner of consistency, and ex ante predictability, which it has not previously enjoyed. That alone would be a sizeable improvement from the status quo. In addition, and perhaps more importantly, it would give a coherent direction to scholars who want to improve upon the mechanics of plausibility analysis as it actually plays out in our federal courts.[35]

I. INDUCTION AND ABDUCTION, PROBABILITY AND PLAUSIBILITY

Let us begin with an example from everyday life. Suppose that I suspect my spouse of infidelity. In an effort to either confirm or refute my suspicion, I look for evidence, such as inconsistencies in our bank records or oddities in the itineraries of her business trips. With each new piece of evidence, I will "build my case." The universe of facts will expand, just as it would over the course of evidence introduction and witness examination during a trial. Once all the facts—or the most important facts—are known, I can make my final determination. This is classic induction. With a hypothesis in tow, I examine the facts to decide if it is correct. And "correct" is defined, as it must be under the epistemic constraints in which we live, as some very high degree of probability.[36]

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[35] For an excellent scholarly contribution written in this spirit, see Suzette M. Malveaux, *The Jury (or More Accurately the Judge) Is Still Out for Civil Rights and Employment Cases Post-*Iqbal, 57 N.Y.L. SCH. L. REV. 719, 722 (2013). Departing from the observation that "the impact of *Twombly* and *Iqbal* remains elusive," Malveaux argues that "empirical data alone cannot answer [the] question[s]" raised by plausibility pleading, as they depend on the concrete "experiences and practices of judges and lawyers" in particular legal settings. *Id.*

[36] The standard way that analytic philosophers describe the epistemic conditions of "knowledge" is true and justified belief. *See* RODERICK M. CHISHOLM, *Knowledge as Justified True Belief*, *in* THE FOUNDATIONS OF KNOWING 43, 43 (1982). Edmund Gettier, however, has offered an important critique of this commonplace position. *See* Edmund L. Gettier, *Is Justified True Belief Knowledge?*, 23 ANALYSIS 121 (1963). In fact, one suspects that if Professor Gettier were to catch wind of the dynamics of hypothesis-formation that beset plausibility analysis, he would be interested in the problem—potent in theory, if not in practice—that could result from judicial confusion about *which* facts render a given complaint plausible. Suppose, for example, that a judge confronts a complaint consisting of Fact *A*, Fact *B*, Fact *C* and Legal Conclusion *X*. Fact *A* is ambiguous between legal conduct and illegal conduct (like the fact of parallel behavior in *Twombly*)—meaning that for Legal Conclusion *X* to be plausible, the judge must have some reason to believe that Fact *A* more naturally leads to an inference of illegal conduct than an inference of legal conduct. Now suppose that the judge construes Legal Conclusion *X* as plausible because he believes that

Fair enough, but this narrative raises an important question. At some point in time, before I started investigating the hypothesis of infidelity, I must have *formed* that hypothesis. I did not suspect my spouse of infidelity from day one. Something made me suspicious; something made me decide that the hypothesis of infidelity was plausible. How did this happen? The answer, obviously, is that I observed a fact in the world that led to the thought, "Perhaps my spouse is cheating on me." In practice, the suspicious fact might have been virtually anything. Perhaps I accidentally stumbled on a series of flirtatious emails with her co-worker, or perhaps I found a receipt for a hotel room while taking out the trash. Whatever the exact catalyst, the important question is this: What was the epistemic process that turned (1) a suspicious fact into (2) a hypothesis worthy of exploration? For this is just the process—or a distilled version of it—that courts go through when determining the quality of pleadings.

The process is as follows. After observing the suspicious fact or facts, I will ask myself: What state of the world gave rise to this? Is it reasonable to hypothesize that my spouse is cheating on me, and that *that* is the reason these emails exist (or that this receipt exists)? Or is there another hypothesis that explains the suspicious facts more perspicuously? As I address this question, my knowledge of reality will be constrained: Having observed the suspicious fact, I know almost nothing about the (inductive) question of what happened. Instead, I must ask: What *might* have happened? That question will generate multiple possibilities. For example, perhaps it is part of her office culture to write emails in a tone that sounds flirtatious to me, or perhaps she has a harmless crush on a co-worker, or perhaps she is cheating, and so forth.[37] With these possibilities generated, I will have to decide which among them I should entertain as my operating hypothesis.

Fact *B* makes it more likely that Fact *A* signifies illegal conduct rather than legal conduct. And in fact, this *is* more likely, but it is not more likely in virtue of Fact *B*; it is more likely in virtue of *Fact* C. Under these conditions, the judge's plausibility determination would be correct in the sense that it accurately describes the status of the complaint for the purposes of Rule 8, and the determination would be justified in the sense that the judge will have adduced an internally supportive reason for arriving at the determination—but something nevertheless "feels wrong." Intuitively, it seems a strain to say that the judge has properly executed plausibility analysis, at least within the parameters outlined in *Twombly* and *Iqbal*. The analysis, simply put, seems predicated on a mistake. Although I leave its full contours for another day, the Gettierian parallel is certainly striking.

[37] There are also, of course, countless possibilities that will not even occur to me because they are so wildly implausible as to be filtered out automatically, unconsciously. This, too, is a natural part of "plausibility analysis," in both its everyday form, and its technical guise. *See, e.g.*, Hayden v. Paterson, 594 F.3d 150, 162 (2d Cir. 2010) (dismissing as implausible, due to the obviousness of a countervailing explanation, the allegation that

Notice that if I decide that infidelity is a plausible hypothesis, it does not follow that I believe it *likely* that my spouse has cheated on me. I may (and hopefully do!) find the possibility quite unlikely. The following dialogue, for example, is easy to imagine:

> Me: I am worried that my spouse is cheating on me.
>
> Friend: Really? Wow. Do you think she would actually do that?
>
> Me: No, I don't *think* so. She's not that kind of person. But still, I found this inexplicable receipt for a hotel room, and it has me worried.

That I can maintain both positions at once in this hypothetical conversation—finding infidelity plausible enough to entertain as a hypothesis, even as I simultaneously find it quite unlikely—speaks to the epistemic peculiarity of "plausibility." My suspicion of infidelity signifies two belief-states simultaneously: First, that if my suspicion is accurate, it would explain the suspicious fact that I observed; and second, that in comparison to other possible hypotheses, the hypothesis of infidelity is sufficiently reasonable to merit further exploration. My suspicion, however, signifies nothing about how likely, as an absolute matter, I believe my spouse's infidelity to be.

This thought experiment achieves two things at once. First, it shores up the distinction between abduction and induction. It was by abduction that I formulated the hypothesis, and by induction that I tested it. Second, the thought experiment provides a precise analogy for plausibility analysis as the *Twombly* Court delineated it. Assessing plausibility is an exercise in abduction, while assessing probability is an exercise in induction. Although scholars and lower court judges have tripped over this issue,[38] the *Twombly* Court, for its part, rendered the

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felon disenfranchisement laws were passed with the purpose of discriminating against Black and Latino voters).

[38] The main error has been to construe plausibility as a more lenient version of probability. *See, e.g.*, *In re* Text Messaging Antitrust Litig., 630 F.3d 622, 629 (7th Cir. 2010) (calling plausibility a "nonnegligible probability" inquiry); Edward D. Cavanagh, *Making Sense of* Twombly, 63 S.C. L. REV. 97, 112 (2011) (calling the *Twombly* Court's approach to plausibility a "goldilocks approach," with probability being "too much," possibility being "too little," and plausibility being "just right"); Seiner, *supra* note 8, at 180–81 (describing plausibility as falling in the "gray area between *possible* and *probable*"); Tymoczko, *supra* note 3, at 529 (outlining various spectrum-based approaches regarding the relationship between plausibility and probability). In one sense, this is true: In practice, plaintiffs operating under a plausibility regime will have to adduce fewer facts than they would have to adduce under a more stringent "probability pleading" regime. The more salient distinction, however, is not quantitative but qualitative. It pertains not to the number of facts that plausibility pleading requires, but to the type of facts. Conceptually, probability and plausibility work in opposite directions. Probability—an exercise in induction—asks whether the established facts lead to an inference that legal harm occurred. Plausibility—an exercise in abduction—formulates theories that, if true, would lead to an inference that the established facts occurred. In the first case, the alleged facts comprise a logical antecedent ("If the alleged facts are true, then it is likely that harm

distinction quite crisply. *Twombly* originated from a claim under § 1 of the Sherman Act, in which plaintiffs alleged that multiple telecom companies had conspired to keep prices high by dividing up the market and agreeing not to compete with each other.[39] The key fact—the fact that gave rise to the whole controversy about plausibility—was parallel behavior.[40] The defendant companies all raised their prices at similar points in time.[41] From this observation, the plaintiffs hypothesized that collusion had occurred. The question was whether the Court should entertain that hypothesis as "plausible," thus allowing the case to proceed to discovery.[42]

Writing for the majority, Justice Souter deemed the fact of parallel behavior insufficient, on its own, to make out a claim under § 1 of the Sherman Act.[43] To justify this conclusion, he argued that parallel conduct is "ambigu[ous]," in the sense that it is "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market;"[44] which means that the "allegations of parallel conduct . . . must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as

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occurred."); whereas in the second, they comprise a logical consequent ("If the world has characteristics (*X, Y, Z*), then the alleged facts are sensible."). The animating insight of plausibility analysis is that multiple sets of worldly characteristics—(*X, Y, Z*), but also (*A, B, C*), (*D, E, F*), and so on—render the alleged facts sensible. The question thus becomes, what set of worldly characteristics best predicts the facts. What it means to "best predict the facts" is certainly not self-evident—hence my motivation to unpack it—but it is just as certainly distinct, in basic form, from probability analysis. Whereas the latter asks judges to evaluate the likely veracity of a specific hypothesis, plausibility asks judges to select among multiple hypotheses. *See infra* Part II.B (fleshing out this point in relation to Meier's "factual specificity" theory).

39 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 550–51 (2007).

40 *Id.* at 550.

41 *See id.*

42 *Id.* at 558. The complaint stated the ultimate allegations as follows:

> In the absence of any meaningful competition between the [ILECs] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.

Id. at 551 (alteration in original).

43 *Id.* at 553.

44 *Id.* at 554.

well be independent action."[45] To reach this conclusion, Justice Souter cited three academic studies,[46] as well as numerous court cases reaching the same conclusion with respect to "ambiguity" of parallel conduct.[47] In this light, what he wanted to see from the plaintiffs—but what their complaint, so drafted, was unable to show—was an additional fact to wrench the Court from its equipoise, giving it reason to hypothesize illegal behavior over the "obvious alternative explanation" of independent business decisions.[48]

In other words, on its own, the fact of parallel conduct gives rise to two competing hypotheses about reality. One is that the defendants colluded, just as the plaintiffs claim. The other is that each firm made an independent business decision, and in the aggregate, those independent decisions led to synchronous conduct. The *Twombly* Court dismissed the complaint, ultimately, not because the hypothesis of collusion was impossible—it was precisely possible—but because the plaintiffs offered no free-standing reason to believe that it was more likely than the countervailing hypothesis of legal behavior.[49] Justice Souter was careful to distinguish this standard, however, from a full-blown probability requirement.[50] Within a plausibility regime, Justice Souter made clear that "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and 'that a recovery is very remote and unlikely.'"[51]

Here, the distinction between plausibility and probability, abduction and induction, comes through pristinely, just as it did in the infidelity thought experiment. An allegation can be plausible—which turns on the qualitative question of whether there is a reason to entertain it—without it necessarily being probable—which turns on the quantitative question of how likely it is to hold true. That the same fact can bear on both issues simultaneously does not make the difference between them any less

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[45] *Id.* at 557.

[46] *Id.* at 554, 556 n.4.

[47] *See, e.g., id.* at 553–54 (quoting Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993).

[48] *Id.* at 567. It bears note, as an aside, that disagreement exists about whether independent business decisions that amount to parallel conduct in practice *ought* to be grounds for an antitrust claim. *See* POSNER, *supra* note 26, at 51–100. Judge Posner advocates an "*economic* approach to punishing collusion, both explicit and tacit, in contrast to the traditional legal approach, which is based [solely] on proof of a conspiracy." *Id.* at 69; *see also* Michael D. Blechman, *Conscious Parallelism, Signaling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws*, 24 N.Y.L. SCH. L. REV. 881, 888–90 (1979) (outlining a procedure for dealing with anticompetitive behavior by oligopists).

[49] *Twombly*, 550 U.S. at 566, 570.

[50] *Id.* at 556.

[51] *Id.* (citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

formal or absolute.[52] In my view, it is precisely confusion about this point that has led existing scholarly accounts of plausibility astray. Without an explanation of the difference between plausibility and probability ready-at-hand, commentators have encountered enormous—and understandable—difficulty keeping precise track of the former.[53] Pursuing an elusive monster, even a hero resorts to lunging in the dark.

II. PLAUSIBILITY IN CONCEPT

Burn away the underbrush, and two viable accounts of plausibility emerge. The first, set forth by Alex Steinman, is that plausibility analysis primarily turns on the question of what allegations are "conclusory."[54] The second account, championed by Luke Meier explicitly as an alternative to the "conclusoriness" view, is that plausibility analysis effectively establishes a heightened threshold of factual

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[52] To bring the difference between probability and plausibility into sharper focus, we could distinguish among three epistemic categories: factual allegations, factual hypotheses, and legal conclusions. *See* Meier, *supra* note 15, at 745–48 (distinguishing between two senses of conclusoriness—"legal conclusions," and "conclusory factual allegations"—to make the same point). A factual allegation is an already-known fact that the complaint puts forth; in *Twombly*, the allegation of parallel behavior was a factual allegation. A factual hypothesis is a fact that the complaint suggests is true, but that is not already known; in *Twombly*, the allegation of collusion was a factual hypothesis. And a legal conclusion is a syllogistic claim about the relationship between the facts—both factual allegations and factual hypotheses—and legal harm (*if* allegation *X* true, *then* liability *Y* obtains); in *Twombly*, the legal conclusion was that collusion constituted an unreasonable restraint of trade under § 1 of the Sherman Act.

In many cases, factual hypotheses will be irrelevant because every fact necessary to form the antecedent of the legal conclusion will already appear in the complaint. Such cases are, quite simply, well pled. In a case like *Twombly*, however, factual hypotheses become paramount, since the complaint does not support the key fact—collusion—with direct evidence. Rather, the complaint posited collusion as a factual *hypothesis*, and it asked the Court to stipulate to that hypothesis provisionally, for the sake of letting the litigation go forward. What the *Twombly* Court had to grapple with, therefore, was whether the hypothesis of collusion was worth stipulating in virtue of the factual allegation of parallel conduct. Probability, on the other hand, would have concerned the relationship between the facts—both the factual allegations and the factual hypotheses—and the legal conclusion: whether the former were predictive of the latter in an absolute sense.

[53] Characterizing the existing scholarship this way, I am not trying to suggest that it has been entirely misaimed. Far from it: Many articles have, for example, provided helpful blueprints for working within the confines of plausibility analysis to maximize court access for plaintiffs. *See An Update After* Matrixx, *supra* note 8, at 39–40; *Taming* Twombly, *supra* note 8, at 494–98; Seiner, *supra* note 8, at 211–13 (outlining strategies for getting discrimination claims off the ground in the shadow of *Iqbal*). And many others have made great strides in outlining the empirical contours of plausibility's impact. *See supra* note 9 and accompanying text.

[54] *Supra* note 14. As noted above, scholars other than Steinman have also articulated this view. *See supra* note 14.

specificity.[55] For reasons explored below, I find neither account fully satisfactory.

In broad strokes, Steinman's argument is that although *Twombly* and *Iqbal* adopt the same analytic framework, it is not a single-prong "plausibility" test.[56] Rather, the framework is a *two*-prong test, with "plausibility," despite its namesake, in the subordinate role.[57] The first prong is a so-called "conclusoriness" test, calling on the court to determine what factual allegations are "conclusory," and pruning those allegations away as invalid.[58] Once the conclusory allegations are pruned away, the second prong is to determine whether the complaint's remaining factual allegations give rise to a plausible inference of harm.[59] For Steinman, therefore, plausibility analysis is a secondary inquiry: It only becomes relevant if a complaint fails the court's threshold "conclusoriness" review.[60]

Meier's argument, like Steinman's, subordinates "plausibility" to a more primary form of threshold review. For Meier, however, the latter has to do not with conclusoriness but with factual specificity.[61] He argues that the *Twombly* complaint failed because it did not describe the legally salient "transaction"—the meeting that gave rise to collusion—in sufficient detail.[62] Had the complaint offered a fuller description of the collusive meeting, the case would have gone forward without any need for plausibility analysis, from which Meier infers, following Steinman, that it was not plausibility *per se* that motivated the *Twombly* holding.[63] From there, however, Meier and Steinman sharply part ways. In Meier's view, the *Iqbal* Court's adoption of a "conclusoriness" test was based on a fundamental misreading of *Twombly*.[64] Had the *Iqbal* Court embraced *Twombly*'s *actual* standard—factual specificity—the complaint in *Iqbal* would have survived dismissal, since it described the key "transaction"—Ashcroft and Mueller's discriminatory program—in adequate detail to move forward.[65] In other words, Meier thinks that the *Iqbal* Court's analysis—and Steinman's incorporation of the *Iqbal* Court's analysis—

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55 Meier, *supra* note 15, at 732–33, 739.

56 Steinman, *supra* note 14, at 1314–16, 1318.

57 *Id.* at 1298, 1314.

58 *Id.* at 1314–15.

59 *Id.* at 1316.

60 *Id.* at 1314, 1316, 1318–19.

61 Meier, *supra* note 15, at 738–39.

62 *Id.* at 735, 741.

63 *Id.* at 736–38.

64 *Id.* at 738, 743.

65 *Id.* at 759, 763–64.

rests on a basic interpretive error.[66] Meier thus advocates restoring *Twombly* back to its roots in factual specificity and, as the title of his article implies, overturning *Iqbal*.[67]

On the whole, while Steinman suggests that *Twombly* and *Iqbal* are both formally and functionally continuous,[68] Meier suggests that the two cases are formally discontinuous and so does not reach the question of functional continuity.[69] My claim, in contrast to both of these accounts, is that *Twombly* and *Iqbal* are formally continuous (thus cutting anchor with Meier) but *functionally* discontinuous (thus cutting anchor with Steinman) in virtue of the extra-legal knowledge they incorporate into the pleading process.[70] To fill out my own position, I work through their accounts in turn.

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[66] *Id.* at 762, 764–65.

[67] *Id.* at 759–60, 765.

[68] *See* Steinman, *supra* note 14, at 1314–16 (stating that *Twombly* and *Iqbal* are formally continuous because both implement the "same analytical structure," and they are functionally continuous because in both cases the "key allegations . . . were disregarded because they were conclusory").

[69] *See* Meier, *supra* note 15, at 710–11.

[70] I also have a methodological quibble with Steinman and Meier, orthogonal to the merits, which bears remarking on. Steinman and Meier strike the same basic orientation: They rope off complaints that require plausibility analysis as statistically uncommon, and from there, they offer substitute accounts of what is really at stake in *Twombly* and *Iqbal*. In other words, both articles suggest that in an important bulk of cases, judges will never *reach* the issue of "plausibility," making its salience marginal—or, at least, more marginal than others have suggested—to pretrial practice. *See* Meier, *supra* note 15, at 738–39 (referring to plausibility as a "second (and possibly unnecessary)" inquiry that is "triggered by a lack of factual specificity"); Steinman, *supra* note 14, at 1314–16. A duly taken point, but once plausibility is relegated to the margins, Steinman and Meier spend precious little time unpacking its content. *See, e.g.*, Meier, *supra* note 15, at 740 (arguing that emphasis on plausibility analysis has "obscured" the "true import of [*Twombly*]" and defending the decision to sidestep it on that basis). This elision is not necessarily blameworthy: They plainly had other ambitions. Yet the maneuver also comes at a cost. When all is said and done, it is unclear if Steinman's and Meier's accounts of plausibility—certainly not the entirety of their articles, but their view of plausibility analysis specifically—go beyond the basic proposition that plausibility analysis is not necessary to deal with robustly pled complaints. This proposition is true, of course. But it verges on tautological, and it marshals no response to the central question posed by plausibility analysis, at least in the *Twombly* Court's formulation, which was precisely how to deal with sparsely pled complaints. The risk, in other words, is that Steinman's and Meier's common orientation ends up—perhaps unwittingly—imagining the core problem out of existence. While Steinman's and Meier's articles, taken on their own terms, obviously shed important light on when plausibility analysis is triggered, the reader does not necessarily come away with a richer understanding of what it means for the Court to carry out that analysis. Truth be told, it is not clear that the question of *when*, as distinct from the question of *how*, was a matter of controversy at all.

A. The "Conclusoriness" View

Steinman's article has much to recommend. For one thing, his prescription of "plain pleading" seems to me an exemplary blueprint of how the Supreme Court, should it decide to overturn *Iqbal*, might go about doing so.[71] Nothing in my remarks here intends to undermine that contribution. For another thing, a review of the case law suggests that Steinman's two-prong theory of plausibility—in which judges are called on, first, to trim away conclusory factual allegations, and second, to determine a claim's plausibility in light of the non-conclusory allegations that remain[72]—maps neatly on to the language from Justice Kennedy's opinion in *Iqbal*, as well as the construction of *Iqbal* (and *Twombly*) throughout the federal courts.[73]

But Steinman's "conclusoriness" theory suffers two shortcomings. The first is that on its face, Steinman's account casts plausibility as a more lenient pleading standard than its precursor, making it difficult to harmonize with the empirical reality that *Iqbal* has become, in practice,

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[71] To reduce Steinman's intricate proposal down to one sentence, it would be that plaintiffs would have to sufficiently "identify the real-world events that give rise to liability." Steinman, *supra* note 14, at 1343. This standard is not far off from Meier's "event or transaction" understanding of the plausibility's factual specificity requirement. Meier, *supra* note 15, at 741–43. In fact, Steinman even uses the term "transactional" in his articulation of plain pleading. Steinman, *supra* note 14, at 1339. What, then, divides the two accounts? In Meier's words,

> I believe that Professor Steinman . . . errs in explaining *Iqbal* as a case that fails the "transactional" trigger for plausibility. According to Professor Steinman: "The problem [in *Iqbal*] is not the cursory allegation of discriminatory animus. The problem is the murkiness surrounding what Ashcroft and Mueller actually did *vis-á-vis* Iqbal." This reading of *Iqbal* is incorrect.

Meier, *supra* note 15, at 762 (alteration in original) (citing Steinman, *supra* note 14, at 1336). But the reason that Meier finds this reading of *Iqbal* "incorrect" has nothing to do with its analytical architecture. It is that Meier believes that the *Iqbal* complaint adequately described the relevant transaction—that is, that the *Iqbal* complaint was sufficiently factually specific—whereas Steinman does not. Their disagreement falls exclusively to application, not theory. I leave it to the reader to decide whether this disagreement, and the broader difference between Steinman's and Meier's views on how pleading should work, more resemble mole hills or mountains.

[72] Steinman, *supra* note 14, at 1314.

[73] *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949–50 (2009) (explicitly outlining the view that *Twombly* stood for "two working principles," that resolve practically into two prongs: conclusoriness and plausibility); *see also* Hayden v. Paterson, 594 F.3d 150, 161 (2d Cir. 2010) (deploying *Iqbal* as a two-prong standard); Fowler v. UPMC Shadyside, 578 F.3d 203, 210–11 (3d Cir. 2009) (delineating the relationship between *Twombly* and *Iqbal* and concluding that plausibility analysis consists of two steps).

a mechanism of more stringent review.[74] Second, even if his account can overcome this obstacle, it faces a deeper problem: Conclusoriness cannot be kept analytically separate from plausibility. Despite the *Iqbal* Court's distinction between conclusoriness review and plausibility analysis,[75] there is a strong case to be made that deeming an allegation conclusory just is to say that it is implausible; or, put the other way around, that if someone finds an allegation implausible, it means that he takes the alleged content to be conclusory.

As for the first problem, the key observation is that even under *Conley*'s "no set of facts" regime,[76] conclusory allegations were insufficient to establish a claim under Rule 8.[77] If a complaint simply rehearsed a legal conclusion, in lieu of providing factual evidence to ground that conclusion, the complaint could be dismissed as a matter of law.[78] Conclusoriness review, in short, has always existed. If Steinman's description of plausibility pleading is right—that the standard maintains conclusoriness review intact, while appending a second prong of analysis in the event of conclusoriness review failing—the effect of plausibility analysis is effectively to offer plaintiffs "another shot" at passing complaints through the dismissal stage. In other words, Steinman's view of *Iqbal* predicts that some complaints that fail conclusoriness review will be "revivable," so to speak, by plausibility analysis.[79] Therefore, a judge faithful to Steinman's view should be inclined, on the margins, to

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[74] *Compare* Steinman, *supra* note 14, at 1319 (arguing that "the plausibility aspect of *Twombly* and *Iqbal* makes the pleading standard *more* forgiving, not less"), *with supra* note 9 (describing the empirical reality that 12(b)(6) dismissals have increased since *Iqbal*).

[75] *Iqbal*, 129 S. Ct. at 1949–50.

[76] Conley v. Gibson, 355 U.S. 41, 45–46 (1957).

[77] *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

[78] Steinman, *supra* note 14, at 1319 ("Imagine if the Court had just said: Mere legal conclusions need not be accepted at the pleadings phase; if that eliminates a crucial element of the claim, then the complaint must be dismissed—*even if* other allegations plausibly suggest an entitlement to relief. This would not have been unprecedented. Lower federal appellate courts had long embraced the idea that mere legal conclusions need not be accepted as true. By definition, this approach would be a stricter one than *Iqbal*, because it would remove entirely the possibility that the plausibility inquiry could *salvage* complaints that *otherwise* rested on mere legal conclusions.") (footnote omitted).

[79] To Steinman's credit, he is well aware of this issue. He deems it the "irony" of plausibility pleading, and it is partly in light of such irony that he advocates replacing plausibility with a "plain pleading" standard. Steinman, *supra* note 14, at 1319, 1339. Fair enough. It is one thing to remark on "irony" instrumentally like this, as a foil for normative critique. But what does it say about the descriptive veracity of Steinman's account? His conception of plausibility-as-leniency is out of sync with the reality of federal practice. This means either that Steinman's account is wrong, or, so to speak, that federal practice is wrong. With all respect due Steinman, the former conclusion seems inescapable—not only by reason of critical mass, but also because it is the behavior of federal judges, ultimately, that determines the meaning of *Iqbal*.

dismiss fewer claims. Yet, the empirical reality clearly belies this prediction.[80]

This critique meets with a natural response. Namely, because the plausibility prong offers complaints "another shot," even if they fail conclusoriness review, it stands to reason that it would also embolden judges to more readily diagnose allegations as "conclusory." Put differently, if one step in the two-step inquiry—plausibility—liberalizes pleading, it makes sense that the other prong—conclusoriness—would operate hydraulically to constrain it, resulting in fewer overall claims surviving the 12(b)(6) stage. Not only does this view synchronize with the empirical record, but it also makes a good deal of conceptual sense. Reasonable people will disagree, in any given case, about what counts as a "conclusory" allegation. A judge with preexisting sympathies for a claim will undoubtedly tend to construe threadbare assertions as non-conclusory, while an unsympathetic judge will tend to do just the opposite. It makes sense, therefore, that a standard that makes it easier to rationalize determinations of conclusoriness—by lessening their analytical weight—would encourage unsympathetic judges to cast more allegations aside.

In resolving the first problem, however, this solution leads Steinman's view headlong into a larger trap. Once it is acknowledged that conclusoriness and plausibility operate interdependently, it becomes far more difficult to maintain a "two-step" view of plausibility pleading. The purpose of describing something as consisting of two steps is to suggest that each step operates independently of the other. If that is not true, if instead, the two steps "interact" and define one another's content, then they are not proper steps. Rather, they fuse into a single, unified standard. Concretely, if the imminence of plausibility review makes judges more prone to find specific allegations "conclusory," it suggests that neither "plausibility" nor "conclusoriness" is an intrinsic property of an allegation—since, as intrinsic properties, they would run orthogonal to one another. It suggests, rather, that they are overlapping properties, which provokes the natural question: Are they simply the same property?

I think so. Consider *Twombly*: If the Court were to deem plaintiff's allegation of market-sharing "conclusory," it would mean that the Court is not persuaded that parallel behavior, on its own, suggests market-sharing.[81] This, however, is exactly the same formulation the Court would use to deem the allegation of "market-sharing" implausible. To call an allegation conclusory is to say that it is not plausibly supported

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[80] *See supra* note 9.

[81] *See* Meier, *supra* note 15, at 753.

by the complaint's non-conclusory allegations; it is to call the allegation implausible by another name.[82] Or, to borrow an analogy from Meier, "[t]o state that a conclusory allegation triggers the plausibility analysis . . . is akin to saying that the defendant's negligent behavior triggers an analysis of whether the defendant acted reasonably."[83] The logic is "circular."[84]

On the whole, then, Steinman's view runs into trouble whichever route he takes. If conclusoriness and plausibility are conceptually distinct prongs of analysis, then Steinman must account for the fact that his theory would predict greater leniency in pleading, despite the empirical record suggesting just the opposite. Thus, if conclusoriness and plausibility are conceptually intertwined, then it is unclear what Steinman's account achieves beyond redefining plausibility in terms of conclusoriness. Meanwhile, the core problem persists.[85]

B. The "Factual Specificity" View

What, then, of Meier's view? In an effort to resurrect plausibility from the ashes of conclusoriness, he returns to its source, the *Twombly* opinion. Meier argues that the true core of *Twombly*—what the *Iqbal* Court failed to grasp—is that the complaint did not offer a sufficiently

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[82] Meier develops this argument more extensively. *See id.*

[83] *Id.* at 754.

[84] *Id.* Meier, better Samaritan than I, offers Steinman a readymade way out of this snare. I recommend consulting Meier's own formulation, *id.* at 748, but distilled to its essence, I understand his argument to be as follows. Whereas "conclusory" typically refers to propositions that (a) require an inferential leap, and (b) leave the listener skeptical about the soundness of the inferential leap, "conclusory" could be redefined to refer to any proposition that requires an inferential leap, irrespective of the leap's perceived soundness. On that definition of "conclusory," it is possible to formally distinguish conclusoriness review from plausibility analysis. The problem—for Steinman, I mean—is that this "massaged" definition of "conclusory" sweeps much too broadly. Under its plain terms, any allegation that requires an inferential leap—even of the most everyday and obvious variety—would count as a "conclusory" allegation. First, this seems fatuous—it does not capture what we typically have in mind when using the term "conclusory." Second, even if true, its practical effect would be to read the "conclusoriness" prong out of plausibility analysis entirely, since virtually every complaint would involve copious allegations of a "conclusory" nature. This effect would be to subvert the deeper purpose of Steinman's account, which is precisely to emphasize the gate-keeping role that conclusoriness analysis plays. *See supra* note 70; *cf.* Donald J. Kochan, *While Effusive, "Conclusory" Is Still Quite Elusive: The Story of a Word,* Iqbal, *and a Perplexing Lexical Inquiry of Supreme Importance,* 73 U. PITT. L. REV. 215, 304–05, 307 (2011) (outlining the tremendous confusion that "conclusory," an ostensible term of art, has engendered in the federal courts).

[85] To reiterate, I am only talking about Steinman's descriptive account of plausibility. His proposed solution, "plain pleading," seems to me a sound contender of how pleading ought to work. *See supra* note 71 and accompanying text.

detailed account of the "transaction" that gave rise to the § 1 claim.[86] Had the complaint alleged more details about the collusion, it would have survived dismissal.[87] Therefore, Meier argues, when a judge dismisses a complaint as implausible, it must mean that the complaint did not provide a sufficiently detailed account of the alleged violation.[88]

Meier provides a hypothetical to gloss this view. In the original complaint, Mr. Twombly offered the following pleading in support of his allegation of market-sharing:

> Plaintiffs allege upon information and belief that [the defendants] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.[89]

On its own, this pleading was held insufficient to establish a claim under Rule 8.[90] In response, Meier invites us to imagine a slightly modified pleading, which, holding everything else constant, incorporates three further allegations:

> 1. On February 6, 1996, all of the defendants named in this lawsuit met at the Marriot Hotel in Waco, Texas.
>
> 2. During this meeting, defendants entered into an agreement to engage in parallel business behavior.
>
> 3. The agreement was memorialized in a document that was drafted on the evening of February 16, although no formal contract was ever drafted.[91]

Meier takes it as "beyond assailment" that a complaint including these allegations would have survived the 12(b)(6) stage.[92] If that is true, he believes it follows that the real problem in *Twombly* is not plausibility but factual specificity.[93] To boil his logic down to its essence: Because greater factual specificity would have cured the complaint in *Twombly*, we can conclude that factual specificity is the fulcrum of plausibility pleading.

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86 Meier, *supra* note 15, at 728–30, 741.

87 *Id.* at 729–30.

88 *Id.* at 734; *see also* Bradley Scott Shannon, *I Have Federal Pleading All Figured Out*, 61 CASE W. RES. L. REV. 453, 455 (2010) ("The word 'plausible' as used by the Supreme Court in connection with a plaintiff's allegations cannot be construed as meaning 'believable.' Rather, it must refer only to the factual sufficiency of a complaint.").

89 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 551 (2007).

90 *Id.* at 556–57.

91 Meier, *supra* note 15, at 729.

92 *Id.* at 729.

93 *Id.* at 730.

Herein lies the rub: Granting Meier that his premise stands beyond reproach—his hypothetical complaint indeed would have survived dismissal—his inference does not necessarily follow. The "factual specificity" theory of plausibility is one possible inference from Meier's premise.[94] But it is not the only one. Another possible inference would be that Meier's imaginary allegations are curative because they would allow the Court to differentiate between two competing hypotheses about the observation of parallel behavior: First, the hypothesis that collusion, not independent business decisions, best explain the parallel behavior; and second, just the inverse.

If we draw the latter inference from Meier's hypothetical, then the theory of plausibility changes considerably. Now, the important effect of Meier's additions is not, as he maintains, that they specify the claim of harm by elucidating the transaction on which a § 1 claim rests.[95] It is, rather, that they address the "ambiguity" inherent in the fact of parallel conduct, as Justice Souter refers to it, by giving the Court grounds for believing that the parallel conduct is better explained by the presence of illegal behavior than it is by the absence of legal behavior.[96] In other words, Meier's imaginary add-on facts disrupt the Court's equipoise, providing an independent rationale for believing that the parallel conduct is more readily ascribed to collusion than to rational market behavior.[97]

There are two reasons to favor my inference from Meier's hypothetical over Meier's own. The first is that Meier's theory of plausibility is unresponsive to the deeper purpose of plausibility pleading, which is not to make plaintiffs "prove their case," or even to approximate proving their case, but rather, to make plaintiffs shoulder the burden of persuading the court that the case is worth *trying* to prove.[98] In this respect, Meier understands the burden of plausibility in far too strict of terms. It comes as little surprise, or ought to, that a complaint containing the facts that Meier imagines—nearly all the facts necessary to prove a § 1 claim in advance of discovery—can comfortably

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[94] *Id.* at 711, 728.

[95] *Id.* at 729–30.

[96] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554–57 (2007).

[97] To be clear, Meier's hypothetical additions do further specify the allegation in question; I am not saying otherwise. What I am contesting is whether that is the most important aspect of what they do. I am asking—in a rather poetic twist—about the most plausible way to understand the corrective force of Meier's imaginary facts.

[98] Professor Hartnett has articulated a helpful distinction along these lines: the plausibility of *winning* on the merits versus the plausibility of discovery leading to evidence that will be *helpful* at the merits stage. *Taming* Twombly, *supra* note 8, at 506–07.

survive dismissal. In the fantasy-world where plaintiffs have access to such facts before discovery, Meier is, of course, right: There is no pleading issue. I daresay, however, that commentators who worry about the constrictive effects of plausibility analysis will find cold comfort in this assurance, since the normative danger of plausibility is precisely that it will force plaintiffs to "make their case" without the benefit of the legal tool—discovery—designed to facilitate that process.[99] Meier's hypothetical, far from *alleviating* anxiety about plaintiffs' inability to obtain relevant factual material without discovery, actively provokes it. What Meier imagines are exactly the sort of facts—details about closed-door transactions likely to be in the exclusive possession of the opposing party—that require discovery most urgently.[100]

Beyond this, there is a second, deeper reason to favor my inference from Meier's hypothetical over his own: the plain language of Justice Souter's *Twombly* opinion. Eyebrow-raising caveats preface Meier's discussion. He claims (1) that Justice Souter's analysis of factual specificity was, in no uncertain terms, "hidden in the opinion"; (2) that because of this, the Court's identification of "factual specificity as the underlying problem" was "not as explicit as it could have been"; and (3) that even after factual specificity emerges as the important metric, the whole business remains "somewhat muddled" by the Court's inability to decide, as a starting proposition, whether the complaint had met the notice requirement of Rule 8.[101] Somewhat muddled, indeed.[102] In fact, apart from a lone footnote discussing the notice requirements of Form 9, the *Twombly* Court gave absolutely no indication that factual specificity was the issue on the table.[103]

In fact, it seems to me that Justice Souter was quite clear about the shortcoming of the complaint in *Twombly*—and clear, as well, about the goal of plausibility analysis.[104] The *Twombly* opinion might be accused of a certain artlessness—it definitely could have been clearer about how plausibility analysis is supposed to *implement* its goal. Meier's error,

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[99] *See, e.g.*, Spencer, *supra* note 8, at 479, 481–82; *see also* Miller, *supra* note 8, at 14, 20–22, 47.

[100] Meier's hypothetical (qua hypothetical) could be reformulated, of course, but the problem will persist. For the point cuts deep: It is precisely concern over the Court's use of specificity that has worried commentators to date, because it is precisely the more granular facts—that is, the facts that one would actually need to press forward with litigation—that are unlikely to be known. The problem is woven into the very fabric of his theory.

[101] Meier, *supra* note 15, at 730–31.

[102] This framing is rather convenient for Meier's position, since it makes the near-invisibility of the Court's remarks on factual specificity an evidentiary *strength* of his claim rather than a weakness, as it would customarily be.

[103] *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 565 n.10 (2007).

[104] *Id.* at 556–57, 559, 564–66.

however, reaches something more fundamental; he misconstrues the goal of plausibility analysis entirely. That goal, as Justice Souter articulated it, is to help courts negotiate between competing factual hypotheses, which plausibility analysis accomplishes by setting the following default rule: A complaint should only be allowed to go forward if its hypothesis of illegal behavior is more plausible than a readily imaginable hypothesis of legal behavior, and "ties"—cases in which the hypothesis of illegal behavior and the hypothesis of legal behavior are equally likely—favor the defendant.[105]

Here, the descriptive problem with Meier's account becomes achingly clear: Notwithstanding Meier's effort to reconstruct plausibility in terms of factual specificity, there is no necessary connection between (a) the materials that plaintiffs might adduce to help the court negotiate between factual hypotheses, and (b) the "event or transaction" that gives rise to competing hypotheses in the first place. In context, there *might* be a connection between them—a possibility exemplified by Meier's hypothetical—but there does not *have* to be one. It is easy, for example, to imagine additional material that is completely unrelated to the underlying "event or transaction," and so performs no "specification" function, but that nevertheless persuades the court that it is reasonable to hypothesize illegal behavior—for example, an alternative economic theory debunking the proposition that independent business decisions tend to converge in an oligopolistic market; a statement from the CEO of one of the companies that he "does not believe in antitrust law"; or documentation about a spate of collusion schemes that had been recently discovered in similar industries. These additional materials, despite providing no further gloss on the alleged transaction, would nonetheless jostle the court in favor of one hypothesis over the other—that of illegal behavior—and thereby satisfy the burden of plausibility as Justice Souter articulated it.

Importantly, the converse claim also holds: There are facts that would further specify the alleged transaction—*pace* Meier's theory—but that would nevertheless fail to resolve the ambiguity of parallel conduct. Suppose the complaint had outlined the terms of the alleged collusion in granular detail. For example, suppose the plaintiffs had alleged: "Defendant Bell Atlantic was given exclusive right to the northeast corridor, while AT&T was given an equivalent right to the southwestern United States." That this would make the alleged transaction more specific is surely beyond dispute. But would it resolve Justice Souter's central question? I think not, since more information about the specific contours of the hypothetical market-sharing scheme does nothing to

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[105] *See id.* at 554–57.

convince the reader that the scheme is *more than hypothetical*. By specifying the terms of the alleged market-sharing agreement, all the plaintiffs would be showing is that the hypothesis of collusion is a refined hypothesis; they would not be showing that the hypothesis of collusion is more likely than the countervailing hypothesis of rational market behavior.[106] Ultimately, as much functional overlap as might exist between (a) the domain of additional facts that provide further detail about an alleged transaction, and (b) the domain of additional materials that can help the court to "disambiguate" factual hypotheses,

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[106] In fact, Meier's reading of *Iqbal* puts this exact ambiguity on display. Meier argues that *Iqbal* should be overturned because the underlying complaint "was much more specific about Ashcroft and Mueller's involvement in the restrictive confinement policy than was *Twombly*'s allegation of conspiracy, which did not detail how the alleged agreement was reached, where it was done, by whom, and when." Meier, *supra* note 15, at 764. To support his view, Meier points to the fact that in the plaintiff's complaint, (a) the detention program was explained at length, and (b) it was alleged that Ashcroft and Mueller engaged in "discussions in the weeks after September 11, 2001." *Id.* at 763 (quoting First Amended Complaint and Jury Demand at 13–14, Elmaghraby v. Aschcroft, No. 04 CV 1809 (JG)(JA), 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005), *aff'd in part, rev'd in part, and remanded sub nom.* Iqbal v. Hasty, 490 F.3d 143, 147 (2d Cir. 2007)). But can this really be the distinguishing factor? The description of the detention program simply does not go to the issue of Ashcroft and Mueller's supervisory liability; it is, ironically enough, a perfect example of the kind of fact that further specifies the allegation, but that is irrelevant to the abductive question of whether that allegation is plausible.

Zooming out, this points to a larger possible pitfall of Meier's argument: I am skeptical of this claim that the *Iqbal* complaint would have satisfied "factual specificity" review. Putting the allegations regarding the details of the detention program to one side, the remaining allegation—that Ashcroft and Mueller engaged in "discussions"—hardly seems to specify what role Ashcroft and Mueller played in designing and implementing the detention policy, much less why they are liable under the *Iqbal* Court's heightened theory of supervisory liability in this setting. For an excellent summary and critique of how *Iqbal* reshaped supervisory liability in the context of *Bivens* claims, see Rosalie Berger Levinson, *Who Will Supervise the Supervisors? Establishing Liability for Failure to Train, Supervise, or Discipline Subordinates in a Post-*Iqbal/Connick *World*, 47 HARV. C.R.-C.L. L. REV. 273, 285–89, 291–92 (2012). Is the allegation of "discussions" during "the weeks after September 11, 2001," really more specific than alleging, say, that "Ashcroft and Mueller designed the policy during the relevant time period?" Not self-evidently—and the latter would plainly fail Meier's specificity test, since it nakedly rehearses an element of the supervisory liability claim without glossing its factual basis. Thus, might the discerning reader wonder: How else besides by having "discussions" could Ashcroft and Mueller have formulated the disputed policy, and when else would it have taken place except for "the weeks after September 11, 2011"? The analogy back to *Twombly* is clear: If the plaintiffs had simply rewritten the complaint to "specify" that the alleged collusion resulted from "discussions" among the defendants during a general time frame, that would not have sufficed, even on Meier's own theory. To my ear, then, Meier's construction of *Iqbal* sounds like a *reductio* argument against his position, not an affirmative argument in its favor.

the domains are formally distinct. And it is on the latter, not the former, that plausibility determinations rest.[107]

C. The Missing Keystone: Abduction

Ultimately, what is absent in Meier's account—and in Steinman's, though less glaringly—is the epistemic distinction between induction and abduction. Induction, we saw above, is the process of adducing factual content to prove a theory.[108] Its goal is to demonstrate truth-value as exhaustively as the relevant evidentiary constraints allow.[109] Meier's factual specificity theory imagines plausibility as a kind of "induction-lite" standard.[110] On his view, the burden that *Twombly* imposes on plaintiffs is inductive in nature, requiring them, if not to *prove* their case at the pretrial stage, at least partially to build it.[111]

The problem with this account is that plausibility, as outlined in *Twombly*, is not geared toward induction but abduction, the process of formulating an operating hypothesis.[112] The goal of abduction, by contrast to induction, is not to demonstrate (or even to suggest) the actual truth-value of a given claim. It is, rather, to ask what claims, in the first place, have possible truth-values worth considering.[113] Meier's factual specificity theory would take the posited facts as a premise and ask about the conclusion to which they lead; and if they do not lead to a (probabilistic) conclusion of legal harm, the corrective action is to provide

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[107] Professor Hartnett makes a similar point about the relationship between specificity and plausibility:

> It is not simply that specific allegations can make an inference less plausible, but that specificity has no necessary connection to plausibility of inference. When assessing the plausibility of an inference, we are asking, "What reason is there to draw that conclusion?" Giving more specifics about the conclusion may be completely unresponsive, while a responsive answer may be no more specific.

Taming Twombly, *supra* note 8, at 496.

[108] *See supra* note 21.

[109] *See* Dan Hunter, *No Wilderness of Single Instances: Inductive Inference in Law*, 48 J. LEGAL EDUC. 365, 369 (1998) (explaining the way in which induction works).

[110] *See* Meier, *supra* note 15, at 739. Specifically, under Meier's theory, "the inference as to whether the event occurred is based on other allegations contained in the complaint. Thus: Y, Z → X?" *Id.*

[111] *See id.* at 741.

[112] "Abduction is a retroactive attempt to account for a past observation. It is post hoc explanation." Jeanne L. Schroeder, *Just So Stories: Posnerian Methodology*, 22 CARDOZO L. REV. 351, 404 (2001).

[113] *Id.* at 404–05 (describing the difference between induction, "show[ing] that something *actually* is operative [i.e., actuality]," and abduction, "suggest[ing] that something *may be* [i.e., possibility]") (second and fourth alterations in original).

more facts.[114] Justice Souter's model, by contrast, takes the posited facts as a conclusion and asks what hypothesis would *lead to them*; and if multiple hypotheses stand in contention, the corrective action is to shed light on the surrounding context in a way that pushes the court to embrace one hypothesis over another.[115] Conceptually, then, the two models are not simply distinct. They pull in opposite directions.[116]

Justice Souter's language of "ambiguity" helps to crystallize the point.[117] His unease at allowing the complaint in *Twombly* to go forward, as written, was that parallel conduct is "ambiguous" in the sense of being "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market."[118] If "ambiguity" is Justice Souter's diagnosis of the complaint's weakness, the corresponding aim of plausibility must be to "disambiguate" the fact of parallel conduct—a formulation that already betrays the underpinnings of abduction. Notice what Justice Souter's formulation does not suggest. His point is not that plaintiff's claim is ambiguous in the sense that its legal merit is unclear. Of course, its legal merit is unclear—as with any case, the allegation in *Twombly* may or may not describe an event that actually happened—but the more perspicuous word for that condition would be "indeterminate." Adopting the language of ambiguity, Justice Souter was making a different point: The fact of parallel conduct is ambiguous in the sense that it opens up onto two different hypothetical worlds, one in which defendants colluded and *that* is why they acted in parallel, and the other in which defendants pursued independent business decisions and *that* is why they manifested parallel action.[119]

These hypothesized worlds are neither true nor false; they have no truth-value whatsoever. They are projections based on an initial premise, and deciding which among them to entertain as the most plausible does not commit one to taking any view of their factual merits. It simply allows the process of exploring that content to move forward. That is the central question of plausibility analysis. It involves selecting from among a set of competing hypotheses—abduction—based on what one thinks is true of the world in an everyday sense. It is to the practical implications of this process that we now turn.

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[114] *See* Meier, *supra* note 15, at 739.

[115] *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007).

[116] For a more analytically involved discussion of this point, see *Taming* Twombly, *supra* note 8, at 483.

[117] *Twombly*, 550 U.S. at 554.

[118] *Id.*

[119] *Id.*

III. PLAUSIBILITY IN PRACTICE

The *Twombly* Court, as I have now reiterated multiple times, rested its plausibility determination on lessons drawn from economic scholarship.[120] If this use of inter-disciplinary expert knowledge was normatively sound, as I believe it was,[121] it is important to be clear about why this is so. The reason is not that expert knowledge is infallible. To the contrary, expertise is unruly. New paradigms continually supplant the old,[122] and at any given moment, different experts in the same field may hold multiple, competing views—an observation no less true of economics than any other discipline.

Consider *California Dental Association v. FTC*, which predated *Twombly* by eight years but directly adumbrated its logic.[123] In *California Dental*, the Court reversed the FTC's determination that a

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[120] This is not unique to *Twombly*. Just as one might expect, it is clearly discernible in antitrust case law post-*Twombly*—but it is even apparent in cases that predate *Twombly*. For example, in *Jefferson Parish Hospital District No. 2 v. Hyde*, the Court abandoned the longstanding *per se* prohibition against "tying" arrangements—the bundling together of two distinct products—in favor of a more lenient "market power" test; the rationale being that although tying arrangements often have an anticompetitive effect, they can also sometimes have a pro-competitive effect. 466 U.S. 2, 14–15 (1984); *see* Erik Hovenkamp & Herbert Hovenkamp, *Tying Arrangements and Antitrust Harm*, 52 ARIZ. L. REV. 925, 941, 944 (2010) (arguing that when tying allows a producer to sell primary goods at a lower rate, consumer welfare can increase rather than decrease). In this sense, the Court found that the mere fact of tying is ambiguous in the same sense as the mere fact of parallel conduct in *Twombly*; thus, it was insufficient to make out a § 1 claim on its own. *See Hyde*, 466 U.S. at 31. This conclusion was a blend of economic theory about firms and distinct economic theory about consumers, the latter of which was rather off the cuff. *See id.* at 30 ("[No] patient who was sophisticated enough to know the difference between two anesthesiologists was not also able to go to a hospital that would provide him with the anesthesiologist of his choice.").

Another example is *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, in which the Court held that the fact of synchronized price decreases among a group of television companies was insufficient, on its own, to make out a predatory pricing claim under § 1. 475 U.S. 574, 583 (1986). The *Matsushita* Court's logic directly adumbrated that of *Twombly*: It found plaintiffs' claim of collusion unjustified absent a specific showing of agreement, and it construed plaintiffs' contention that defendants intended to recuperate lost profits via future price-hikes as too "speculative" to stipulate. *Id.* at 588–89, 595–97 (citing Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 268 (1981)). Indeed, somewhat amusingly, the record in *Matsushita* brought to light that even after the alleged "predation" scheme subsided, the largest market share of American television sales still belonged to plaintiff firms, not to any of the defendants. *Id.* at 591.

[121] More than that, even: I take it as a model of well-executed plausibility analysis. *Infra* Part IV.

[122] *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 12 (3d ed. 1996).

[123] *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 780–81 (1999).

dental group was prohibited from dictating the parameters of advertising among its member dentists.[124] The FTC had reasoned that such parameters had an anti-competitive effect.[125] In response, the Court held that the FTC "fail[ed] to present a situation in which the likelihood of anticompetitive effects is comparably obvious," which meant that although it was *possible* that the advertising parameters were like general "restrictions on advertis[ing] . . . price and quality[,]" in violation of § 1, economic theory rendered it more plausible that the parameters would either have a "procompetitive effect, or . . . no effect at all on competition."[126]

Writing for the dissent in *California Dental*, Justice Breyer argued that the Court ought to defer to the FTC's finding of violation.[127] In his words, "The problem with . . . argument[s] [about possible pro-competitive effects] is an empirical one. Notwithstanding its theoretical plausibility, the record does not bear out" the claim that the California Dental Association "had to prevent dentists from engaging in the kind of truthful, nondeceptive advertising that it banned in order [to] effectively . . . stop dentists from making [misleading] claims."[128] The question, in Justice Breyer's view, was one of economic reality, not economic theory; and as for the latter, the Court was not in the best position to judge.[129]

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[124] *Id.* at 762–65.

[125] *Id.* at 762.

[126] *Id.* at 771. Justice Souter, writing for the Court, offered a few possibilities of what these pro-competitive effects might be. For example, if it is assumed that the average consumer knows very little about the intricacies of dental service, uniform disclosure might help to mitigate this information asymmetry. *See id.* at 771–72 (citing George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 495 (1970)). Or, if it is assumed that patients derive value from the relational aspect of dentistry services, for example, maintaining the same dentist over time, it is conceivable that limiting predatory advertising among dentists actually carries a consumer benefit. *Id.* at 772–73 (citing Robert G. Evans, *Professionals and the Production Function: Can Competition Policy Improve Efficiency in the Licensed Professions?*, *in* OCCUPATIONAL LICENSURE AND REGULATION 225, 235–36 (Simon Rottenberg ed., 1980) (describing why professional service sectors, with their relational quality, are out of sync with traditional conceptions of competition)).

[127] *See id.* at 786 (Breyer, J., dissenting).

[128] *Id.* at 787.

[129] *Id.* at 786–87, 791. For a similar, if analytically more intricate, example of economic theory and empirical economic analysis coming into collision, see *Eastman Kodak Co. v. Image Technical Services, Inc.*, which dealt with a tying claim against *Eastman*, alleging that their policy of forcing consumers to use Kodak parts and services on Kodak cameras violated § 1 of the Sherman Act. 504 U.S. 451, 459 (1992). The *Eastman* majority took the view that the central question was a factual one fit for trial. It concluded this on the basis of empirical evidence that consumers do not always understand how secondary markets work when they purchase goods in primary markets; on this basis, the Court

In a case like *California Dental*, the status of expert knowledge was highly indeterminate. Does it illuminate or obscure? The majority and dissent fiercely disagreed, offering no reason to think that exploring other expert materials would clarify the question. Yet acknowledging the indeterminacy of expert knowledge should not cast a pall over plausibility analysis. The variegation of expert knowledge, far from rendering the process hopeless, is precisely what propels and mediates abduction. In its best form, plausibility analysis unfolds as a debate about the background conditions of the world, accountable to neutral and objective sources of knowledge. That reasonable people disagree about those sources, or about what those sources imply, no more undermines plausibility analysis than competing theories about monopolistic behavior undermine economics, or competing theories about the nature of space-time undermine physics. In all these examples, what ensures the coherence and rigor of the inquiry is not consensus about truth-claims. It is, rather, good faith on the part of all parties involved as they work toward such consensus. In the meantime, disagreements are sure to be persistent, as they have always been, as to matters both lofty and mundane.[130]

If *Twombly* is a paradigm case of plausibility analysis hinged on expert knowledge, what is *Iqbal*? Scholarship to date has grouped the two together.[131] But the epistemic account of plausibility advanced in the last two Parts makes clear the two cases are better understood diametrically. The core factual allegation in *Iqbal* is that, directly after 9/11, the FBI, in tandem with a host of other agencies, "arrested and detained thousands of Arab Muslim men as part of its investigation," and that such detainees were held in "highly restrictive conditions of confinement until they were 'cleared' by the FBI."[132] From this allegation, the complaint goes on to hypothesize that the detention program was designed to be intentionally discriminatory against Arab

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inferred that even absent a showing of market power in the primary goods market—the gold standard of tying claims under *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 18 (1984)—it was still possible, as a matter of fact, that consumers were being de facto coerced. *Eastman*, 504 U.S. at 473, 477–78. In dissent, Justice Scalia disagreed vociferously with this view, because he found it unreasonable, as a matter of theory, that coercion was taking place in the absence of market power in the primary goods market. *Id.* at 498–99 (Scalia, J., dissenting). In Justice Scalia's view, it was necessarily true, as a matter of economic theory, that the cost of goods in a secondary market will be incorporated into the costs of goods in the primary market. *Id.* at 495–96.

[130] That disagreement exists is surely no reason, however, to become pessimistic about plausibility. It is a feature of interpretation in general. *See generally* Petroski, *supra* note 7, at 417–18.

[131] *See, e.g.*, Miller, *supra* note 8, at 17 (discussing *Twombly* and *Iqbal* as a unit).

[132] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1944 (2009).

Muslims,[133] which, if true, would mean that the detainees' constitutional rights had been violated. Such was the basis of their *Bivens* action.[134]

Writing for the Court, Justice Kennedy viewed this situation as analogous to the situation in *Twombly*: The plaintiff was relying on a factual hypothesis, rather than a direct allegation, to sustain his legal theory, and the question was whether his factual hypothesis was more plausible than the countervailing hypothesis of legal behavior.[135] What Justice Kennedy understood the case's resolution to turn on, in other words, is exactly the same process of abductive hypothesis-selection on which *Twombly* turned.[136] And just as in *Twombly*, there were two relevant hypotheses in *Iqbal*. The first was Mr. Iqbal's hypothesis that various high-ranking officials in the U.S. government, including Robert Mueller and John Ashcroft, designed a post-9/11 law enforcement program that consciously sought to detain Arab Muslims.[137] The second, countervailing hypothesis was that Mueller, Ashcroft, et al. had simply enacted a legitimate law enforcement program, designed to arrest individuals who might be linked to 9/11, and that this program had "produce[d] a disparate, incidental impact on Arab Muslims."[138]

Justice Kennedy found the latter hypothesis more plausible.[139] Nothing in the complaint sufficed to persuade him (or to persuade the other conservative Justices) that it was more likely that race-based detentions, as opposed to race-neutral detentions with a disparate impact on Arab Muslims, had given rise to Mr. Iqbal's factual allegations.[140] In Justice Kennedy's words, "All [Iqbal's complaint] plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared."[141] And this, of course, is no foundation for liability.

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[133] *Id.*

[134] *Id.* at 1943 (citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971)).

[135] *Id.* at 1950–51.

[136] *See id.*

[137] *Id.* at 1951.

[138] *Id.*

[139] *Id.* at 1951–52.

[140] *Id.* at 1952.

[141] *Id.* Because he had authored the *Twombly* opinion just two years prior, Justice Souter's dissent from this holding displayed an added layer of chagrin. He distinguished the cases as follows: Whereas in *Twombly*, "[t]he difficulty was that the conduct alleged was 'consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy[,]'" *id.* at 1959 (Souter, J., dissenting) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554 (2007)), in *Iqbal*, "the allegations in the complaint are . . . [not] consistent with legal conduct. The complaint alleges that FBI officials discriminated

Fair enough. But the puzzle is this: What did Justice Kennedy rely on to come to this conclusion? What data did he use to carry out the hypothesis-selection required by plausibility analysis? In *Twombly*, we know that Justice Souter relied on economic theory derived from expert assessments—indeed, expert consensus—about the behavior of firms within an oligopolistic marketplace.[142] In *Iqbal*, by contrast, Justice Kennedy does not cite a *single source* to justify his impression that it is comparatively more likely that high-ranking government officials pursued a race-neutral detention program than that the same officials decided to systematically lock up Arab Muslims on account of their ethnicity.[143]

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against Iqbal solely on account of his race, religion, and national origin." *Id.* at 1960. This is not quite right, and the subtlety of its wrongness has likely contributed to the conceptual confusion about the relationship between *Twombly* and *Iqbal*. Justice Souter is correct, of course, that discrimination alleged in the *Iqbal* complaint is illegal on its face. But that is true, too, of the market sharing alleged in the *Twombly* complaint. The whole point of plausibility analysis is that when a factual hypothesis interpolates between a factual allegation and a legal conclusion, the legal conclusion cannot be stipulated to automatically; instead, the factual hypothesis must be interrogated for its likelihood. So, Justice Souter is wrong, in my view, when he writes,

> In *Twombly*, ... [t]he difficulty was that the conduct alleged was "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strateg[ies] . . . ." [In *Iqbal*], by contrast, the allegations in the complaint are neither confined to naked legal conclusions nor consistent with legal conduct . . . . Iqbal's complaint therefore contains "enough facts to state a claim to relief that is plausible on its face."

Id. at 1959–60. The same basic condition—competing factual hypotheses—obtained in *Iqbal* as obtained in *Twombly*. The actual source of Justice Souter's disagreement is that he draws a different abductive conclusion than the majority about the comparative likelihood of race-based detention vis-à-vis race-neutral detention. But this is a grievance on the merits, entirely different from saying that the *Iqbal* Court has misapplied *Twombly*'s analytic framework.

[142] *See Twombly*, 550 U.S. at 555–59. Justice Souter cites mostly to previous judicial opinions, but those opinions, too, contain citations—many of which are empirical and theoretical economic studies of firm behavior in oligopolistic markets.

[143] *See Iqbal*, 129 S. Ct. at 1950–52. In some sense, the reality is even grimmer than this lets on. Although the Court fails to furnish any evidence for its understanding of the relevant context (the way high-ranking officials tend to behave)—perhaps an inherent red flag—it is not necessarily the case that the absence of evidence renders a plausibility determination unlikely to be sound. Everyday examples of plausibility make it clear, I think, that lack of rigor and improbability do not always stem from the same bud. For example, when it comes to a question like whether my spouse is cheating on me, my intuitive sense is probably worth more—much more—than any source of "objective" corroborating evidence. *Infra* Part 206. In the context of *Iqbal*, the trouble is that beyond the sheer absence of evidence—even assuming we can construe that fact as neutral—there is reason to believe that decisions implicating national security are among the most prone toward cognitive biases in favor of deference to the political branches. *See* Peter Margulies, *Judging Myopia in Hindsight:* Bivens *Actions, National Security Decisions, and the Rule of Law*, 96 IOWA L. REV. 195, 197–98 (2010) (profiling the ways in which judgment goes awry

This is not to say that Justice Kennedy's determination is wrong—only that it is unjustified.[144] I mean this adjective literally, not pejoratively, for it is not clear, even in theory, that Justice Kennedy *could* justify his hypothesis-selection. What would it mean to do so? What source material would he draw on? Unlike the question of how firms behave in an oligopolistic environment, there are no rigorous studies about the question of how high-ranking government officials behave in the face of national disaster. Did they flout the law or conform to its letter? Did they react the way many ordinary Americans did, blaming a large swath of people, based on race and religion, for a heinous act carried out by a small minority? Or, did they remain steadfast, remembering the oath of constitutional fidelity that they took when they entered office, not letting race guide their decisions, no matter how pressing the temptation to do otherwise?[145]

Two things are clear. First, these are precisely the type of questions that the Justices had to engage with—if only tacitly—to decide which hypothesis, conscious discrimination or incidental disparity, was more plausible. Second, these questions are not empirical or falsifiable in the manner as *Twombly*'s core question of market dynamics. The question of how John Ashcroft and Eric Mueller likely behaved intersects many disciplines at once. It certainly involves political philosophy and what it means for people with power to wield it legitimately. It also involves psychology, in exploring whether power is corrupting and, if so, in what sense. It may also involve personal character; it would not be surprising if some members of the Supreme Court knew John Ashcroft or Eric

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in the context of national security disputes); *cf.* Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 854 (2009) (discussing the role of cognitive heuristics in interpretation in general). At an epistemic level, this line of thought is far more damning to the *Iqbal* Court's position than the mere absence of affirmative evidence.

[144] *See Iqbal*, 129 S. Ct. at 1951–52. It is amusing—darkly amusing—that Justice Kennedy draws on an entirely conclusory premise to dismiss what he takes to be plaintiff's conclusory claim. Of course, even if Justice Kennedy is correct that high-ranking government officials tend to enact constitutional policies of their own accord, this behavior must be due, at least partially, to the ever-present possibility of judicial review. By relying on a presumed default of governmental responsibility, Justice Kennedy is trying to justify a circumscription of constitutional suits by recourse to a state of affairs brought about at least partially *by* such suits. This is a bit analytically tasteless, if not distasteful in a deeper sense.

[145] I am trying to present this as neutrally and humanely as possible. No matter how repulsive we find the prospect of high-ranking officials reverting to racism and discrimination in response to 9/11, it is quite understandable. It is a normal human response. And the crown looms heavy. Of course, that it is understandable does not vindicate the decision at a constitutional level. But we do a disservice to the situation—a clear *ex post* fallacy—to treat the decision as any species of easy.

Mueller personally, a fact that would surely color one's viewpoint. Whatever the question of high-ranking officialdom precisely involves, the point is that it can hardly be isolated and addressed in the way the *Twomby* Court was able to isolate and address the question of how businesses behave in oligopolistic markets.[146]

This dynamic, moreover, is not unique to *Iqbal*. Nor is it unique to *Bivens* actions against high-ranking government officials, although there has certainly been no shortage of such actions since *Iqbal* came down, many of a politically disturbing character.[147] No, the implications reach more broadly, to every instance when the court confronts vexing questions about how government officials tend to behave. In *Haley v. City of Boston*, for example, the First Circuit had to decide whether

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[146] A colloquy from the *Iqbal* oral argument exemplified this point. Counsel for Mr. Iqbal tried to distinguish *Iqbal* from *Twombly* on the basis that in the latter, there were "two possibilities," leaving the court in "equipoise," whereas in *Iqbal*, there was no hypothesis of legal behavior that could accommodate the underlying allegation. To this Justice Scalia responds as follows:

> Well, there are two possibilities here. Number one is the possibility that there was a general policy adopted by the high-level officials which was perfectly valid and that whatever distortions you are complaining about was in the implementation by lower level officials. That's one possibility.
>
> The other possibility, which seems to me much less plausible, is that the—the high-level officials themselves directed these—these unconstitutional and unlawful acts.

Transcript of Oral Argument at 33, Ashcroft v. Iqbal, 556 U.S. 662 (2009) (No. 07-1015). Justice Scalia offers no evidence for this ad hoc plausibility determination, and in the context of oral argument, we would hardly expect him to. But the point goes deeper: Even if Justice Scalia were pressed to offer evidence for his view, it is unclear what form that evidence would possibly take. The ad hoc nature of the determination could be said, in other words, to reflect a deeper truth.

[147] For example, in *Vance v. Rumsfeld*, the Seventh Circuit construed as plausible plaintiff's allegation that Donald Rumsfeld personally oversaw the torture of U.S. contractors in Iraq, in response to suspicion that they had been flipped as enemy spies. 653 F.3d 591, 603–04 (7th Cir. 2011), *rev'd en banc*, 701 F.3d 193, 199 (7th Cir. 2012) (finding that "special factors" precluded the *Bivens* action from going forward); *see also* Vance v. Rumsfeld, 694 F. Supp. 2d 957, 961 (N.D. Ill. 2010) ("When a plaintiff presents well-pleaded factual allegations sufficient to raise a right to relief above a speculative level, that plaintiff is entitled to have his claim survive a motion to dismiss even if one of the defendants is a high-ranking government official."). Similarly, in *Doe v. Rumsfeld*, the D.C. District Court held that the allegation that Donald Rumsfeld was personally responsible for the plaintiff's unlawful detention in Iraq was plausible. 800 F. Supp. 2d 94, 114 (D.D.C. 2011), *rev'd*, 683 F.3d 390, 397 (D.C. Cir. 2012). In *Hamad v. Gates*, however, the Western District of Washington dismissed as implausible the allegation that Robert Gates, in his official capacity as Secretary of Defense, violated the plaintiff's rights by ordering his detention in Guantanamo Bay. No. C10-591, 2012 WL 1253167, at *7 (W.D. Wash. Apr. 13, 2012). This was so, moreover, even after plaintiff had an opportunity to file an amended complaint—the court found none of the plaintiff's new material, including the allegations that Secretary Gates had been personally apprised of the situation in Guantanamo by his advisors, sufficient to ground a plausible claim. *Id.* at *5.

plaintiff had plausibly alleged a *Brady* violation as a basis for his § 1983 action.[148] Plaintiff claimed that police officers failed to disclose inconsistent statements made by key witnesses on the day of the crime, an error that resulted in the plaintiff spending thirty-four years unduly behind bars.[149] In finding plaintiff's allegations sufficient to make out a plausible § 1983 claim, the court drew explicit reference to the "volume of cases involving nondisclosure of exculpatory information," on account of which plaintiff's claim "step[s] past the line of possibility into the realm of plausibility."[150] No legal or factual authority was offered for the proposition that *Brady* violations are rampant; nor was it clear what type of evidence could be offered.[151] The diagnosis of nondisclosure as a persistent problem simply reflected what the appellate judges believed to be true about the operation of police departments, for reasons that have nothing to do with facts alleged in the complaint.[152]

Another illustrative example is *Arnett v. Webster*, in which the Seventh Circuit had to determine whether a prisoner sufficiently alleged a constitutional violation by claiming that medical staff acted with deliberate indifference when they failed to administer alternative remedy for Rheumatoid Arthritis ("RA") during a ten-month window, in which Embrel, the typical treatment, was unavailable.[153] This failure, plaintiff alleged, unreasonably caused him severe, prolonged pain, in contravention of the Eighth Amendment.[154] The court found the allegations sufficient to state a plausible claim, relying, in large part, on what it took to be the incompetence of the medical staff.[155] It would be no

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[148] Haley v. City of Boston, 657 F.3d 39, 47 (1st Cir. 2011).

[149] *Id.* at 45.

[150] *Id.* at 53.

[151] The court does cite authority for the proposition that "[d]isclosure abuses are a recurring problem in criminal cases." *Id.* (citing United States v. Osorio, 929 F.2d 753, 755 (1st Cir. 1991)). But this citation can hardly sustain the analytical work for which it sets out. First, the citation is from a case nearly twenty years old; it requires an overarching theory of how police departments tend to work—just the sort of extra-legal knowledge we might expect from plausibility analysis—to connect claims from twenty years ago to claims from today. Second, the citation itself is *ipse dixit*. *See Osorio*, 929 F.2d at 755 ("This appeal from a criminal conviction presents, *inter alia*, the recurring problem of belated government compliance with its duty to provide timely disclosure of exculpatory evidence.").

[152] For a similar example of appellate judges offering ad hoc determinations about how specific institutions tend to operate, see Ocasio-Hernández v. Fortuño-Burset, 640 F.3d 1, 15–16 (1st Cir. 2011) (deeming allegation of First Amendment retaliation against a governor's office plausible, on the basis of knowledge about how "small workplace[s]" tend to operate).

[153] Arnett v. Webster, 658 F.3d 742, 748–49 (7th Cir. 2011).

[154] *Id.*

[155] *Id.* at 754–55.

exaggeration, in fact, to say that the court momentarily stepped into the role of medical expert to deliver its conclusion.[156] To wit: "[Plaintiff] has an inflammatory condition, yet he was never provided anti-inflammatory medication, not even aspirin, a well-known and readily available NSAID. [Plaintiff] wasn't seeking an unconventional treatment; he sought medication that would reduce his pain and swelling and slow the progression of his RA."[157] How the court decided what counted as a "conventional" treatment for RA is anyone's guess; no citation was provided.[158] But on the basis of the intermediate determination, the court saw fit to hold that plaintiff deserved further discovery.[159]

IV. CHANGING THE NORMATIVE TACK

The foregoing examples were selected from an innumerable many. Literally every civil case that makes its way through the federal courts has to contend—or at least has to be ready to contend—with the strictures of plausibility analysis. The examples were chosen for their evocative character; I did not mean to shade substantive impressions one way or another. I meant only to underscore the evidentiary puzzle that underpins plausibility analysis, that is, the inescapable need for judges to reach beyond the four corners of the complaint and incorporate extra-legal knowledge in their determinations of what is "plausible." To do this, judges must rely on what they know about the world to select one among the multiple hypotheses that predict the alleged facts. In this respect, the burden that plausibility analysis imposes on plaintiffs is neither an inherently light one,[160] nor an inherently arduous one.[161]

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[156] *See id.* at 758.

[157] *Id.* at 754.

[158] *See id.*

[159] Similar analysis has emerged in sister circuits. *See, e.g.*, Bistrian v. Levi, 696 F.3d 352, 371 (3d Cir. 2012) (holding that plaintiff's allegation that prison administrators left him in the recreational yard with known adversaries was sufficient to plead a plausible claim of deliberate indifference); Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011) (holding that plaintiff's allegation that subordinate officers stood by idly while he screamed for help during a stabbing was sufficient to state a plausible claim of supervisory liability); *see also* Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007) (per curiam) (finding, in a pre-*Iqbal* era case with remarkably similar logic, that plaintiff's allegation that prison administrators intentionally denied him treatment for Hepatitis C was sufficient to state a claim for relief under the Eighth Amendment). The opinion explicitly rebukes the Tenth Circuit for construing plaintiff's allegations of deliberate indifference as too "conclusory" to state a claim. *Erickson*, 127 S. Ct. at 2199–200.

[160] *See, e.g.*, Miller, *supra* note 8, at 35–36; Spencer, *supra* note 5, at 16–18. Perhaps the strangest of these complaints is the pejorative description of plausibility as "constrictive," Miller, *supra* note 8, at 9–10, or "illiberal," Spencer, *supra* note 5, at 29–30. Apart from their unwillingness to make any concession to practical issues like skyrocketing litigation costs—which may or may not be a weakness, depending on one's view—the

Formally, the burden of plausibility is neither light nor arduous. It becomes light or arduous only in practice, by virtue of the doctrinal setting in which it is implemented.[162] This is so because plausibility analysis in law, and as in everyday life, requires one to draw on knowledge about the world, an inquiry that depends on the setting in which it is carried out, and whose rigor is bounded by the richness of the dataset on which one has to draw.

It is precisely on this last dimension that *Twombly* and *Iqbal* differ so markedly. They hail from opposite sides of the "rigor" spectrum in terms of the type of extra-legal knowledge they embed. In antitrust law, the relevant dataset is both uncontroversial and readily accessible: economic theory.[163] In civil rights law, by contrast, the relevant dataset is either controversial, in the sense that reasonable people would disagree categorically about what the relevant data are, or there simply is no dataset.[164] And between these extremes, middle cases are beginning to emerge. For example, the Court recently applied *Twombly* and *Iqbal* in the setting of a § 10(b) securities action; a determination that required speculation about what omissions consumers would "likely" have found material.[165] In addition, a host of employment cases, applying *Iqbal* in

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deeper problem with these accusations is that they do essentially zero conceptual work. The whole *point* of pleading rules is to constrict: to make an institution built on a liberal ideal of access—the judiciary—slightly less liberal. Unto itself, therefore, the observation that *Iqbal* and *Twombly* constrict access to federal courts mounts no normative claim.

[161] See, for example, Steinman, *supra* note 14, at 1339–40, which argues that plausibility is actually more permissive than its predecessor, since it effectively gives plaintiffs another shot, even if their pleadings fail conclusoriness review. Of course, this could be seen as a reduction argument against his position just as easily as an insight his argument produces; I explore this issue at some length above. *Supra* Part II.A.; *see also* Tymoczko, *supra* note 3, at 530 (describing plausibility as a "low threshold" that should make "courts . . . hesitant . . . to dismiss any but the most tenuous claims").

[162] *See An Update After* Matrixx, *supra* note 8, at 45–47; Spencer, *supra* note 8, at 459–60 (arguing, in general, that the stringency of plausibility depends on the role that evidence plays in a particular doctrinal setting, and in particular, that plausibility is "more demanding in the context of claims in which direct evidence supporting the wrongdoing is difficult for plaintiffs to identify at the complaint stage").

[163] *See* John E. Lopatka & William H. Page, *Economic Authority and the Limits of Expertise in Antitrust Cases*, 90 CORNELL L. REV. 617, 619–20 (2005).

[164] For further discussion of this point, see Malveaux, *supra* note 35, at 724–25.

[165] *See* Matrixx Initiatives, Inc. v. Siracusano, 131 S. Ct. 1309, 1323 (2011). Although the *Matrixx* Court cited no studies or other expert materials—and in that respect differed from the *Twombly* Court—it also relied on propositions about consumer behavior in the securities market that are beholden in principle to objective knowledge; for example, that "[c]onsumers likely would have viewed the risk [of Matrixx's main product] as substantially outweighing [its] benefit . . . in light of the existence of many alternative products on the market." *Id.* In other words, the *Matrixx* Court lays out reasons for its plausibility determination that could, in theory, be unsettled by empirical study or conceptual critique. In this respect, the *Matrixx* opinion deviates sharply from *Iqbal*.

the Title VII setting, have made their way through the appellate courts—many of which require intermediate determinations about the elements of a facial discrimination claim.[166]

Everyday examples of abduction, too, fall on different points of the rigor spectrum. Recalling the infidelity example, whatever hypothesis I end up abducing from the suspicious receipt, the hypothesis is unlikely to be rigorous. If I tell my friend, "I found this suspicious receipt; I think my spouse may be cheating on me," he could easily come back and say, "I think you're overreacting; I don't draw any suspicious inference from that receipt." This dialogue would put us in the same position as two judges with divergent assessments of, say, the *Iqbal* complaint. It is difficult to imagine how my friend and I, if we wanted to resolve our dispute, would go about doing so. I look at the receipt and, taking into account everything I know about my spouse and our relationship, something gives me the sense that the receipt is suspicious. When my friend looks at the evidence, he also takes into account what he knows of my spouse and our relationship, but he sees no cause for alarm. We are simply at loggerheads; we have different impressions of the world. "Is it plausible that my spouse is cheating on me?" therefore occupies the same position, conceptually, as the question "Is it plausible that John Ashcroft and Eric Mueller consciously designed a discriminatory detention program?" In both, reasonable minds will surely disagree, and they will disagree for reasons that have very little to do with the facts that have been adduced, and quite a lot to do with competing ideas about how the world is composed.

Just as the infidelity example tracks *Iqbal*, there are everyday analogies to *Twombly* as well. Suppose I injure my ankle while running,

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166 *See, e.g.*, EEOC v. Tuscarora Yarns, Inc., No. 1:09-cv-217, 2010 WL 785376, at *3 (M.D.N.C. Mar. 3, 2010) (holding that the plaintiff's allegations of various forms of sexual harassment provided no plausible foundation for a Title VII claim). This case is illustrative of the whole, and not surprisingly, scholars of discrimination law have mostly lamented the court's use of plausibility analysis. *See, e.g.*, Ramzi Kassem, *Implausible Realities:* Iqbal's *Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN. ST. L. REV. 1443, 1446 (2010) (arguing that *Iqbal* facilitates the perpetuation of bias on the part of majority groups); O'Neil, *supra* note 9, at 177; *cf.* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002) (holding, in a pre-*Twombly* case, that it was sufficient, to state an employment discrimination claim under Title VII, for plaintiff to allege that his termination had been motivated by age and national origin). There is substantial dispute about whether *Swierkiewicz* remains good law in the shadow of *Iqbal*. *See* Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009) (holding, somewhat tentatively, that *Iqbal* overturned at least the analytical predicates of *Swierkiewicz*); Seiner, *supra* note 8, at 184–85 (discussing *Swierkiewicz* in the wake of *Iqbal*). *Compare* Steinman, *supra* note 14, at 1322–23 (arguing that *Swierkiewicz* remains good law), *with* Meier, *supra* note 15, at 757 (arguing that there is "no way to reconcile, as a matter of pleading standards, the Court's approach to the 'conclusory allegations of discrimination' in *Swierkiewicz* and *Iqbal*.").

and there are two possible explanations: The ankle is either broken or sprained. When I get home, I examine my ankle and hypothesize that it is broken. When my friend examines it, however, he hypothesizes that it is sprained. Just as in the infidelity example, my friend and I have different impressions of the world. But unlike the infidelity example, he and I will be able to consult an objective body of knowledge—calling a doctor, or the equivalent—to enrich our understanding of how ankle injuries work, just as the *Twombly* Court was able to draw on economic theory to enrich its understanding of how firms behave.[167] This enriched understanding will help us select between the two hypotheses; it will cast light on the meaning of the known facts, for example, if I am limping, or if my ankle is swollen. It will give us a common, objective foundation from which to work and, by doing so, will make our ultimate determination more rigorous. Rigor is no guarantee of consensus. My friend and I may review countless sources of medical information, for example, without coming to any agreement: I may still hypothesize that the ankle is broken, and he that the ankle is sprained. Again, just as in the discussion of *Twombly*, the point is not that an objective field of knowledge necessarily eliminates the space for interpretive divergence. The point is that it renders such divergence accountable rather than opaque.

Here, then, is my ultimate proposal. First, *Twombly* should become our model of plausibility analysis at its most functional level, not because *Twombly*, in either logic or result, is beyond reproach, but because it exemplifies the tethering of plausibility analysis to objective knowledge about the world. Second, in doctrinal settings unlike antitrust law—without a disciplinary anchor like economic theory to mediate intuitional disagreements about what is plausible—"objective knowledge" should be built from the ground up. Abstract as this might sound, I mean something quite concrete: Scholars and litigators should begin proposing, and judges should begin codifying, guidelines about the proper source materials for performing the hypothesis-selection on which plausibility rests. For the most part, these guidelines should be setting-specific, in respect of the setting-specific nature of plausibility analysis itself. A few generalizations are possible, however. For one thing, it seems plain that courts should welcome the incorporation of expert research into pleadings. Whenever the wisdom of other disciplines can supplant crude intuition and "common sense," then it should. For another thing, one piece of evidence that would almost certainly make plausibility determinations more rigorous would be empirical data about previous litigations in the same substantive area. If it could be

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[167] *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553–54 (2007).

demonstrated, for example, that most plaintiffs—or an important threshold of plaintiffs—alleged parallel conduct at the outset end up prevailing at trial, or settling advantageously, this type of information would surely help judges evaluate the plausibility of legally analogous claims.

Ultimately, without any seismic shift in the law of pleading, it would be possible to improve the status quo dramatically by equipping litigators and judges with a few heuristics to define and delimit the universe of evidence on which plausibility determinations are based. Scholars are well situated to assist in this enterprise. I humbly submit that in lieu of formulating theories of how pleading ought to operate, we should focus our attention on making plausibility analysis, as it operates, more functional. When the conceptual dust settles—and my main ambition was to help settle it—the question that most matters is an intensely practical one. How can our federal courts be made to work better, indeed, to work at all, for the most vulnerable among us?

ADOPTION: UPSIDE DOWN AND SIDEWAYS? SOME CAUSES OF AND REMEDIES FOR DECLINING DOMESTIC AND INTERNATIONAL ADOPTIONS

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I. THE NEED TO RECOGNIZE ADOPTION SUCCESSES, PROBLEMS, AND SOLUTIONS

There are few government-regulated transactions that morally compare with the selfless, charitable, and compassionate act of responsible adults taking parentless children from foreign countries into their homes. Adoption is usually a magnificent and wonderfully humane commitment of service and love. However, there are some unexpected obstacles to adoption today. To identify those obstacles requires consideration of reliable adoption data and relevant social trends. Obtaining access to reliable and complete data about adoption trends in the United States, and about what is driving those trends, however, is surprisingly challenging.[1]

Social trends and government programs influence the number of adoptions significantly. For example, the dramatic drop in adoptions from 1970 to the mid-1980s undoubtedly was due, to some extent, to the Supreme Court's decision in January 1973 in *Roe v. Wade*.[2] This case

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[1] *See* National Adoption Information Clearinghouse, *How Many Children Were Adopted in 2000 and 2001?*, *in* NATIONAL COUNCIL FOR ADOPTION, ADOPTION FACTBOOK IV 79, 97 (Thomas C. Atwood et al. eds., 2007); *see also* Paul J. Placek, *National Adoption Data Assembled by the National Council For Adoption*, *in* NATIONAL COUNCIL FOR ADOPTION, ADOPTION FACTBOOK V 3, 4 (Elisa A. Rosman et al. eds., 2011) [hereinafter FACTBOOK V].

[2] Roe v. Wade, 410 U.S. 113, 164–65 (1973); *see* Marianne Bitler & Madeline Zavodny, *Did Abortion Legalization Reduce the Number of Unwanted Children? Evidence from Adoptions*, 34 PERSP. ON SEXUAL & REPROD. HEALTH 25, 31–32 (2002); Lisa A. Gennetian, *The Supply of Infants Relinquished for Adoption: Did Access to Abortion Make*

mandated the legalization of abortion on demand[3] which arguably caused the significant, dramatic rise in the number of abortions[4] and which correlated with a dramatic drop in the number of children being placed for adoption.[5] Likewise, the increase in public agency adoptions of children in foster care in the past dozen years is largely attributable to the passage of a federal law[6] that gives welfare-funding incentives to states that reduce the time that foster children are in "limbo" in foster care and increase the number of foster children placed in adoptive homes.[7]

This Article examines a developing social trend and adoption policy changes that may have long-term consequences for adoption in the United States and globally. It considers whether and how the growth in the practice of placing children for adoption with same-sex partners may be impacting both domestic and international adoptions in the United

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a Difference?, 37 ECON. INQUIRY 412, 427 (1999); *see also* FACTBOOK V, *supra* note 1, at 28 tbl.9 (tabulating total unrelated adoptions in the United States by year from 1951–2007).

[3] *See Roe*, 410 U.S. at 164–65. Though *Roe* did not explicitly legalize abortion on demand, that was its ultimate effect. Clarke D. Forsythe, *A Legal Strategy to Overturn* Roe v. Wade *After* Webster*: Some Lessons from Lincoln*, 1991 BYU L. REV. 519, 520 n.7 (1991) ("In reality, *Roe* ushered in abortion on demand from conception to birth for any reason or no reason in every state."); Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1022 (2003) ("[I]t is clear to all today that *Roe*, in tandem with *Doe v. Bolton*, in fact created a regime of abortion-on-demand throughout all nine months of pregnancy for any reason agreed to by the mother and abortionist . . . .").

[4] *See* Ctrs. for Disease Control & Prevention, U.S. Dep't of Health & Human Servs., *Abortion Surveillance—United States, 2005*, MORBIDITY & MORTALITY WKLY. REP., Nov. 28, 2008, at 1, 16 tbl.2; *see also* John M. Breen, *Modesty and Moralism: Justice, Prudence, and Abortion—A Reply to Skeel & Stuntz*, 31 HARV. J.L. & PUB. POL'Y 219, 281–82 (2008) (attributing the rise in abortion rates to the legalization of abortion) *By Most Measures, Abortions Have Declined in Recent Decades*, FAMILYFACTS.ORG, http://familyfacts.org/charts/230/by-most-measures-abortions-have-declined-in-recent-decades (last visited Nov. 11, 2013) (comparing abortion statistics from two different sources). Several states had already legalized abortion before *Roe*, causing some of the increase in abortion rates to occur in the early 1970s prior to the Court's decision. *See* JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY, 556–57 (2006).

[5] *See* sources cited *supra* note 2.

[6] Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.). For further discussion of the Act's effects, see Olivia Golden & Jennifer Macomber, *The Adoption and Safe Families Act (ASFA), in* CTR. FOR THE STUDY OF SOC. POLICY, INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 8, 32 (2009).

[7] *See* LaShanda Taylor, *Resurrecting Parents of Legal Orphans: Un-Terminating Parental Rights*, 17 VA. J. SOC. POL'Y & L. 318, 355 n.195 (2010) ("The Adoption Incentive Program, created in 1997 by the Adoption and Safe Families Act, provides a financial reward to states that increase the number of finalized adoptions from foster care. For each foster care adoption that exceeds an established baseline number, the state receives $4,000, which can be used for any child welfare purpose."); *see also* 42 U.S.C. § 673b (2006 & Supp. V 2012).

States. It suggests that there is a way to legalize and recognize same-sex, second-parent legal status without allowing same-sex partner adoptions which appear to have a negative impact upon relinquishment and placement of both domestic and foreign children for adoptions.

This Article makes several connected points. First, it briefly notes in Part II that there has been a clear decline in the number of intercountry adoptions, both globally and in the United States, and in the domestic adoption of unrelated, parentless children in the United States. It reviews briefly why that decline in adoptions is serious and how it harms parentless children. Adoption is a very important solution to that problem for many children, and both domestic and intercountry adoption provide many homes for many children who would never otherwise be raised in families.

Second, in Part III, this Article reviews how the drafting and adoption of the Hague Convention on Intercountry Adoption has caused some reduction in intercountry adoptions. The Hague Convention was intended to facilitate and encourage intercountry adoption, but it has increased the bureaucracy and expense of time of intercountry adoptions in a way that has discouraged intercountry adoption.

Next, Part IV reviews the legalization of adoption by same-sex individuals, partners, and couples in American family law. It notes that individuals with same-sex orientation are allowed to adopt in practically all states, and although fewer than half of the states allow same-sex partners or couples to adopt, there is a growing trend toward allowing these adoptions. It also notes the connection between allowing same-sex couples and partners to adopt and the legalization of same-sex marriage.

Fourth, this Article suggests in Part V that placing children for adoption with gay or lesbian parents may be a contributing factor to the reduction in both domestic and intercountry adoptions. Unless these adoptions are very carefully regulated and closely monitored, it is contrary to the best interests of promoting intercountry adoption. While the Hague Convention itself is "neutral" about lesbian, gay, bisexual, and transgender (collectively "LGBT") adoption, the Convention reinforces, protects, and requires compliance with the subscribing nations' policies. Most nations in the world, including nations that have adopted the Hague Convention on Intercountry Adoption, prohibit placing children for adoption with LGBT partners or couples (and sometimes singles).

Next, in Part VI, this Article asserts that deceptive, misleading, and fraudulent adoption practices intended to circumvent national policies barring placement of children for adoption with LGBT singles, partners, or couples not only violate the principles of the Hague Convention but also reduce the number of intercountry adoptions.

Part VII proposes that "sideways" adoption status ("uncle" or "aunt" adoptive status rather than co-parent status) may be a method to allow some adoptions that might not be allowed as traditional two-parent or single-parent intercountry adoptions. This may be a practical compromise that benefits children, prospective adopters, and traditional values regarding family integrity.

This Article concludes in Part VIII by reiterating the need to recognize the successes and failures of the Hague Convention on Intercountry Adoption. It also examines the need to explore the causes of and possible solutions to the current impediments to the practice of intercountry adoption. Small changes might remedy problems that are now significantly depressing responsible intercountry adoption and perhaps indirectly drive some possible responsible-but-impecunious adoptions underground (and, ironically, into child-trafficking).

II. THE DECLINE OF DOMESTIC AND INTERCOUNTRY ADOPTIONS OF UNRELATED CHILDREN

A. The Decline in Intercountry Adoptions to the United States

For the past six decades, "[t]he United States has been the largest receiving country . . . , accounting for more than half of all international adoptions."[8] Historically, Americans adopt more children than all of the other nations of the world combined.[9] For example, best estimates suggest that the top twenty adopting countries adopted just over 32,000 children from other nations in 1999,[10] and over half of those children (16,363) entered the United States.[11] Of course, if relative populations are compared, the Scandinavians are doing even better in the practice of intercountry (and domestic) adoption. For example, in 1998 the rate of

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[8] Ann Laquer Estin, *Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States*, 62 FLA. L. REV. 47, 80 (2010).

[9] *See* Nili Luo & David M. Smolin, *Intercountry Adoption and China: Emerging Questions and Developing Chinese Perspectives*, 35 CUMB. L. REV. 597, 597 (2005); Jennifer M. Lippold, Note, *Transnational Adoption from an American Perspective: The Need for Universal Uniformity*, 27 CASE W. RES. J. INT'L L. 465, 468–69 (1995) (stating that since the mid-1950s American couples successfully completed over 100,000 intercountry adoptions); Caeli Elizabeth Kimball, Student Article, *Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 33 DENV. J. INT'L L. & POL'Y 561, 564–65 (2005) (citing Ethan B. Kapstein, *The Baby Trade*, FOREIGN AFF., Nov.—Dec. 2003, at 115, 117) ("In 2001, over 34,000 intercountry adoptions took place worldwide, with the United States receiving over 19,000 adoptees.").

[10] Peter Selman, *Trends in Intercountry Adoption: Analysis of Data from 20 Receiving Countries, 1998–2004*, 23 J. POPULATION RES. 183, 187 tbl.2 (2006).

[11] *Id.*

adoption in the United States was 5.8 children per 100,000 people while it was 10.5 in Sweden and 14.6 in Norway.[12] About two thirds of the children brought to the United States by intercountry adoption are females.[13] Also, about 40% of the children are under the age of one, about 35% of the children are one to two years old, and about 25% of the children are aged three to seventeen.[14]

The United States was one of the early signatories of the Hague Convention, formally signing on March 31, 1994.[15] The Hague Convention came into effect in the United States on April 1, 2008.[16] Tragically, the Hague Convention has substantially reduced the number of intercountry adoptions.[17] As the date for implementing the Hague Convention approached, three years before it took effect in the United States, the numbers of intercountry adoptions in the United States began to fall as new regulations, drafted in preparation for compliance with the Hague Convention, took effect. The numbers of intercountry

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[12] *Id.* at 189 tbl.4.

[13] *See Statistics, Intercountry Adoption*, U.S. DEP'T ST., http://adoption.state.gov/about_us/statistics.php (last visited Oct. 30, 2013); *see also* FACTBOOK V, *supra* note 1, at 29 tbl.10.

[14] *See Statistics*, *supra* note 13.

[15] Rachael M. Schupp-Star, Note, *The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption: The Need for a Uniform Standard for Intercountry Adoption by Homosexuals*, 16 ROGER WILLIAMS U. L. REV. 139, 145 (2011). *See generally* Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *opened for signature* May 29, 1993, S. TREATY DOC. NO. 105-51 (1998) [hereinafter Convention on Intercountry Adoption].

[16] Schupp-Star, *supra* note 15, at 145 (The Hague Convention "was transmitted to the Senate for its advice and consent on June 11, 1998. . . . The United States Senate gave its advice and consent to the United States' ratification of the Convention on September 20, 2000."); *see also* 146 CONG. REC. 18,766 (2000) (explaining that "the hard work of putting the promise of the Hague Convention into reality begins" and the actions taken for recognizing the Convention as having passed through parliamentary procedure up to ratification); Linda J. Olsen, Comment, *Live or Let Die: Could Intercountry Adoption Make the Difference?*, 22 PENN ST. INT'L L. REV. 483, 521 (2004) ("On September 20, 2000, the Senate provided advice and consent to ratification of the Convention, subject to the passage of implementing legislation . . . ."). Also in 2000, both Houses of Congress passed the Intercountry Adoption Act of 2000 ("IAA"), which provides for the implementation of the Hague Convention. Intercountry Adoption Act of 2000, Pub. L. No. 106-279, §§ 1–2, 114 Stat. 825, 825–26 (codified at 42 U.S.C. § 14901 (2006)). Congress assigned primary responsibility for implementation of the Hague Convention "to the State Department, because of its experience 'on the ground' with international adoptions. Beyond the State Department's role as Central Authority, the Bureau of Citizenship and Immigration Services (CIS) in the Department of Homeland Security also has responsibility for implementing the immigration and visa aspects of the law." Estin, *supra* note 8, at 81–82. "The United States completed the formal ratification procedures for the [Hague Convention] on December 12, 2007 . . . ." Schupp-Star, *supra* note 15 at 145.

[17] *See infra* Part III.

adoptions bringing children to the United States have continued to fall dramatically.[18]

Table 1: Intercountry Adoptions in the United States from All Foreign Countries Combined, 1999–2012[19]

Year	Adoptions
1999	15,719
2000	18,857
2001	19,647
2002	21,467
2003	21,654
2004	22,991
2005	22,734
2006	20,680
2007	19,608
2008	17,456
2009	12,744
2010	11,058
2011	9,319
2012	8,668
Total	242,602

Since 2004, "[t]he number of 'orphan' visas granted by the United States has fallen by more than half,"[20] and the number of intercountry adoptions by American families has fallen by sixty-two percent from their decade high.[21]

B. The Global Decrease in Intercountry Adoptions

Information on the number of intercountry adoptions worldwide is often less than precise.[22] In 2001, the leading international authority on this subject, Dr. Peter Selman,[23] reported that the best data indicate that during the 1980s there was a minimum of about 162,000 intercountry

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[18] *See infra* Table 1.

[19] *See Statistics*, *supra* note 13 (select "Adoptions by Year" tab).

[20] Peter Selman, *Global Trends in Intercountry Adoption: 2001–2010*, ADOPTION ADVOC., Feb. 2012, at 1, 2–3 [hereinafter Selman, *Global Trends*], *available at* https://www.adoptioncouncil.org/images/stories/documents/NCFA_ADOPTION_ADVOCATE_NO44.pdf.

[21] *See supra* Table 1.

[22] Peter Selman, The Movement of Children for Intercountry Adoption: A Demographic Perspective, at 3–4 (Aug. 18–24, 2001) (unpublished manuscript) [hereinafter Selman, Movement of Children], *available at* http://www.archive-iussp.org/Brazil2001/s20/S27_P05_Selman.pdf.

[23] *See* Selman, *Global Trends*, *supra* note 20, at 16 note (sidebar titled "About the Author").

adoptions, averaging 16,000 per year.[24] A decade ago, Dr. Selman estimated that during the 1990s the number of intercountry adoptions ranged from about 19,000 to a little over 32,000 per year.[25] Dr. Selman's most recent report (in 2012) found that "[i]n 1998 there were just under 32,000 adoptions; by 2004 this number had risen to over 45,000; by 2009 the world total had fallen to under 30,000—less than in 1998—and the decline continued in 2010."[26] Clearly, the number of children adopted in intercountry adoptions increased through the 1990s—the decade in which the Hague Convention was ratified—and has significantly declined since the 21st century began, both globally and in the United States.

The National Council for Adoption has confirmed that the reduction in intercountry adoptions has occurred *around the world*, not just in the United States.[27] In surveying data on twenty-three receiving states between 2001 and 2010, the report confirms the massive depression of intercountry adoption:

> The global number of intercountry adoptions peaked in 2004 after a steady rise in annual numbers from the early 1990s. Since then, annual numbers have decreased to the point that by 2008 the total was lower than it had been in 2001, and by 2009 lower than it was in 1998.[28]

Beginning in 2009, more children were going to Europe for adoption than were going to the United States,[29] reversing a sixty-year adoption pattern.[30] "Global numbers [of intercountry adoptions] fell by 35 percent between 2004 and 2009."[31] The top sending countries have changed significantly between 1980 and 2010,[32] and the adoption numbers from most Eastern European nations also have dramatically fallen between 2003 and 2010.[33] In Africa, only Ethiopia has shown any significant increase in intercountry adoption placements since 2004.[34]

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[24] Selman, Movement of Children, *supra* note 22, at 5.

[25] *Id.*

[26] Selman, *Global Trends*, *supra* note 20, at 2.

[27] *See id.* at 1–3, 6–7, 9–12, 14–15.

[28] *Id.* at 1 (citations omitted).

[29] *See id.* at 2.

[30] *See id.* at 2, 4.

[31] *Id.* at 3.

[32] *See id.* at 5 tbl.4 (showing that only Columbia was among the top seven sending countries in both 1980 and 2010).

[33] *See id.* at 11 tbl.13.

[34] *See id.* at 12 tbl.18.

Figure 1: Trends in Intercountry Adoption to Twenty-three Receiving States, 2001–2010[35]

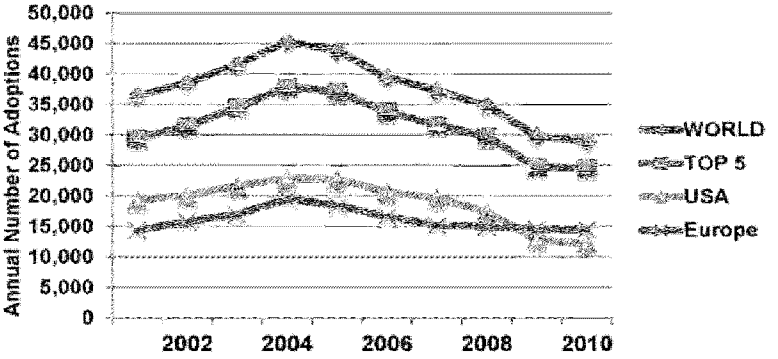

Table 2: Intercountry Adoptions to Twenty-three Receiving Countries, 1998 to 2010, by Rank in 2004 (Peak years highlighted in bold)[36]

Country	1998	2001	2004	2006	2008	2009	2010
USA (FY)	15,774	19,237	**22,884**	20,679	17,438	12,753	12,149
Spain	1,487	3,428	**5,541**	4,472	3,156	3,006	2,891
France	3,769	3,094	**4,079**	3,977	3,271	3,017	3,504
Italy	2,374	1,797	3,402	3,188	3,977	3,964	**4,130**
Canada	**2,222**	1,874	1,955	1,535	1,916	2,129	1,946
Total to all states	**31,875**	**36,391**	**45,298**	**39,460**	**34,785**	**29,867**	**29,095**
% to USA	49%	53%	51%	52%	50%	43%	42%
% to Europe	41%	39%	43%	42%	43%	49%	50%

[35] Peter Selman, *The Rise and Fall of Intercountry Adoption in the 21st Century: Global Trends from 2001 to 2010*, *in* INTERCOUNTRY ADOPTION: POLICIES, PRACTICES, AND OUTCOMES 7, 9 (Judith L. Gibbons & Karen Smith Rotabi eds., 2012) [hereinafter *Rise and Fall*] (Copyright 2012 Ashgate Publishing Ltd., figure reprinted with permission). The original source for this figure is the preceding book; however, the graphic was provided by and has been reprinted with permission from the National Council for Adoption. Peter Selman, *Global Trends in Intercountry Adoption: 2001–2010*, NAT'L COUNCIL FOR ADOPTION, http://www.adoptioncouncil.org/publications/adoption-advocate-no-44.html (last visited Oct. 30, 2013).

[36] *Rise and Fall*, *supra* note 35, at 8 tbl.1.1 (The 2010 United States data includes 1,090 emergency visas for Haiti. Eighteen other countries are included in the grand total: Australia, Belgium, Cyprus, Denmark, Finland, Germany, Iceland, Ireland, Israel, Luxembourg, Malta, Netherlands, New Zealand, Norway, Sweden, Switzerland, and the United Kingdom, and including Andora beginning in 2001) (Copyright 2012 Ashgate Publishing Ltd., reprinted with permission).

C. The Decline in Domestic Adoptions of Unrelated Children in the United States

The United States Department of Health and Human Services reports that, of 1,782,000 total number of adoptions over the time of which it has record, the largest share (38%) have been domestic private adoptions, accounting for 677,000 adoptions; followed closely by domestic foster care adoptions (37%) numbering 661,000; followed by intercountry adoptions totaling 25% (444,000 in number).[37] The Department of Health and Human Services also reports that 69% of all adoptions are by married couples, approximately 29% are by single individuals, and 2% are by unmarried couples.[38]

However, the U.S. government does not generally collect adoption data, let alone comprehensive adoption information.[39] By default, therefore, the most reliable sources of thorough information about adoption in the United States are private adoption organizations, especially the National Council for Adoption ("NCFA") whose *Adoption Factbook V* in 2011 contains the most comprehensive (and the most recent) data about adoption in the United States.[40] Reporting on the period from 1951 to 2007, the NCFA reports: "[A]doptions rose from 72,000 in 1951 to a peak of 175,000 in 1970, declined to 108,463 in 1996, and rose to 133,737 in 2007."[41] In 2007, the NCFA reports that there were 57,248 related domestic adoptions and 76,489 unrelated domestic adoptions (for a total of 133,737 domestic adoptions); in addition, there were another 19,442 foreign children adopted in the United States through intercountry adoption—for a grand total of 153,179 children adopted in the United States in 2007.[42]

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[37] SHARON VANDIVER ET AL., U.S. DEP'T OF HEALTH & HUM. SERVS., ADOPTION USA: A CHARTBOOK BASED ON THE 2007 NATIONAL SURVEY OF ADOPTIVE PARENTS 3 fig.1 (2009), *available at* http://aspe.hhs.gov/hsp/09/NSAP/chartbook/index.pdf.

[38] *Id.* at 9, 17, 62 tbl.5.

[39] *See* FACTBOOK V, *supra* note 1, at 3.

[40] *See id.* at 4; Elisa Rosman, *Forward* to NATIONAL COUNCIL FOR ADOPTION, FACTBOOK V, at iii, iii (Elisa A. Rosman et al. eds., 2011).

[41] FACTBOOK V, *supra* note 1, at 9, 27 tbl.8; *see also* Paul Placek, *National Adoption Data, in* ADOPTION FACTBOOK IV 3, 9 (Thomas C. Atwood et al. eds., 2007) [hereinafter FACTBOOK IV] (reporting similar data in 2002: "Adoptions rose from 72,000 in 1951, to a peak of 175,000 in 1970, declined to 104,088 in 1986, and rose to 130,269 in 2002.").

[42] FACTBOOK V, *supra* note 1, at 11 tbl.1. Total adoption figures can be ambiguous because they combine domestic adoptions (in which the adoptive parents and the adopted child are from the same nation) and intercountry adoptions; adoptions of related children (often step-parent adoptions but also including adoptions by grandparents, aunts and uncles, and other relatives) and adoptions of unrelated children; and public adoptions (through child welfare agencies, generally of children in foster care) and private adoptions

However, total adoption figures can be ambiguous because they combine various categories of adoption. For example, if one looks only at the total adoption data, an increase in related adoptions may offset and mask a decrease in unrelated adoptions (and vice versa). Similarly, looking at total adoption figures, a decrease in international adoptions may be hidden by an increase in domestic adoptions. The reported rise in total adoptions between 1996 and 2007[43] masks some profound reductions in certain categories of adoption that bode ill for the future. For example, the number of unrelated infant domestic adoptions in the United States fell steadily from 1992 (26,672) to 2007 (only 18,078).[44] Likewise, the total number of private adoptions fell from 1992 to 2007 (from 17,136 to 13,257).[45] Most disturbingly, since 1994 there has been a steady, profound decline in the number of adoptions by American families of children from other nations, reversing a sixty-year pattern.[46]

The Evan B. Donaldson Adoption Institute reported in the 1990s that "adoptions by unrelated adults [were] declining" and that the "number of infants available for private adoption [was] decreasing."[47] In 2000, the Census Bureau reported that 2.5% of all children in the United States had been adopted by the householder, totaling 2,058,915 adopted children living in homes in the United States, including 1,586,004 who were age 17 or younger.[48] In 2008, the Centers for Disease Control and Prevention reported a significant long-term drop (trend) in the percent of ever-married U.S. women who had adopted (from 2.2% in 1982 to 1.4% in 2002).[49] Consistently, the percentage of American women who ever

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(including both private-agency-involved adoption and independent placements by the mother). *See, e.g.*, FACTBOOK IV, *supra* note 41, at 4–5.

[43] *See supra* text accompanying note 41.

[44] FACTBOOK V, *supra* note 1, at 5 fig.2.

[45] *Id.* at 6 fig.6.

[46] *See infra* Part III.

[47] *Private Domestic Adoption Facts*, EVAN B. DONALDSON ADOPTION INST., http://www.adoptioninstitute.org/FactOverview/domestic.html (last visited Oct. 30, 2013); *see also* VICTOR E. FLANGO & CAROL R. FLANGO, THE FLOW OF ADOPTION INFORMATION FROM THE STATES 22 tbl.3. (1994) (tabulating adoption data showing around 120,000 adoptions of children per year in the late 1980s and early 1990s). This data is dated, but recent evidence shows that trends are similar. *Compare* FACTBOOK IV, *supra* note 41, at 30 tbl.5 (reporting 5.5 infant adoptions per 1,000 live births, and 16.3 infant adoptions per 1,000 nonmarital live births in 2002), *with*, FACTBOOK V, *supra* note 1, at 20 tbl.5 (reporting 4.2 infant adoptions per 1,000 live births, and 10.3 infant adoptions per 1,000 nonmarital live births in 2007).

[48] ROSE M. KREIDER, U.S. CENSUS BUREAU, ADOPTED CHILDREN AND STEPCHILDREN: 2000, 2 tbl.1 (2003), *available at* http://www.census.gov/prod/2003pubs/censr-6.pdf.

[49] Jo Jones, U.S. Dep't of Health & Human Servs., *Adoption Experiences of Women and Men and Demand for Children to Adopt by Women 18-44 Years of Age in the United*

had taken steps to adopt was highest among older women (age range groups of 40–44 years old, 35–39 years old, and 30–34 years old), reflecting, *inter alia*, that more women tried to adopt in past years.[50]

D. Why the Decrease in Adoption Matters

The suffering and deprivations of parentless children is a terrible tragedy that mocks our pretensions of progress toward international human rights. This suffering also undermines the needs and basic human dignity of children and our aspirations for international social justice.[51] In 1993, "UNICEF estimate[d] about 100 million street children exist[ed] in the world . . . . About forty million [we]re in Latin America, twenty-five to thirty million in Asia, and ten million in Africa."[52] The numbers are rising.[53] In 2006, UNICEF revised its report and admitted that "[t]he exact number of street children is impossible to quantify, but the figure almost certainly runs into tens of millions across the world. It is likely that the numbers are increasing as the global population grows and as urbanization continues apace."[54] In 2012, UNICEF reported that "[e]stimates suggest that tens of millions of children live or work on the streets of the world's towns and cities—and the number is rising with global population growth, migration and increasing urbanization."[55]

States, 2002, VITAL & HEALTH STAT., Aug. 2008, at 1, 19 tbl.1. *But see id.* at 28 tbl.10 (comparing 1995 and 2002 numbers of women seeking adoption, showing higher numbers in 2002).

[50] *Id.* at 23 tbl.5. Of course, adoption demand tends to increase as women age beyond their child-bearing years. *See id.* at 27 tbl.9.

[51] For further discussion by the author of the topics in this Section, see generally Lynn D. Wardle, *The Hague Convention on Intercountry Adoption and American Implementing Law: Implications for International Adoptions by Gay and Lesbian Couples or Partners*, 18 IND. INT'L & COMP. L. REV. 113 (2008) [hereinafter Wardle, *HCIA Implementing Law*]; Lynn D. Wardle, *Protecting Children by Protecting Domestic and International Adoption*, *in* LEBENDIGES FAMILIENRECHT: FESTSCHRIFT FÜR RAINER FRANK [LIVING FAMILY LAW: CELEBRATION IN HONOR OF RAINER FRANK] 313 (2008) [hereinafter Wardle, *Protecting Adoption*].

[52] Susan O'Rourke von Struensee, *Violence, Exploitation and Children: Highlights of the United Nations Children's Convention and International Response to Children's Human Rights*, 18 SUFFOLK TRANSNAT'L L. REV. 589, 616 (1995); *see also* Marc D. Seitles, *Effect of the Convention on the Rights of the Child upon Street Children in Latin America: A Study of Brazil, Colombia, and Guatemala*, 16 PUB. INT. 159, 159 (1997).

[53] *See* von Struensee, *supra* note 52, at 616–17.

[54] UNICEF, THE STATE OF THE WORLD'S CHILDREN 2006, at 40–41 (2005) (endnote omitted), *available at* http://www.unicef.org/sowc06/pdfs/sowc06_fullreport.pdf.

[55] UNICEF, THE STATE OF THE WORLD'S CHILDREN 2012 32 (2012) [hereinafter THE WORLD'S CHILDREN 2012], *available at* http://www.unicef.org/iran/SOWC_2012-Main_Report_EN_13Mar2012.pdf.

Parentless children in poor nations often become homeless persons or "street children."[56] A UNICEF study reported that in 2009 there were 153 million orphans worldwide that year, which included 145 million orphans (among them 16.9 million AIDS orphans) in developing countries and 41.7 million orphans (including 7.4 million AIDS orphans) in the least developed countries.[57] The number of orphans is substantially higher than the estimate of the total number of orphans predicted less than a decade earlier by a 2002 UNAIDS-UNICEF study.[58] This study suggests that the crisis may be expanding faster than experts have anticipated.[59]

The plight of parentless children, especially in third-world countries, is extreme. Many of them are unable to survive. They die ignominiously, often from starvation, with bloated bellies, listless, bony bodies, pain-drenched eyes, with cries of hunger and fear. Their suffering and death indicts us. The United Nations estimates that approximately 50,000 human beings die every day "as a result of poor shelter, water, or sanitation,"[60] and parentless children are especially vulnerable to these ravages.[61] They are also vulnerable to many kinds of miserable exploitations, abuses, and even murder, especially when living on the street.[62] They often desperately exploit their bodies or turn to crime to

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[56] Carolyn J. Seugling, Note, *Toward a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States*, 37 VAND. J. TRANSNAT'L L. 861, 885 (2004).

[57] THE WORLD'S CHILDREN 2012, *supra* note 55, at 103 tbl.4.

[58] *Compare id.* (tabulating the estimated worldwide number of orphans in 2009 at 153 million, 17 million of which were caused by AIDS), *with* UNAIDS & UNICEF, CHILDREN ON THE BRINK 2002: A JOINT REPORT ON ORPHAN ESTIMATES AND PROGRAM STRATEGIES 3 (2002), *available at* http://data.unaids.org/Topics/Young-People/childrenonthebrink_en.pdf (predicting that by 2010 there would be 106 Million orphans worldwide, 25 million of which would be orphaned by AIDS).

[59] *See supra* note 58; *see also AIDS Creating Global 'Orphans Crisis,'* CBS NEWS, Feb. 11, 2009, http://www.cbsnews.com/stories/2002/07/09/health/main514560.shtml ("Another report . . . by the Swiss-based advocacy and research group Association Francois-Xavier Bagnoud[] predicted an even worse scenario—as many as 100 million orphans by 2010." Such predictions from "[i]nternational agenc[ies] . . . only count children up to the age of 15 because government statistics classify people in 5-year age groups.").

[60] Janet Ellen Stearns, *Urban Growth: A Global Challenge*, 8 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 140, 141 (1999).

[61] Seugling, *supra* note 56, at 882.

[62] *See* Jacqueline Bhabha & Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 INT'L J. REFUGEE L. 84, 86 (1999); Ariel E. Dulitzky & Luguely Cunillera Tapia, *A Non-governmental Perspective Regarding the International Protection of Children in the Inter-american System of Human Rights*, 8 J. TRANSNAT'L L. & POL'Y 265, 266 (1999).

survive—and to die.[63] UNICEF reported last year that "[n]early 8 million children died in 2010 before reaching the age of 5, largely due to pneumonia, diarrhea and birth complications. Some studies show that children living in informal urban settlements are particularly vulnerable."[64] The global problem of parentless children cannot be ignored. "[H]idden inside cities, wrapped in a cloak of statistics, are millions of children struggling to survive. . . . They live in squalor . . . . [and] in slums . . . ."[65]

The plight of parentless children in the United States is also severe. The major collection of such children who need permanent homes with permanent, committed-to-them parents is in the child welfare system of the various states.[66] Over 100,000 legally-parentless children are currently potentially available for adoption in the United States and are languishing in the limbo of long-term foster care.[67]

III. HOW THE HAGUE CONVENTION CAUSED A REDUCTION IN INTERCOUNTRY ADOPTIONS

The 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, sometime known as "the Hague Convention on Intercountry Adoption" (herein "Hague Convention"), was a significant advance in international adoption law

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[63] *See* Tracy Agyemang, Note, *Reconceptualizing Child Sexual Exploitation as a Bias Crime Under the Protect Act*, 12 CARDOZO J.L. & GENDER 937, 951–52 (2006); Laura P. Wexler, Note, *Street Children and U.S. Immigration Law: What Should Be Done?*, 41 CORNELL INT'L L.J. 545, 547 (2008).

[64] THE WORLD'S CHILDREN 2012, *supra* note 55, at 14 (footnote omitted).

[65] Queen Rania Al Abdullah, *Out of Sight, Out of Reach*, *in* THE WORLD'S CHILDREN 2012, *supra* note 55, at 15, 15.

[66] *See* Elisa Rosman et al., *Finding Permanence for Kids: NCFA Recommendations for Immediate Improvement to the Foster Care System*, ADOPTION ADVOC., Sept. 2009, at 3, 3–4 ("In 2008 . . . there were 463,000 children in foster care, of which 123,000 were waiting to be adopted.").

[67] *Id.*; *Meet the Children*, ADOPTUSKIDS, http://www.adoptuskids.org/meet-the-children (last visited Oct. 30, 2013) ("Today there are 104,000 children in foster care waiting to be adopted . . . ."); *see also* U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT (2009), *available at* http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport16.pdf (stating 17% of children in foster care waiting to be adopted had been waiting for more than 5 years). *But see* David M. Smolin, *Of Orphans and Adoption, Parents and the Poor, Exploitation and Rescue: A Scriptural and Theological Critique of the Evangelical Christian Adoption and Orphan Care Movement*, 8 REGENT J. INT'L L. 267, 271, 320–21 (2012) (noting that "both Christian and secular sources promoting adoption commonly claim that there are more than 100 million orphans in the world, a staggering figure indicating a virtually limitless need for adoptive families. Those focused on adoption from the United States foster care system estimate more than 100,000 children in the United States in need of adoption" but arguing that such numbers should not be the driving force behind the adoption movement).

and practice.[68] The Hague Convention grew out of a consensus by the representatives of the dozens of nations from around the world that comprise the Hague Conference on Private International Law (currently 72 nations).[69] They agreed that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,"[70] and that "intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin."[71] They were "[c]onvinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children."[72] Thus, the Hague Conference drafted the Hague Convention with two overarching goals: first, to promote intercountry adoption for children without families in their states of origin; and second, to prevent abusive practices such as the selling of children.[73] International adoption is one important component in protecting the welfare of parentless children, especially those in third-world countries.[74] While it operates one child at a time, it makes a huge difference to each of those children as well as future children.[75]

The Hague Convention governs intercountry adoptions among nations who have adopted the convention.[76] As of September 6, 2013, ninety-four nations had signed, ratified, or acceded to the Hague Convention,[77] and it had entered into force in all but four of those nations.[78]

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[68] Convention on Intercountry Adoption, *supra* note 15; Cynthia Ellen Szejner, Note, *Intercountry Adoptions: Are the Biological Parents' Rights Protected?*, 5 WASH. U. GLOBAL STUD. L. REV. 211, 213 (2006).

[69] HAGUE CONFERENCE ON PRIVATE INT'L LAW, ANNUAL REPORT 2012, at 25 (2013).

[70] Convention on Intercountry Adoption, *supra* note 15, at pmbl.

[71] *Id.*

[72] *Id.*

[73] *See* Maarit Jänterä-Jareborg, *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 63 NORDIC J. INT'L L. 185, 188 (1994).

[74] *See* Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFF. HUM. RTS. L. REV. 151, 158 (2007).

[75] *See id.*

[76] Lindsay K. Carlberg, Note, *The Agreement Between the United States and Vietnam Regarding Cooperation on the Adoption of Children: A More Effective and Efficient Solution to the Implementation of the Hague Convention on Intercountry Adoption or Just Another Road to Nowhere Paved with Good Intentions?*, 17 IND. INT'L & COMP. L. REV. 119, 129 (2007).

[77] *Status Table*, THE HAGUE CONF. ON PRIVATE INT'L L., http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (last visited Oct. 30, 2013). Sixty-one nations belonging to the Hague Conference have signed or given effect to this Convention (forty-

The Hague Convention has been a good starting point for reducing illegal practices such as baby-selling and extra-legal child trafficking.[79] At its inception, there was hope that adopting the Hague Convention would reduce bad policy practices and adoption process abuses in those nations that ratified or acceded to the Convention.[80] However, it has failed to facilitate and promote intercountry adoption—the other major purpose for the Convention.[81]

The Hague Convention on Intercountry Adoption was, *inter alia*, intended to reduce the "delays, complications and [the] considerable costs" of intercountry adoption.[82] However, it requires implementing bureaucracy and extensive regulations that are quite complicated and difficult.[83] These elements increase bureaucratic complexity, costs, and

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seven by ratification, twelve by accession, and two by signing) and thirty-three other sovereign nations have signed or given effect to it (six by ratification, twenty-five by accession, and two by signing), for a total of ninety-four nations that have taken some step to join by signing, ratifying, or acceding. *See id.*

[78] *Id.*; *see also* Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons, 71 Fed. Reg. 8064, 8064–65 (Feb. 15, 2006) (to be codified at 22 C.F.R. pt. 96) (explaining how the United States has enforced the Hague Convention through the Intercountry Adoption Act of 2000); Anna Mary Coburn et al., *International Family Law*, 38 INT'L LAW. 493, 494 (2004) ("The Hague Convention will . . . enter into force between the United States and other party countries approximately three months after . . . ratification . . . .") Lynn D. Wardle, *Parentlessness: Adoption Problems, Paradigms, Policies, and Parameters*, 4 WHITTIER J. CHILD & FAM. ADVOC. 323, 358–59 (2005) (noting a surprising amount of support in the first eight years of the Hague Convention's existence); Rosanne L. Romano, Comment, *Intercountry Adoption: An Overview for the Practitioner*, 7 TRANSNAT'L LAW. 545, 572–73 (1994) (noting the pioneering nature of the Hague Convention and the general procedural process for countries to ratify it). Two of the *International Family Law* co-authors, Anna Mary Coburn and Mary Helen Carlson, were attorneys for the United States Department of State, which participated in the Hague Convention proceedings, Coburn, *supra*, at 1 n.*; one of the article's co-authors, Adair Dyer, is the former Deputy Secretary General of the Hague Conference, who participated in the drafting of the Hague Convention, *see* Hans van Loon, *Preface* to GLOBALIZATION OF CHILD LAW: THE ROLE OF THE HAGUE CONVENTIONS, at VII, VII–VIII (Sharon Detrick & Paul Vlaardingerbroek eds., 1999).

[79] *See* Kate O'Keeffe, Note, *The Intercountry Adoption Act of 2000: The United States' Ratification of the Hague Convention on the Protection of Children, and its Meager Effect on International Adoption*, 40 VAND. J. TRANSNAT'L L. 1611, 1615 (2007).

[80] *See* Elizabeth Long, Note, *Where Are They Coming From, Where are They Going: Demanding Accountability in International Adoption*, 18 CARDOZO J.L. & GENDER 827, 827–28 (2012). *See generally* Wardle, *HCIA Implementing Law*, at 145–46 (discussing early hopes of success in procedural reforms of international adoption).

[81] Elisabeth M. Ward, Note, *Utilizing Intercountry Adoption to Combat Human Rights Abuses of Children*, 17 MICH. ST. J. INT'L L. 729, 734–35 (2009).

[82] William Duncan, *The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, *in* INTERCOUNTRY ADOPTION: DEVELOPMENTS, TRENDS, AND PERSPECTIVES 40, 46–47 (Peter Selman ed., 2000).

[83] *See* O'Keeffe, *supra* note 79.

delays.[84] Those bureaucracies and regulations "impose costs (the cost of the accreditation process itself and supervision of accreditors by the State Department) that [are] passed on to adoptive families and taxpayers."[85] Thus, one common criticism of the Hague Convention is that it has increased and "will [continue to] increase the costs of adoption services."[86] Both public and private costs of intercountry adoption have jumped and are predicted to increase under the Hague Convention, and "[t]he addition of new costs and fees will probably put the choice of intercountry adoption beyond the reach of the middle class."[87]

For example, a recent study by the European Commission Study on Adoption reported that even in Europe this is a problem: "The *cost of adoption* is an important issue and sometimes forces the prospective adoptive parents to give up the procedure. Other complaints include excessive bureaucracy, the duration of the procedure, and the disparity of case law, even at [a] national level, which often leads to discrimination."[88]

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[84] *See* Katherine Sohr, Comment, *Difficulties Implementing the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption: A Criticism of the Proposed Ortega's Law and an Advocacy for Moderate Adoption Reform in Guatemala*, 18 PACE INT'L L. REV. 559, 578, 587 (2006) ("Implementation of the Hague Convention's requirements proves difficult for both sending and receiving countries.").

[85] Mary Eschelbach Hansen & Daniel Pollack, *The Regulation of Intercountry Adoption*, 45 BRANDEIS L.J. 105, 122 (2006).

[86] *Id.* at 106, 122. Other authors have arrived at the same conclusion:

> [A]nother potential impact of the Hague Convention on adoptive families is the increased cost of adopting from Hague Convention countries. Adoption practitioners and agencies will experience increased costs in order to meet the Hague requirements and these costs will likely be transferred to the adoptive families through adoption fees.
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> . . . [T]he Hague Convention . . . does not provide adequate assurances of smooth and functional implementation in countries, particularly in the sending countries who face an insurmountable hurdle of costly implementation.

Sohr, *supra* note 84, at 579, 591; *see also* Gina M. Croft, Note, *The Ill Effects of a United States Ratification of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 33 GA. J. INT'L & COMP. L. 621, 642 (2005) (predicting costs will increase).

[87] Croft, *supra* note 86, at 642–43; *see also* Paige Tackett, Note, *"I Get By With A Little Help From My Friends": Why Global Cooperation Is Necessary to Minimize Child Abduction and Trafficking in the Wake of Natural Disaster*, 79 UMKC L. REV. 1027, 1032 (2011) ("[T]he requisite costs [of complying with the Hague Convention] have been astronomical. . . . Compliance with the Hague Convention is expensive and time consuming . . . .").

[88] Patrizia De Luca, Team Leader, Civil Justice Unit, Directorate Gen. Justice, Freedom & Sec., Eur. Comm'n, Presentation at the Joint Council of Europe and European

The Hague Convention has inflated the adoption bureaucracy. As Professor Sara Dillon noted a decade ago:

> [T]he Hague Convention does not set down . . . [standards] designed to prevent children from languishing in orphanages. It does not state that countries should avoid creating unnecessary bureaucratic hurdles to adoption . . . before institutionalization has caused real developmental damage. In this sense, even the Hague Convention emphasizes the dangers of unethical adoption over the dangers of no adoption at all, and fails to provide a proper balance between the two poles of this human rights dilemma.[89]

In fact, the Hague Convention has priced responsible intercountry adoption out of the reach of many poor, third-world nations.[90] Ironically, those are the very nations from which children are most likely to be sought for intercountry adoption.[91]

It should be emphasized that many factors have undoubtedly contributed to the decline in adoption globally and within particular nations in recent years.[92] This Article does not suggest that only one factor has impacted the reduction in international (and intra-national) adoption. For example, the increasing availability of assisted reproductive technologies ("ART") and the increase in the use of ART by otherwise infertile couples (as well as by non-married individuals) to obtain biological, partially-related, or "designer" babies has probably impacted the number of intercountry and domestic adoptions.[93]

Commission Conference: European Commission Study on Adoption, (Dec. 1, 2009) (emphasis in original).

[89] Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INT'L L.J. 179, 213–14 (2003); *see also* Laura McKinney, *International Adoption and The Hague Convention: Does Implementation of the Convention Protect the Best Interests of Children?*, 6 WHITTIER J. CHILD & FAM. ADVOC. 361, 389–90 (2007) (implying that while the Hague Convention has the potential to regulate and facilitate international adoption, implementation appears to be more effective at preventing corruption and abuse than at facilitating the adoption of children who are in need of a family).

[90] Colin Joseph Troy, Comment, *Members Only: The Need for Reform in U.S. Intercountry Adoption Policy*, 35 SEATTLE U. L. REV. 1525, 1538–39 (2012); *see* O'Keeffe, *supra* note79, at 1615.

[91] *See* Troy, *supra* note 90, at 1539–40.

[92] *See* Selman, *Global Trends*, *supra* note 20, at 14–15 (discussing possible factors that have contributed to the downward trend in adoptions both globally and within particular nations).

[93] Gulcin Gumus & Jungmin Lee, *Alternative Paths to Parenthood: IVF or Child Adoption*, 50 ECON. INQUIRY 802, 803–04 (2012); *see* ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING 24, 28, 34–37 (1993) (discussing societal bias for biological children over adoption and the difficulties of adopting after seeking infertility treatments); Susan Frelich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL F. 393, 408 (2004).

IV. THE STATUS OF ADOPTION BY LGBT PARTNERS AND COUPLES IN AMERICAN LAW AND THE CONNECTION TO LEGALIZING SAME-SEX MARRIAGE

A. Status of Adoption by LGBT Partners and Couples in the United States

The legality of adoption of children by same-sex partners and couples is changing in the United States. For example, in 1995, one prominent professor (supportive of LGBT parenting) found only nine states in which adults who were openly gay or lesbian had been allowed to adopt.[94] In most states they were deemed "unfit parents" as lawmakers "consider[ed] parenthood [to be] incompatible with gay identity."[95] In 1998, the student author of another piece identified four states that barred LGBT adoptions but noted that "about eighteen states allow gay partners to adopt children, [but] they may not adopt at the same time. One parent can legally adopt and the other parent can apply for joint rights."[96] In 2008, "[s]ixteen states contemplated initiatives . . . to ban gays and lesbians from adopting children."[97]

Today, all states except one clearly allow otherwise-qualified gay and lesbian adults to adopt by themselves.[98] Seventeen states (plus the District of Columbia) allow joint adoption by LGBT couples.[99] Fifteen states (plus the District of Columbia) permit so-called "second-parent" adoptions by a same-sex partner of the biological parent.[100] "Some states

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[94] Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL'Y 191, 195–96 (1995) (number of states includes the District of Columbia).

[95] Karla J. Starr, Note, *Adoption by Homosexuals: A Look at Differing State Court Opinions*, 40 ARIZ. L. REV. 1497, 1498 (1998); *see also id.* at 1499; Joseph Evall, *Sexual Orientation and Adoptive Matching*, 25 FAM. L.Q. 347, 352–55 (1991) (discussing the inability of homosexuals to adopt); Alexa E. King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 UCLA WOMEN'S L.J. 329, 344–45 (1995) ("Heterosexism also affects adoption and foster parenting. Although there has been some liberalization in foster parenting laws concerning gays and lesbians, adoption laws remain restrictive."). *But see In re* Adoption of Charles B., 552 N.E.2d 884, 885–86 (Ohio 1990) (allowing a homosexual man to adopt a child); *id.* at 890 (Resnick, J., dissenting) ("Existing Ohio law is very clear that a homosexual is not as a matter of law barred from adopting a child."); Fred A. Bernstein, *This Child Does Have Two Mothers . . . and a Sperm Donor with Visitation*, 22 N.Y.U. REV. L. & SOC. CHANGE 1, 6 n.25 (1996) ("numerous states . . . allow second-parent adoptions").

[96] Joyce F. Sims, Note, *Homosexuals Battling the Barriers of Mainstream Adoption—and Winning*, 23 T. MARSHALL L. REV. 551, 564–65 (1998) (footnote omitted).

[97] Deirdre M. Bowen, *The Parent Trap: Differential Familial Power in Same-Sex Families*, 15 WM. & MARY J. WOMEN & L. 1, 5–6 (2008).

[98] *See infra* Table 6.

[99] *See infra* Table 6.

[100] *See infra* Table 6.

that permit same-sex couple adoptions through the second-parent adoption process do not give legal recognition to same-sex partnerships through marriage, civil union or partnership law. There is, as one author says, an odd 'irony' to the inconsistent positions taken in some jurisdictions."[101]

A state-by-state review of the laws and judicial decisions provides more detail about the varying approaches, standards, and policy positions taken in each of the states and in the District of Columbia. It reveals that the allowance of adoption of children by LGBT couples and partners is a very recent phenomenon and still a minority position in American states.[102] But the number of states that allow such adoptions has been increasing steadily.

Alabama

The Alabama Code provides: "Any adult person or husband and wife jointly who are adults may petition the court to adopt a minor," with no preclusion of homosexual singles.[103] By allowing "any adult person" to adopt without any preclusion based on sexual orientation, it can be assumed that homosexual singles can adopt. The Code is otherwise silent on whether homosexual adoption is legal. Since the Code refers to a "husband and wife" as a requirement for joint adoption, it can be inferred that this precludes same-sex couples from adopting children. Neither the Alabama Constitution nor any court decisions directly address homosexual adoption under the Code.[104] Alabama law is silent on same-sex, second-parent adoption and on second-parent adoptions in general, only allowing for stepparent adoption: "Any person may adopt his or her spouse's child according to the provisions of this chapter."[105] Since this section requires the stepparent to be a "spouse" of the other parent and because Alabama does not provide for or recognize same-sex

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[101] Kathy T. Graham, *Same-Sex Couples: Their Rights as Parents, and Their Children's Rights as Children*, 48 SANTA CLARA L. REV. 999, 1020 (2008) (quoting Vanessa A. Lavely, *The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies Between Marriage and Adoption Cases*, 55 UCLA L. Rev. 247, 287 (2007)).

[102] *See infra* paragraph accompanying note 311.

[103] ALA. CODE § 26-10A-5(a) (Westlaw through 2013 Reg. Sess.).

[104] *But see Ex parte* J.M.F., 730 So. 2d 1190, 1195–96 (Ala. 1998) (quoting *Ex parte* D.W.W., 717 So. 2d 793, 796 (Ala. 1998)) (granting heterosexual father's petition for custody over lesbian mother because of the mother's open relationship, relying on studies showing that homosexual parenting may have negative consequences on children, and noting that the mother's lifestyle, was "neither legal in [Alabama], nor moral in the eyes of most of its citizens."); L.A.M. v. B.M., 906 So. 2d 942, 946 (Ala. Civ. App. 2004) (stating the Supreme Court's holding in *Lawrence v. Texas*, 539 U.S. 558 (2003), does not overrule the Alabama Supreme Court's decision in *Ex parte J.M.F.*).

[105] § 26-10A-27 (Westlaw).

marriage,[106] it can be inferred that Alabama does not allow for same-sex, second-parent adoptions.

Alaska

The Alaska Code allows an "unmarried adult" to petition for adoption, with no prohibition of homosexual singles.[107] The Supreme Court of Alaska also stated that it was improper to consider a mother's lesbian relationship in a custody determination when there was no evidence that her relationship adversely affected the child.[108] Alaska law also states that a "husband and wife" may adopt together.[109] Since Alaska does not allow same-sex marriage,[110] nor recognize out-of-state same-sex marriages,[111] this implies that same-sex couples cannot jointly adopt. Alaska law does allow for stepparent adoption if the petitioner is the "spouse"[112] of the child's natural parent, which seems to preclude second-parent adoptions by homosexuals since, again, Alaska does not allow same-sex marriage. No other Alaska law deals with second-parent adoption by a homosexual.

Arizona

Arizona allows "[a]ny adult resident of this state" to petition for adoption, with no preclusion of homosexual singles.[113] According to the same statute, the only people who may jointly petition for adoption are a "husband and wife."[114] Since Arizona does not allow or recognize same-sex marriage,[115] this means that Arizona probably does not allow for same-sex couples to jointly adopt. And since the stepparent provision in Arizona's law requires the petitioner to be the "spouse" of the child's legal parent,[116] same-sex couples probably will not be able to accomplish a second-parent adoption through the stepparent provision.[117] There is

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106 ALA. CONST. amend. 774(d)–(e).

107 ALASKA STAT. § 25.23.020(a)(2) (LEXIS through 2012, 3d Spec. Sess.).

108 S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1985).

109 § 25.23.020(a)(1) (LEXIS).

110 *Id.* § 25.05.013 (LEXIS).

111 *Id.* § 25.05.013(a) (LEXIS).

112 *Id.* § 25.23.020(a)(4)(A) (LEXIS); *see also id.* § 25.23.130(a)(1) (LEXIS).

113 ARIZ. REV. STAT. ANN. § 8-103(A) (Westlaw through 2013 Reg. Sess.).

114 *Id.*

115 ARIZ. CONST. art. XXX, § 1; ARIZ. REV. STAT. ANN. §§ 25-101, 25-125 (Westlaw through 2013 Reg. Sess.).

116 § 8-117(C) (Westlaw).

117 *See also In re* Appeal in Pima Cnty. Juvenile Adoption Action No. B-13795, 859 P.2d 1343, 1344 (Ariz. Ct. App. 1993) ("The statutory exception [for step-parent adoption] applies only in the context of a marriage between the natural parent and the adoptive parent.").

no other statutory or judicial authority on point for either joint or second-parent adoption by same-sex couples.

Arkansas

Under the Arkansas Code, "an unmarried adult" and "the unmarried father or mother of the individual to be adopted" can adopt.[118] There is no preclusion of homosexual singles. In 2008, Arkansas voters approved a law that would ban any person cohabiting outside a valid marriage from adopting.[119] This law was eventually overturned by the Arkansas Supreme Court because it violated the right to privacy that is implicit in the Arkansas Constitution.[120] The Arkansas Code states that a "husband and wife together" may petition for adoption, which seems to preclude same-sex couples from jointly adopting.[121] No other case law or statute deals with joint, same-sex couple adoption. The Code does not specifically address second-parent adoptions, only allowing for stepparent adoption if the second parent is married to the parent of the child to be adopted.[122] Since Arkansas neither allows for nor recognizes same-sex marriage,[123] this seems to preclude same-sex, second-parent adoptions. No other statutes or case law address this issue.

California

California law does not put any restrictions on adoption by single people according to sexual orientation,[124] and the California Supreme Court has allowed same-sex, second-parent adoptions.[125] Also, California's domestic partnership laws, which give same-sex domestic partners the same rights as "spouses," would also allow same-sex couples to get a second-parent adoption, as well as a joint adoption, if they were registered.[126]

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[118] ARK. CODE ANN. § 9-9-204(2)–(3) (LEXIS through 2012 Fiscal Sess.).

[119] Catherine L. Hartz, *Arkansas's Unmarried Couple Adoption Ban: Depriving Children of Families*, 63 AR. L. REV. 113 (2010); § 9-8-304(a) (repealed 2013); *see also* Ark. Dep't of Human Servs. v. Cole, 380 S.W.3d 429, 431 (Ark. 2011).

[120] *Cole*, 380 S.W.3d at 431.

[121] § 9-9-204(1) (LEXIS).

[122] *Id.* § 9-9-204(4)(i) (LEXIS).

[123] *Id.* § 9-11-208(a)(1)(B) (LEXIS).

[124] *See* CAL. FAM. CODE § 8802(a)(1) (Westlaw through Ch. 130, 2013 Reg. Sess.).

[125] Sharon S. v. Superior Court, 73 P.3d 554, 572 (Cal. 2003).

[126] § 297.5(a) (Westlaw).

Colorado

The Colorado Code provides that anyone over the age of twenty-one can petition for adoption.[127] There is no preclusion of homosexual singles, and it is safe to infer that this group can adopt. Also, Colorado allows for second-parent adoptions even when the couple is not married,[128] and this includes same-sex couples.[129] As of May 2013, Colorado allows civil unions, giving partners in a civil union substantially similar rights enjoyed by married couples.[130] This law allows joint adoption by same-sex couples registered in a civil union.[131]

Connecticut

The Connecticut Code provides that "any adult person" may adopt, which implicitly allows for homosexual singles to petition for adoption.[132] The Code also allows for second-parent adoption:

> [A]ny parent of a minor child may agree in writing with one other person who shares parental responsibility for the child with such parent that the other person shall adopt or join in the adoption of the child, if the parental rights, if any, of any other person other than the parties to such agreement have been terminated.[133]

The gender and marriage-neutral language in this section arguably allows for same-sex, second-parent adoption.[134] Connecticut law also allows "any parent" to "join in the adoption of the child," which suggests that same-sex couples could probably petition for a joint adoption, though there is no case law on point.[135]

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[127] COLO REV. STAT. § 19-5-202(1) (LEXIS through 2013 Reg. Sess.).

[128] *Id.* § 19-5-203(1)(d.5)(I) (LEXIS).

[129] *Id.* § 14-15-107(5)(g) (LEXIS).

[130] *Id.* § 14-15-107(1) (LEXIS).

[131] *Id.* § 14-15-107(5)(g) (LEXIS).

[132] CONN. GEN. STAT. § 45a-724(a)(1) (Westlaw through Pub. Acts of 2013 Reg. Sess.).

[133] *Id.* § 45a-724(a)(3) (Westlaw).

[134] *See id.;* Oleski v. Hynes, No. KNLFA084008415, 2008 WL 2930518, at *1, *12 (Conn. Super. Ct. July 10, 2008) (allowing same-sex partner of child's biological parent to petition for adoption of child through Connecticut's statute); *see also* Jason C. Beekman, *Same-Sex Marriage: Strengthening the Legal Shield or Sharpening the Sword? The Impact of Legalizing Marriage on Child Custody/Visitation and Child Support for Same-Sex Couples*, 18 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 215, 225 n.40 (2012); Susanna Birdsong, *Voiding Motherhood: North Carolina's Shortsighted Treatment of Subject Matter Jurisdiction in* Boseman v. Jarrell, 21 AM. U. J. GENDER SOC. POL'Y & L. 109, 112–13 (2012); Leslie Joan Harris, *Voluntary Acknowledgements of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 467, 471 n.15 (2012).

[135] § 45a-724(a)(3) (Westlaw); *see also* Raftopol v. Ramey, 12 A.3d 783, 787, 793 (Conn. 2011) (allowing same-sex partner of biological parent to assume custody of child conceived through artificial insemination pursuant to gestational agreement without going

Delaware

The Delaware Code authorizes "[a]n unmarried person or a husband and wife jointly" to petition for adoption.[136] Because the Code does not specifically exclude homosexual singles from adopting, it can be inferred that this group may petition for adoption. Delaware's recently-enacted civil union provision provides that parties to a civil union "shall have the same rights . . . as . . . married spouses;"[137] thus, same-sex couples who have entered into a civil union can adopt a child.[138] The same provision would allow a same-sex, second-parent adoption as well.[139]

District of Columbia

District of Columbia law allows "any person" to petition for adoption.[140] The District of Columbia Court of Appeals held that unmarried couples, including homosexual couples, can petition the court for adoption.[141] The Court also stated that the D.C. Code's provision that allows for stepparent adoptions without terminating the rights of the natural parent,[142] applies equally to homosexual couples.[143]

Florida

Florida law states that "[n]o person eligible to adopt under this statute may adopt if that person is a homosexual."[144] The statute was upheld by the 11th Circuit in 2004,[145] but a Florida District Court of Appeal has recently held that the statute was unconstitutional in *Florida Department of Children and Families v. Adoption of X.X.G.*[146] However, the Florida law banning homosexuals from adopting is still currently in the Florida state code. It is unclear how *X.X.G.* affects second-parent and joint same-sex couple adoption. However, it is

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through adoption proceedings); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008) (holding that same-sex couples have a constitutional right to marry in Connecticut).

136 DEL. CODE ANN. tit. 13, § 903 (LEXIS through 79 Del. Laws, Ch. 172).

137 *Id.* § 212 (LEXIS).

138 *See id.* §§ 212, 903 (LEXIS); *see also id.* § 204 (LEXIS).

139 *Id.* § 904(a)(1) (LEXIS).

140 D.C. CODE § 16-302 (Westlaw through July 14, 2013).

141 *In re* M.M.D., 662 A.2d 837, 840 (D.C. 1995).

142 §16-302 (Westlaw).

143 *In re M.M.D.*, 662 A.2d at 859–60.

144 FLA. STAT. ANN. § 63.042(3) (Westlaw through 2013, 1st Reg. Sess.).

145 Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 806, 823, 827 (11th Cir. 2004).

146 45 So. 3d 79, 86, 92 (Fla. Dist. Ct. App. 2010) (allowing a homosexual foster father to adopt his foster children).

unlikely that these forms of adoption are recognized in Florida from its statutory language. The only couples who are authorized to jointly adopt in Florida are "a husband and wife jointly."[147] Furthermore, the statutes do not allow for second-parent adoption but do allow for stepparent adoption when the petitioner is "married."[148] Since Florida does not allow same-sex marriage,[149] it is unlikely that Florida would allow homosexual couples to take advantage of the stepparent provision.

Georgia

The Georgia Code states that "any adult person" can petition for adoption, with no specific ban on homosexual singles.[150] The Code is silent on joint petitions for adoption by same-sex couples, and there is no case law on point. The Code is also silent on second-parent adoptions but does allow for stepparent adoptions when the second-parent is a "spouse" of the other parent.[151] Since Georgia does not allow for, nor recognize, same-sex marriage,[152] it can be inferred that second-parent and joint adoptions by same-sex couples are prohibited, but there is no other law on point.

Hawaii

The Hawaii Code allows "any proper adult person [who is] not married" to petition for adoption, with no explicit preclusion of homosexual singles.[153] The Code further allows only for a "husband and wife" to jointly adopt.[154] Hawaii enacted a civil union statute in 2011 that gave registered parties to a civil union the same protections as those who are married.[155] The Code is silent about second-parent adoptions but does allow for stepparent adoption ("a person married to [the] legal parent" of the child to be adopted).[156] Same-sex couples in civil unions can take advantage of the stepparent provisions,[157] but it is unclear whether unmarried same-sex couples can adopt each other's children as there is no case law or statute on point. In November 2013, the Hawaii

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147 § 63.042(2)(a) (Westlaw).

148 *Id.* § 63.042(2)(c)(1) (Westlaw).

149 *Id.* § 741.212(1) (Westlaw).

150 GA. CODE ANN. § 19-8-3(a)(1) (LEXIS through 2013 Reg. Sess.).

151 *Id.* § 19-8-3 (LEXIS).

152 *Id.* § 19-3-3.1 (LEXIS).

153 HAW. REV. STAT. ANN. § 578-1 (LEXIS through Act 110, 2013 Reg. Sess.).

154 *Id.*

155 *Id.* § 572B-9 (LEXIS).

156 *Id.* § 578-16(d) (LEXIS).

157 *Id.* § 578-1 (LEXIS); *see also* Dean A. Soma, *Civil Unions in Hawai'i—A One-Year Retrospective*, 17 HAW. B.J. 4, 11–12 (2013).

legislature and governor enacted a law legalizing same-sex marriage (to take effect in December 2013)[158] that would seem to allow such couples to adopt as a married couple, which could make it less likely that unmarried same-sex or heterosexual couples would be deemed eligible to adopt.

Idaho

The Idaho Code allows "any adult person" to petition for adoption, with no specific preclusion of homosexual singles.[159] The Code is silent on same-sex joint adoption, and no cases are on point. The Code does not specifically recognize second-parent adoption but implicitly recognizes stepparent adoption: "*Unless the decree of adoption otherwise provides*, the natural parents of an adopted child are, from the time of the adoption, relieved of all parental duties toward, and all responsibilities for, the child so adopted."[160] Although there is no case law on same-sex adoption per se, the Supreme Court of Idaho said the following on custody matters: "Sexual orientation, in and of itself, cannot be the basis for awarding or removing custody; only when the parent's sexual orientation is shown to cause harm to the child, such that the child's best interests are not served, should sexual orientation be a factor in determining custody."[161] Idaho only recognizes marriage between a man and a woman,[162] but no other law is on point for whether the state recognizes same-sex, second-parent, or joint adoptions.

Illinois

In *In re Petition of K.M.*, one appellate court in Illinois permitted homosexual persons to petition for adoption, as well as same-sex couples to petition both jointly and through second-parent adoptions.[163] The Illinois Compiled Statutes provide that "[a] reputable person of legal age and of either sex" may petition for adoption, with no explicit preclusion of homosexual singles.[164] Other than *K.M.*, no case law addresses joint or

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[158] S. 1, 27th Leg., 2d Spec. Sess. (Haw. 2013) (redefining marriage as "permitted between two individuals without regard to gender"); *see also Hawaii Senate Sends Marriage Equality Bill to Governor*, BUZZFEED (Nov. 12, 2013, 5:56 PM), http://www.buzzfeed.com/tonymerevick/hawaii-senate-sends-marriage-equality-bill-to-governor.

[159] IDAHO CODE ANN. § 16-1501 (LEXIS through 2013 Sess.).

[160] *Id.* § 16-1509 (LEXIS) (emphasis added).

[161] McGriff v. McGriff, 99 P.3d 111, 117 (Idaho 2004).

[162] § 32-201(1) (LEXIS).

[163] *In re* Petition of K.M., 653 N.E.2d 888, 892, 895, 898–99 (Ill. App. Ct. 1995).

[164] 750 ILL. COMP. STAT. 50/2(A)(a) (Westlaw through P.A. 98-194, except P.A. 98-122, 98-176, 98-192, 2013 Reg. Sess.).

second-parent adoptions by same-sex couples. Under Illinois's recent same-sex marriage law, however, joint and second-parent adoptions by same-sex couples will be allowed.[165]

Indiana

The Indiana Code allows for "[a] resident of Indiana" to petition for adoption, with no preclusion of homosexual singles.[166] The Indiana Court of Appeals ruled that the state's adoption act did not prevent a same-sex couple from jointly petitioning to adopt a child.[167] The same court has held that the common law allows for same-sex, second-parent adoptions.[168]

Iowa

The Iowa Code allows "an unmarried adult" to petition for adoption, with no preclusion of homosexual singles.[169] There is no statute that deals directly with joint adoption by same-sex couples, but the Supreme Court of Iowa has ruled that same-sex marriage is legal, which means that same-sex couples can jointly adopt.[170] There is no statute or case law that deals with same-sex second-parent adoption, but married same-sex couples should be able to take advantage of Iowa's stepparent adoption provision.[171]

Kansas

The Kansas Code allows "any adult" to petition for adoption, with no preclusion of homosexual singles.[172] There is no case law or statute that explicitly addresses joint, same-sex adoptions. The Kansas Code, however, specifies that only a "husband and wife" can adopt jointly, which implies that same-sex couples are precluded.[173] There is also no statute or case law that specifically addresses same-sex, second-parent

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165 S. 10, 98th Gen. Assemb. (Ill. 2013).

166 IND. CODE ANN. § 31-19-2-2(a) (Westlaw through 2013 Legis.).

167 R.K.H. v. Morgan Cnty. Office of Family & Children (*In re* Infant Girl W.), 845 N.E.2d 229, 233, 243–44 (Ind. Ct. App. 2006) (finding the Indiana Code did not preclude unmarried and same-sex couples from petitioning for adoption).

168 *See In re* Adoption of K.S.P., 804 N.E.2d 1253, 1259 (Ind. Ct. App. 2004) (allowing for same-sex, second parent adoption when the first parent was the biological parent of the child to be adopted); *In re* Adoption of M.M.G.C., 785 N.E.2d 267, 268, 270–71 (Ind. Ct. App. 2003) (allowing for same-sex, second parent adoptions when the first parent was the legal adoptive parent of the child to be adopted).

169 IOWA CODE ANN. § 600.4(1) (Westlaw through 2013 Reg. Sess.).

170 *See* Varnum v. Brien, 763 N.W.2d 862, 872–73, 884, 906–07 (Iowa 2009).

171 *See* § 600.13(4) (Westlaw).

172 KAN. STAT. ANN. § 59-2113 (Westlaw through 2012 Reg. Sess.).

173 *Id.*

adoptions. Kansas requires that, before a child can be adopted, the child's biological parent's rights must be terminated, unless the petitioner for adoption is the spouse of the biological parent.[174] Kansas law thus seems to preclude any second-parent adoptions, whether by same-sex or heterosexual couples.

Kentucky

The Kentucky Code states that any resident of the state over eighteen years old can petition for adoption, with no preclusion of homosexual singles.[175] The Kentucky Court of Appeals has explicitly denied same-sex second-parent adoption.[176] Kentucky's Code and case law are silent on joint, same-sex adoptions, but given the Court of Appeals' ruling on second-parent adoption for same-sex couples, it is unlikely that the same-sex couples can petition to jointly adopt.

Louisiana

The Louisiana Code allows for "[a] single person, eighteen years or older" to petition for adoption, with no preclusion of homosexual singles.[177] There is no statute or case law on same-sex, second-parent adoptions, and it is unclear whether same-sex couples may take advantage of the stepparent provision.[178] There is no case law or statute that deals directly with joint petitions for adoption by same-sex couples, but Louisiana law provides that a couple has to be "married" in order to jointly adopt.[179] Since same-sex marriage is neither allowed nor recognized in Louisiana, it is doubtful that same-sex couples can petition jointly to adopt.[180] The Louisiana Attorney General has stated, "[b]y refusing to accept an out-of-state judgment obtained by two unmarried individuals who jointly adopted a child (in another jurisdiction), Louisiana does not violate the Full Faith and Credit Clause of the United States Constitution."[181] The Fifth Circuit held that it did not

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[174] *Id.* § 59-2118(b) (Westlaw).

[175] KY. REV. STAT. ANN. § 199.470(1) (Westlaw through 2013 Reg. Sess.).

[176] S.J.L.S. v. T.L.S., 265 S.W.3d 804, 809, 822 (Ky. Ct. App. 2008) (holding that since Kentucky law required a legal marriage for step-parent adoption, § 99.520(2) (Westlaw), and because Kentucky prohibited same-sex marriage, same-sex, second parent adoption was not allowed in Kentucky).

[177] LA. CHILD. CODE ANN. art. 1198 (Westlaw through 2012 Reg. Sess.).

[178] *See id.* arts. 1243(A)–(B), 1256(A), (C) (Westlaw through 2012 Reg. Sess.).

[179] *Id.* art. 1198 (Westlaw).

[180] LA. CIV. CODE ANN. arts. 89, 3520 (Westlaw through 2012 Reg. Sess.). *See also* Adoption of Meaux, 417 So.2d 522, 523 (La. Ct. App. 1982) (holding that an unmarried couple was not eligible to adopt their own natural child).

[181] La. Att'y Gen. Op., No. 06-0325, at 1 (Apr. 18, 2007), *available at* http://www.ag.state.la.us/Shared/ViewDoc.aspx?Type=4&Doc=18900.

violate the Full Faith and Credit clause to deny a same-sex couple a revised birth certificate for their Louisiana-born child whom they adopted in New York.[182]

Maine

The Maine Code provides that any "unmarried person" can petition for adoption, with no preclusion of homosexual singles.[183] Although the Code states that a "husband and wife" may jointly petition for adoption,[184] same-sex couples can legally marry in Maine,[185] and, as a result, these couples are able to jointly adopt. Furthermore, the Supreme Judicial Court of Maine ruled in *Adoption of M.A.* that this provision also allows unmarried, same-sex couples to jointly petition the court for adoption.[186] Some sources say the court's decision in *M.A.* also recognizes same-sex, second-parent adoptions,[187] but the court's opinion does not explicitly mention same-sex, second-parent adoption, though it is strongly implied by its holding.[188]

Maryland

Maryland's Code permits "any adult" to petition for adoption, with no preclusion of homosexual singles.[189] These same provisions require a married petitioner to have his or her spouse join in the adoption unless the couple is separated or the other spouse is incompetent.[190] Further, a Maryland court found that petitioners for adoption do not have to be married.[191] As of January 1, 2013, same-sex couples can legally marry in

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[182] Adar v. Smith, 639 F.3d 146, 161 (5th Cir. 2011).

[183] ME. REV. STAT. tit. 18-A, § 9-301 (Westlaw through Ch. 367, 369–427, 2013 Reg. Sess.).

[184] *Id.*

[185] ME. REV. STAT. tit. 19-A, § 650-A (Westlaw through Ch. 367, 369–427, 2013 Reg. Sess.).

[186] Adoption of M.A., 930 A.2d 1088, 1090 (Me. 2007).

[187] *See, e.g.*, Karel Raba, Note, *Recognition and Enforcement of Out-of-State Adoption Decrees Under the Full Faith and Credit Clause: The Case of Supplemental Birth Certificates*, 15 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 293, 313, 314 n.116, 315 n.120 (2013) (discussing same-sex parenting and second-parent adoption, observing that *Adoption of M.A.* recognizes second-parent adoptions).

[188] *See Adoption of M.A.*, 930 A.2d at 1090, 1098.

[189] MD. CODE ANN., FAM. LAW §§ 5-331(b)(1), 5-345(b)(1) (LEXIS through 2013 Reg. Sess.).

[190] *Id.* §§ 5-331(b)(2), 5-345(b)(2) (LEXIS).

[191] *In re* Adoption No. 90072022/CAD, 590 A.2d 1094, 1096 (Md. Ct. Spec. App. 1991).

Maryland,[192] which should affirmatively allow same-sex couples to jointly petition for adoption. The Code and case law are silent regarding same-sex, second-parent adoptions, but in light of the recognition of same-sex sex marriage, the existing provisions for stepparent adoptions should allow married same-sex couples to have a second-parent adoption.[193] It is questionable whether unmarried same-sex couples may have a second-parent adoption.

Massachusetts

The Massachusetts General Laws provide that "[a] person of full age may petition" for adoption.[194] The Supreme Judicial Court of Massachusetts in *Adoption of Tammy* declared that "there is nothing in the statute that prohibits adoption based on gender or sexual orientation."[195] This same case allowed a lesbian to adopt her partner's natural born child.[196] Concerning joint petitions for adoption by same-sex couples, the Court in *Tammy* said, "[t]here is nothing on the face of the statute which precludes the joint adoption of a child by two unmarried cohabitants such as the petitioners."[197]

Michigan

Michigan law states that "a person" can petition for adoption, with no preclusion of homosexual singles.[198] Michigan's prohibition for same-sex marriage[199] makes it unlikely that it will recognize either joint or second-parent, same-sex petitions for adoption. The only joint petitions for adoption allowed in Michigan are those where the petitioner jointly

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[192] *See* Civil Marriage Protection Act, 2012 Md. Laws 9–14 (codified at MD. CODE ANN., FAM. LAW §§ 2-201, 2-202); *see also* Todd Donovan, *Direct Democracy and Campaigns Against Minorities*, 97 MINN. L. REV. 1730, 1753 (2013) (noting that the pattern of statewide votes against same-sex marriage changed in 2012 with votes in Maine, Maryland, Minnesota, and Washington).

[193] *See* MD. CODE ANN., EST. & TRUSTS § 1-207(a) (LEXIS through 2013 Reg. Sess.) (allowing second-parent adoptions if the petitioner is married to the natural parent of the child).

[194] MASS. GEN. LAWS ANN. ch. 210, § 1 (Westlaw through Ch. 59, except Ch. 38, 46, 2013 Ann. Sess.).

[195] Adoption of Tammy, 619 N.E.2d 315, 318 n.2 (Mass. 1993).

[196] *Id.* at 315–16, 321.

[197] *Id.* at 318.

[198] MICH. COMP. LAWS ANN. § 710.24(1) (Westlaw through P.A. 2013, No. 106, 2013 Reg. Sess.); *see also* Mich. Att'y. Gen. Op., No. 7160, at 3 (Sept. 14, 2004), *available at* http://www.ag.state.mi.us/opinion/datafiles/2000s/op10236.htm ("[A same-sex individual] may adopt a child as a single person.").

[199] MICH. CONST. art. I, § 25; MICH. COMP. LAWS ANN. § 551.1 (Westlaw through P.A. 2013, No. 106, 2013 Reg. Sess.).

files with a "wife or . . . husband, if married."[200] Michigan does not allow for second-parent adoption and allows stepparent adoption only if the petitioner is married to the legal parent of the child to be adopted.[201] Thus, it is unlikely that a court would view a same-sex couple as "married," which would preclude both joint and second-parent, same-sex adoptions. There is no other law on point.

Minnesota

The Minnesota Statutes say that "any person" can petition for adoption, with no preclusion of homosexuals.[202] There is no statute or case law on point that deals with same-sex couples petitioning to adopt. No statute or case law directly addresses same-sex, second-parent adoption, but Minnesota law does allow for stepparent adoption when the adoptive parent is the "spouse" of the legal parent.[203] A recent Minnesota Court of Appeals decision declined to address the legality of same-sex, second-parent adoptions because the holding of that case was based on other grounds, but the lower court said in dictum that such adoptions were legal.[204] The court of appeals observed: "[W]e have no occasion to address the district court's dictum that second-parent, same-sex adoption is lawful in Minnesota."[205] The district court case was unpublished, and there is no other case law on point.

Mississippi

The Mississippi Code provides that an "unmarried" adult may petition for adoption.[206] The Code also explicitly states that "[a]doption by couples of the same gender is prohibited."[207] Although Mississippi law does not specifically mention second-parent adoption by same-sex couples, the Code strongly implies that such adoptions are prohibited as well.[208] There is no case law dealing with any of these issues.

Missouri

The Missouri Statutes say that "[a]ny person desiring to adopt another person" can petition for adoption, with no preclusion of

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[200] § 710.24(1) (Westlaw).

[201] *Id.* § 710.51(5) (Westlaw).

[202] MINN. STAT. ANN. § 259.22(1) (Westlaw through 2013 Spec. Sess.).

[203] *Id.* §§ 259.21(7), 259.22(1) (Westlaw).

[204] J.M.J. v. L.A.M. (*In re* Adoption of T.A.M.), 791 N.W.2d 573, 578 (Minn. Ct. App. 2010).

[205] *Id.*

[206] MISS. CODE ANN. § 93-17-3(4) (LEXIS through 2012 Reg. Sess.).

[207] *Id.* § 93-17-3(5) (LEXIS).

[208] *See id.*

homosexual singles.[209] There is no case law or statute on point regarding same-sex joint petitions for adoption; neither is there any case law or statute regarding same-sex, second-parent adoptions.

Montana

Montana law permits "an unmarried individual who is at least 18 years of age" to petition for adoption, with no preclusion of homosexual singles.[210] There is no case law or statute that deals directly with same-sex joint adoptions, but the Code only makes joint adoption available to a "husband and wife."[211] Since Montana prohibits same-sex marriage,[212] it probably does not allow same-sex joint adoptions. The Code and case law are also silent on same-sex, second-parent adoption. But the Code allows stepparent adoption when the second parent is "the husband or wife if the other spouse is a parent of the child."[213] In light of Montana's proscription of same-sex marriage, and given the lack of other statutory or case law guidance, Montana probably will not allow same-sex, second-parent adoptions under the stepparent provision. The Montana Supreme Court has, however, allowed a woman to have a "parental interest" in her former lesbian partner's adoptive children after the couple split.[214]

Nebraska

Nebraska law provides that "any minor child may be adopted by any adult person or persons," with no preclusion of homosexual singles.[215] The Supreme Court of Nebraska has specifically ruled against second-parent adoption by unmarried persons, but that was more than a decade ago.[216] Regarding joint, same-sex adoptions, the Code provides that any adult person "or persons" may petition the court for adoption,[217] which seems to imply that two unmarried "persons" could petition for adoption, but no court has taken up the issue so far.

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[209] MO. ANN. STAT. § 453.010(1) (Westlaw through 2013, 1st Reg. Sess.).

[210] MONT. CODE ANN. § 42-1-106(2) (Westlaw through July 1, 2013).

[211] *Id.* § 42-1-106(1) (Westlaw).

[212] *Id.* § 40-1-401(1)(d) (Westlaw).

[213] *Id.* § 42-1-106(1) (Westlaw).

[214] Kulstad v. Maniaci, 220 P.3d 595, 597, 609–10 (Mont. 2009).

[215] NEB. REV. STAT. ANN. § 43-101(1) (LEXIS through 2012 Sess.).

[216] B.P. v. State (*In re* Adoption of Luke), 640 N.W.2d 374, 379 (Neb. 2002) (quoting § 43-101(1) (LEXIS)) ("[W]e conclude that with the exception of the stepparent adoption, the parent or parents possessing existing parental rights must relinquish the child before 'any minor child may be adopted by any adult person or persons.'").

[217] § 43-101(1) (LEXIS).

Nevada

Nevada law provides that "[a]ny adult person or any two persons married to each other" can petition for adoption, with no preclusion of homosexual singles.[218] Nevada grants joint, same-sex adoption through its domestic partnership law: "Domestic partners have the same rights, protections and benefits . . . as are granted to . . . spouses."[219] Nevada allows for domestic partners to take advantage of their stepparent procedures: "[T]he adoption of a child by his or her stepparent shall not in any way change the status of the relationship between the child and his or her natural parent who is the spouse of the petitioning stepparent."[220] Although the domestic partnership laws make it possible for same-sex couples to petition for joint and stepparent adoptions, it is uncertain whether unregistered same-sex couples could do so as there is no case law or statute on point.

New Hampshire

New Hampshire law allows "[a]n unmarried adult" to petition for adoption with no preclusion of homosexual singles.[221] Underscoring joint and second-parent adoptions for same-sex couples is New Hampshire's 2010 law that allows same-sex marriage.[222] Although there is no case law on point, this would presumably allow petitions for adoptions by at least married same-sex couples jointly, as well as same-sex married couples under the stepparent adoption provision.[223]

New Jersey

New Jersey law provides that "[a]ny person may institute an action for adoption," with no specific preclusion of homosexual singles.[224] Also, in *In re Adoption of Two Children by H.N.R.*, a New Jersey court said that homosexual singles can apply for adoption.[225] New Jersey's Code is

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[218] NEV. REV. STAT. ANN. § 127.030 (LEXIS through 2011 Sess.).

[219] *Id.* § 122A.200(1)(a) (LEXIS).

[220] *See id.*; § 127.160 (LEXIS).

[221] N.H. REV. STAT. ANN. § 170-B:4(II) (Westlaw through Ch. 279, 2013 Reg. Sess.).

[222] H.R. 436 F.N. Local, 2009 Session (N.H. 2009) (effective Jan. 1, 2010); *see* § 457:1-a (Westlaw).

[223] § 170-B:4(IV) (Westlaw) (allowing "[a] married person without that person's spouse joining as a petitioner, if the adoptee is not the petitioner's spouse" to petition for adoption).

[224] N.J. STAT. ANN. § 9:3-43(a) (Westlaw through L. 2013, c. 84, J.R. No. 9).

[225] 666 A.2d 535, 538 (N.J. Super. Ct. App. Div. 1995) ("[A]n unmarried person, either heterosexual or homosexual, qualifies" under § 9:3-43(a) to petition for adoption).

silent on second-parent adoption, but allows for stepparent adoption.[226] However, *H.N.R.*'s holding established that an unmarried, same-sex partner could petition to adopt her partner's biological children under the stepparent exception.[227] Furthermore, in New Jersey, same-sex couples can enter into marriages[228] or civil unions where they are entitled to the same "legal benefits[] and protections" as spouses in matters of "adoption law and procedures."[229] Thus, this statute appears to authorize joint, same-sex petitions for adoption. And given *H.N.R.*'s holding, it is likely that even unregistered same-sex couples can jointly adopt.

New Mexico

The New Mexico Code provides that "any individual" can petition for adoption, with no preclusion of homosexual singles.[230] There is no case law or statute on point regarding same-sex joint adoption. New Mexico's statutes and case law are also silent on second-parent adoption, but allow for stepparent adoption for "married" individuals.[231] New Mexico's laws do not address whether in some circumstances a same-sex couple could be considered "married," and thus it is uncertain whether a same-sex couple could use New Mexico's stepparent provision to adopt a child.

New York

New York Law states that: "An adult unmarried person, an adult married couple together, or any two unmarried adult intimate partners together may adopt another person."[232] The plain language of the statute allows for both homosexual single adoption, and joint, same-sex petitions for adoption. The language of this statute was changed in 2010 from "husband and wife" to "married couple" in order to unambiguously allow

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[226] § 9:3-50(c)(1) (Westlaw) (stating that adoptions will "terminate all parental rights and responsibilities of the parent towards the adoptive child except for a parent who is the spouse of the petitioner and except those rights that have vested prior to entry of the judgment of adoption").

[227] *H.N.R.*, 666 A.2d at 538.

[228] Garden State Equality v. Dow, No. L-1729-11, 2013 WL 5397372, at *25 (N.J. Super. Ct. Law Div. Sept. 27, 2013).

[229] § 37:1-32(d) (Westlaw).

[230] N.M. STAT. ANN. § 32A-5-11(B)(1) (Westlaw through 2013, 1st Reg. Sess.).

[231] *Id.* § 32A-5-11(B)(2) (Westlaw).

[232] N.Y. DOM. REL. LAW § 110 (Westlaw through L. 2013, Ch. 1–340).

for joint same-sex couple adoptions.[233] The New York Court of Appeals has allowed same-sex, second-parent adoptions as well.[234]

North Carolina

The North Carolina General Statutes provide that "[a]ny adult may adopt another individual," with no preclusion of homosexual singles.[235] North Carolina law only allows couples who are married to jointly adopt: "If the individual who files the petition is unmarried, no other individual may join in the petition . . . ."[236] Given this provision, and since North Carolina does not allow or recognize same-sex unions,[237] the state explicitly bars joint same-sex petitions for adoption through its state law. Although in years past some North Carolina courts allowed for second-parent adoption,[238] recently the North Carolina Supreme Court ruled that second-parent adoptions are not consistent with North Carolina's stepparent adoption scheme, which requires the termination of the biological or previous parent's parental rights unless the stepparent is married to the existing parent.[239]

North Dakota

North Dakota allows an "unmarried adult" to petition the court for adoption, with no preclusion of homosexual singles.[240] The only people who can jointly adopt a child under the North Dakota statues are a "husband and wife together."[241] Since North Dakota does not allow or recognize same-sex marriage,[242] it is unlikely the state would allow same-sex couples to adopt. This same line of reasoning makes it unlikely that North Dakota allows same-sex, second-parent adoptions. Only stepparents who are "married" can adopt their husband or wife's biological child.[243]

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[233] 2010 N.Y. Sess. Laws 1364–65 (McKinney).

[234] *In re* Jacob, 660 N.E.2d 397, 398 (N.Y. 1995).

[235] N.C. GEN. STAT. § 48-1-103 (LEXIS through 2012 Reg. Sess.).

[236] *Id.* § 48-2-301(c) (LEXIS).

[237] *Id.* § 51-1.2 (LEXIS).

[238] *See, e.g.*, Boseman v. Jarrell, 704 S.E.2d 494, 497 (N.C. 2010); *Same-Sex Couple Adoption Voided*, NEWSOBSERVER.COM (Dec. 21, 2010), http://www.newsobserver.com/2010/12/21/873846/same-sex-couple-adoption-voided.html.

[239] *Boseman*, 704 S.E.2d at 496, 498–99, 501, 503. For the step-parent adoption statutes in North Carolina, see §§ 48-4-101, 48-1-106(d) (LEXIS).

[240] N.D. CENT. CODE § 14-15-03(2) (LEXIS through 2011 Reg. Sess.).

[241] *Id.* § 14-15-03(1) (LEXIS).

[242] N.D. CONST. art. XI, § 28.

[243] § 14-15-03(4) (LEXIS).

Ohio

Ohio allows an "unmarried adult" to petition for adoption with no exclusion of gay or lesbian singles.[244] Ohio allows stepparent adoption, but requires the petitioner to be the "spouse" of the adoptive child's parent.[245] An Ohio Court of Appeals case specifically prohibited a lesbian second-parent adoption because the couple was not married.[246] There is no case law or statute on point as to whether same-sex couples can jointly adopt. But since Ohio only allows a "husband and wife" to jointly adopt,[247] and since Ohio does not allow or recognize same-sex marriage,[248] it can easily be inferred that there is no joint, same-sex couple adoption in Ohio.

Oklahoma

Oklahoma allows "[a]n unmarried person who is at least twenty-one (21) years of age" to petition for adoption, with no preclusion of homosexual singles.[249] Although Oklahoma statutory law allows homosexual single persons to adopt, it allows only "a husband and wife" to jointly adopt.[250] Because Oklahoma does not allow or recognize same-sex marriage,[251] it is unlikely that same-sex couples can petition for joint adoption. In *In re Adoption of M.C.D.*, an Oklahoma appeals court ruled that unmarried persons cannot petition the court for adoption when the adoptive child would not have a "stable, permanent loving famil[y]" as a result.[252] Oklahoma does not otherwise give the possibility for same-sex, second-parent adoptions because the biological parent's parental rights are automatically terminated by an adoption decree unless the adoptive parent is the "spouse" of the biological parent.[253] Again, because Oklahoma does not allow or recognize same-sex marriage, it is unlikely that same-sex couples can use the stepparent provision to adopt a child.

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[244] OHIO REV. CODE ANN. § 3107.03(B) (LEXIS through File 24, 26–37, 2013 Sess.); *see also In re* Adoption of Charles B., 552 N.E.2d 884, 885–86, (Ohio 1990) (allowing a homosexual man to adopt a child).

[245] § 3107.03(D)(1) (LEXIS).

[246] *In re* Adoption of Doe, 719 N.E.2d 1071, 1072 (Ohio Ct. App. 1998).

[247] § 3107.03(A) (LEXIS).

[248] OHIO CONST. art. XV, § 11; OHIO REV. CODE ANN. § 3101.01(C) (LEXIS through File 24, 26–37, 2013 Sess.).

[249] OKLA. STAT. tit. 10, § 7503-1.1(3) (Westlaw through 2013, 1st Reg. Sess.).

[250] *Id.* § 7503-1.1(1) (Westlaw).

[251] OKLA. CONST. art. II, § 35.

[252] Depew v. Depew (*In re* Adoption of M.C.D.), 42 P.3d 873, 881 (Okla. Civ. App. 2001).

[253] *See* § 7505-6.5(B) (Westlaw).

Oregon

Oregon law allows "[a]ny person" to petition for adoption, with no preclusion of homosexual singles.[254] Oregon's statutes do not provide for second-parent adoption specifically, but they do have a stepparent statute. This statute requires the stepparent to be "the spouse" of the first parent.[255] Oregon has a domestic partnership law that states any rights given by statute to married persons are also given to a couple in a domestic partnership.[256] Thus, same-sex couples registered as domestic partnerships, should be able to have a second-parent adoption through the stepparent provision; if the couple is not registered as a domestic partnership, they probably would not be able to use the stepparent provision. There is no case law on un-registered same-sex couples trying to adopt. This holds true for same-sex joint adoptions as well—it can be assumed that registered partners could jointly petition for adoption, while it is uncertain if non-registered same-sex couples could jointly petition.

Pennsylvania

Pennsylvania law provides that "[a]ny individual may become an adopting parent," with no exclusion of homosexual singles.[257] There is no case law or statute that addresses joint same-sex petitions for adoption. Pennsylvania law provides that in a stepparent adoption, the existing parental rights will not be disturbed if the adopting party is the "spouse" of the first parent.[258] The commonwealth has a "strong and longstanding public policy" against same-sex marriage.[259] However, the Pennsylvania Supreme Court ruled that trial courts have discretion to grant same-sex, second-parent adoptions when the petitioners show "cause."[260]

Rhode Island

Rhode Island allows "[a]ny person" to petition for adoption, with no preclusion of homosexual singles.[261] Rhode Island allows same-sex couples to enter civil unions, which give these couples the same rights as

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[254] OR. REV. STAT. ANN. § 109.309(1) (Westlaw through Ch. 676, 2013 Reg. Sess.).

[255] *Id.* § 109.041(2) (Westlaw).

[256] *Id.* § 106.340(1) (Westlaw).

[257] 23 PA. CONS. STAT. ANN. § 2312 (Westlaw through Act 2013-11, Reg. Sess.).

[258] *See id.* § 2903 (Westlaw).

[259] *Id.* § 1704 (Westlaw). However, the Pennsylvania legislature has recently discussed changing the state's longstanding policy. *See* H.R. 1647, 2013 Gen. Assemb. (Pa. 2013); S. 719, 2013 Gen. Assemb. (Pa. 2013).

[260] *In re* Adoption of R.B.F., 803 A.2d 1195, 1202 (Pa. 2002).

[261] R.I. GEN. LAWS § 15-7-4(a) (LEXIS through 2012 Sess.).

those who have contracted for civil marriage.[262] This allows same-sex couples to jointly petition for adoption if they have registered in a civil union.[263] This statute also allows registered same-sex couples to take advantage of the stepparent provision, which requires the petitioner to be "married" to the adoptive child's parent.[264] But there is no statute or case law on point regarding whether unregistered same-sex partners can petition for joint or second-parent adoptions.

South Carolina

South Carolina law provides that: "Any South Carolina resident may petition the court to adopt a child," with no preclusion of homosexual singles.[265] South Carolina allows stepparent adoptions when the petitioner is the "spouse" of the adoptive child's parent.[266] Since South Carolina does not recognize same-sex marriages or civil unions,[267] it is unlikely that the state recognizes same-sex, second-parent adoptions. In the absence of any case law or statutes on same-sex joint petitions for adoption, South Carolina's constitutional ban on same-sex unions makes it unlikely that it recognizes joint petitions for adoption.

South Dakota

South Dakota law allows "any adult person" to petition for adoption, with no exception of LGBT singles.[268] South Dakota does not explicitly recognize second-parent adoptions, but allows stepparent adoptions when the petitioner "is the present spouse of the natural parent."[269] There is no case law or statute that deals specifically with same-sex, second-parent adoptions. Since South Dakota does not allow or recognize same-sex marriage,[270] it is unlikely that the state will recognize a homosexual couple as "spouse[s]" for purposes of the stepparent provision. South Dakota statutes and case law are silent on who can jointly petition for adoption, and thus do not necessarily limit it to "married" couples, thus making it uncertain whether same-sex couples could petition jointly for adoption.

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[262] *Id.* § 15-3.1-6 (LEXIS).

[263] *See id.* §§ 15-3.1-6, 15-7-4(a) (LEXIS).

[264] *Id.* § 15-7-17 (LEXIS).

[265] S.C. CODE ANN. § 63-9-60(A)(1) (Westlaw through 2012 Reg. Sess.).

[266] *Id.* § 63-9-1110 (Westlaw).

[267] S.C. CONST. art. XVII, § 15.

[268] S.D. CODIFIED LAWS § 25-6-2 (Westlaw through 2013 Reg. Sess.).

[269] *Id.* § 25-6-17 (Westlaw).

[270] S.D. CONST. art. XXI, § 9.

Tennessee

Tennessee law provides that "[a]ny person over eighteen (18) years of age may petition" for adoption, with no preclusion of homosexual singles.[271] Tennessee's stepparent adoption provision only mentions such adoptions in the context of the petitioner being the "spouse" of the legal or biological parent.[272] Since Tennessee does not allow or recognize same-sex marriage,[273] it is unlikely that a same-sex couple could use the stepparent provision of Tennessee law to accomplish a second-parent adoption through the stepparent provision. There is no case law or other statute on point for second-parent adoptions. There is also no case law or other statutes that deal directly with joint adoption by same-sex couples, though some sources speak favorably of same-sex couples adopting.[274]

Texas

Texas law states "an adult may petition to adopt a child" and makes no preclusion of homosexual singles.[275] Although there is no case law or statute on point regarding joint same-sex petitions for adoption, the Court of Appeals of Texas in *Goodson v. Castellanos* said in dictum that "there is no direct statement of public policy found in the family code or the constitution prohibiting the adoption of a child by two individuals of the same sex."[276] *Goodson* declined to declare void a joint same-sex adoption that a district court had granted because the petitioner waited too long to attack the validity of the adoption.[277] Additionally, this case shows that lower courts in Texas have granted such adoptions.[278]

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[271] TENN. CODE ANN. § 36-1-115(a) (LEXIS through 2012 Reg. Sess.).

[272] *Id.* § 36-1-115(c) (LEXIS).

[273] TENN. CONST. art. XI, § 18.

[274] *See* Adoptions by Same Sex Couples, Tenn. Att'y Gen. Op., No. 07-140, at 1 (Oct. 10, 2007), *available at* http://www.tn.gov/attorneygeneral/op/2007/op/op140.pdf ("Assuming the adoption is found to be in the best interest of the child, there is no prohibition in Tennessee adoption statutes against adoption by a same sex couple," though an opinion of the Attorney General does not carry the force of law); *see also In re* Adoption of M.J.S., 44 S.W.3d 41, 56–57 (Tenn. Ct. App. 2000) (citations omitted) (in affirming the adoption petition of a lesbian, the court said, "the lifestyle of a proposed adoptive parent is certainly a factor that the trial court should consider in determining whether a proposed adoption is in a child's best interests. By itself, however, this factor does not control the outcome of custody or adoption decisions, particularly absent evidence of its effects on the child.").

[275] TEX. FAM. CODE ANN. § 162.001(a) (Westlaw through Ch. 65, 2013 Reg. Sess.).

[276] 214 S.W.3d 741, 751 (Tex. App. 2007).

[277] *Id.* at 748.

[278] *Id.* at 745, *see also* Hobbs v. Van Stavern, 249 S.W.3d 1, 3 (Tex. App. 2006) (noting that the trial court appointed two women as joint managing conservators for a child following their breakup). At least one lower court has also granted same-sex, second parent adoptions. *See In re* S.D.S.-C., No. 04-08-00593-CV, 2009 WL 702777, at *1 (Tex. App. Mar.

However, no appellate court has actually ruled on the issue of whether joint or second-parent same-sex adoptions are legal in Texas. While joint same-sex adoptions are probable, same-sex, second-parent adoptions are unlikely to be recognized in Texas. This is because the stepparent provision requires the petitioner to be the "spouse" of the legal or biological parent.[279] Same-sex couples will probably not qualify as "spouses" because Texas does not allow or recognize same-sex marriage.[280] Thus, in the absence of any statute or case law regarding second-parent adoptions, it is unlikely that same-sex couples could get such an adoption through the stepparent provision.

Utah

Utah law allows any "adult" to petition for adoption, unless that person is "cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state."[281] Therefore, single homosexuals could adopt as long as they are not cohabiting in a relationship not recognized as a legal marriage. In light of this provision, and since Utah does not recognize or allow same-sex marriage,[282] joint and second-parent, same-sex adoptions are disallowed.

Vermont

Vermont's law allows "any person" to petition for adoption and does not preclude homosexual singles.[283] The same statute also allows second-parent adoptions, with no exclusion of same-sex couples: "If a family unit consists of a parent and the parent's partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent's parental rights is unnecessary in an adoption under this subsection."[284] Same-sex couples can jointly adopt because Vermont allows for same-sex marriage,[285] as well as civil unions (parties to civil unions have same rights as married people, including adoption).[286] Since Vermont allows for same-sex marriage,[287] married,

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18, 2009) (reviewing a same-sex, second parent adoption granted by a lower court for different issues).

[279] § 162.001(b)(2) (Westlaw).

[280] *Id.* § 6.204(b) (Westlaw).

[281] UTAH CODE ANN. § 78B-6-117(2)(b), (3) (LEXIS through 2013, 1st. Spec. Sess.).

[282] *Id.* § 30-1-2(5) (LEXIS), § 78B-6-117(2)(b), (3) (LEXIS).

[283] VT. STAT. ANN. tit. 15A, § 1-102(a) (LEXIS through 2011 Adjourned Sess.).

[284] *Id.* § 1-102(b) (LEXIS).

[285] *Id.* tit. 15, § 8 (LEXIS).

[286] *Id.* § 1204(a), (e)(4) (LEXIS); *see also* Titchenal v. Dexter, 693 A.2d 682, 686–87 (Vt. 1997) (saying, in dictum, that "[t]hrough marriage or adoption, heterosexual couples may assure that nonbiological partners will be able to petition the court regarding parental

same-sex couples can petition for joint adoptions. It is unclear, however, whether unmarried, same-sex couples can do the same as there is no case law or statutes on point.

Virginia

The Code of Virginia allows "any natural person" to petition for adoption with no exclusion of LGBT singles.[288] Virginia statutes and case law are silent on joint, same-sex adoptions. Virginia law does not explicitly address second-parent adoptions, but does allow for stepparent adoptions when the petitioner is the "husband or wife" of the child's legal parent.[289] Because Virginia does not recognize same-sex marriage,[290] it is unlikely that an individual in a same-sex relationship can be a "husband or wife" for purposes of this provision. Such an individual will, therefore, most likely not be able to utilize the stepparent provision to accomplish a second-parent adoption.

Washington

Washington law states, "[a]ny person who is legally competent and who is eighteen years of age or older may be an adoptive parent."[291] The law also provides that "[i]f the petitioner is married, the petitioner's spouse shall join in the petition."[292] Since Washington formally recognizes same-sex marriage as of December 2012,[293] it is now even clearer that married, same-sex couples can jointly petition for adoption.[294] Washington does not explicitly allow for second-parent adoptions, but allows stepparent adoptions when the petitioner is

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rights and responsibilities or parent-child contact in the event a relationship ends. Nonbiological partners in same-sex relationships can gain similar assurances through adoption[,]" and "same-sex couples may participate in child-rearing and have recourse to the courts in the event a custody or visitation dispute results from the breakup of a relationship.").

287 Tit. 15, § 8).

288 VA. CODE ANN. § 63.2-1201 (LEXIS through 2013 Spec. Sess. I).

289 *Id.* § 63.2-1215 (LEXIS).

290 VA. CONST. art. I, § 15-A; VA. CODE ANN. § 20-45.2 (LEXIS through 2013 Spec. Sess. I).

291 WASH. REV. CODE ANN. § 26.33.140(2) (Westlaw through 2013 Legis.).

292 *Id.* § 26.33.150(4) (Westlaw).

293 2012 Wash. Sess. Laws 199.

294 *See* § 26.33.140(2) (Westlaw); *see also* Andersen v. King County, 138 P.3d 963, 982 (Wash. 2006) (stating, in dictum, that adoption in Washington is not limited to couples that are legally married); State *ex rel.* D.R.M., 34 P.3d 887, 891 (Wash. Ct. App. 2001) (discussing that common law recognizes only biological parents and that adoption is purely statutory); Lucas v. Dep't of Soc. & Health Servs. (*In re* Dependency of G.C.B.), 870 P.2d 1037, 1044 (Wash. Ct. App. 1994) ("Adoption is not a public forum open to any and every person who may wish to adopt.").

"married" to the other parent.[295] Washington's legalization of same-sex marriage should also make second-parent adoptions affirmatively available to married, same-sex couples. Washington also allows same-sex couples that register as a domestic partnership to take advantage of the joint adoption and stepparent adoption provisions.[296] However, it is uncertain whether unmarried same-sex couples can petition for joint or second-parent adoptions because there is no statute or case law on point.

West Virginia

West Virginia allows "[a]ny person not married or any person, with his or her spouse's consent, or any husband and wife jointly" to adopt with no preclusion of homosexual singles.[297] West Virginia is unlikely to recognize either same-sex joint or second-parent adoptions, though there is no case law on the subject. The state allows stepparent adoption if the petitioner is the "husband or wife" of the adoptive child's legal parent.[298] Since West Virginia does not allow or recognize same-sex marriage,[299] it is unlikely that an individual in a same-sex relationship will be considered a "husband or wife" under the stepparent provision. Similarly, a same-sex couple will most likely not be considered a "husband or wife" for joint adoptions. The state's case law and statutes are otherwise silent on joint or second-parent same-sex adoptions.

Wisconsin

Wisconsin law allows "[a]n unmarried adult" to petition for adoption, with no indication that LGBT singles are excluded from eligibility.[300] The law also allows for stepparent adoption by "the husband or wife if the other spouse is a parent of the minor."[301] However, the Supreme Court of Wisconsin specifically ruled that since a same-sex lesbian couple was not married, the petitioner could not adopt her partner's child without terminating the partner's existing parental

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[295] *See* § 26.33.260(1) (Westlaw).

[296] *Id.* § 26.33.902 (Westlaw) ("For the purposes of this chapter, the terms spouse, marriage, marital, husband, wife, widow, widower, next of kin, and family shall be interpreted as applying equally to state registered domestic partnerships or individuals in state registered domestic partnerships as well as to marital relationships and married persons . . . .").

[297] W. VA. CODE ANN. § 48-22-201 (LEXIS through 2013, 1st Extraordinary Sess.).

[298] *Id.* § 48-22-703(a) (LEXIS).

[299] *Id.* §§ 48-2-104(c), 48-2-603 (LEXIS).

[300] WIS. STAT. ANN. § 48.82(1)(b) (Westlaw through 2013 Wis. Act 19).

[301] *Id.* § 48.82(1)(a) (Westlaw).

rights.[302] Since Wisconsin law only allows joint adoptions by "husband and wife,"[303] it is unlikely that same-sex couples can petition jointly for adoption. There is no case law or other statute on point, but a Wisconsin Supreme Court decision intimated that same-sex couples cannot jointly petition for adoption.[304] Although Wisconsin law allows for domestic partnerships, these partnerships are "not substantially similar to that of marriage."[305] Furthermore, the Wisconsin Constitution states that "[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in this state."[306]

Wyoming

Wyoming law provides that "[a]ny adult person" can petition for adoption, with no preclusion of homosexual singles.[307] There is no specific statute or case law on second-parent adoptions, but Wyoming does allow for stepparent adoptions by "the husband or wife if the other spouse is a parent of the child."[308] Since Wyoming does not allow or recognize same-sex marriage,[309] it is unlikely that same-sex couples qualify for second-parent adoption through the stepparent provision. There is no statute or case law directly addressing joint, same-sex adoptions. However, the only people that Wyoming law allows to jointly petition for adoption are a "husband and wife."[310] And in light of Wyoming's prohibition of same-sex marriage, it is unlikely that the state would allow a joint petition for adoption by a same-sex couple.

As this survey has demonstrated, over the past decade, American states have become more receptive toward adoption of children by gay and lesbian singles, partners, and couples. That trend continues. While less than half of the American states today allow same-sex partners or couples to adopt, if the trend continues, a majority of states will allow such adoptions within a few years. The trend of allowing adoption by

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[302] Georgina G. v. Terry M. (*In re* Angel Lace M.), 516 N.W.2d 678, 680, 683 (Wis. 1994) (holding that, absent the provision for step-parents, "a minor is not eligible for adoption unless the rights of both of her parents have been terminated.").

[303] § 48.82(1)(a) (Westlaw).

[304] *See* Holtzman v. Knott (*In re* Custody of H.S.H.-K.), 533 N.W.2d 419, 437 n.41 (Wis. 1995) (noting in dictum that joint same-sex adoptions are "a remedy not permitted in Wisconsin").

[305] § 770.001 (Westlaw).

[306] WIS. CONST. art. XIII, § 13.

[307] WYO. STAT. ANN. § 1-22-103 (LEXIS through 2013 Reg. Sess.).

[308] *Id.* § 1-22-104(b) (LEXIS).

[309] *Id.* § 20-1-101 (LEXIS).

[310] *Id.* § 1-22-104(b) (LEXIS).

LGBT partners and couples seems generally to correlate with the trend toward reduction in the number of intercountry adoptions.[311]

B. Reciprocal Implications of Adoption by Same-Sex Partners and Same-Sex Marriage

While not directly on point, the recent decisions of the Supreme Court in *United States v. Windsor*, invalidating the "vertical" Section Three of the federal Defense of Marriage Act ("DOMA") which barred recognition in federal law of same-sex marriages,[312] and *Hollingsworth v. Perry*, refusing to review and leaving intact a dubious district court opinion invalidating California's Proposition 8, which prohibited same-sex marriage in the state,[313] are not irrelevant for adoption by same-sex partners. In Part IV of the *Windsor* opinion, the Court enthusiastically emphasized the perception that the enactment of Section Three of DOMA was motivated by animus, a "desire to harm a politically unpopular group,"[314] to "impose a disadvantage, a separate status, and so a stigma" upon same-sex couples who married.[315] The majority opinion specifically mentioned that refusal to allow same-sex marriage "demeans" persons in same-sex relationships, and "humiliates" their children.[316]

The *Windsor* decision gives a boost to advocates of same-sex marriage and equal treatment of same-sex family relationships, including parent-child relations. If five Justices think that denial of same-sex marriage humiliates children being raised by such couples, it is not unlikely that many courts will conclude that denial of same-sex partner adoption also humiliates children being raised by such couples.

Moreover, there is a logical and practical connection between legalizing adoption by LGBT couples and partners and legalizing same-sex marriage. All states that have legalized same-sex marriage, except Minnesota, allow or probably allow same-sex partners and couples to adopt.[317] Most states that have legalized adoption by same-sex partners

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[311] *Compare supra* Figure 1, *with infra* Table 4 *and* Christy M. Glass et al., *Toward a 'European Model' of Same-Sex Marriage Rights: A Viable Pathway for the U.S.?*, 29 BERKELEY J. INT'L L. 132, 140–42 (2011).

[312] United States v. Windsor, 133 S. Ct. 2675 (2013); *see also* Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution*, 58 DRAKE L. REV. 951, 956 (2010).

[313] *See* Hollingsworth v. Perry, 133 S. Ct. 2652, 2659, 2663 (2013).

[314] *Windsor*, 133 S. Ct. at 2693.

[315] *Id.*

[316] *Id.* at 2694.

[317] *Compare infra* Table 4, *with infra* Table 6. For more information, also see Lynn D. Wardle, *Comparative Perspectives on Adoption of Children by Cohabiting, Nonmarital*

and couples have legalized same-sex marriage.[318] Numerous commentators have noted the connection between legalizing adoption by LGBT couples and partners and legalizing same-sex marriage.[319] Even in the Supreme Court oral arguments in *Hollingsworth v. Perry* about whether the Constitution of the United States requires legalization of same-sex marriage, the lawyer for the respondents insisted that one reason California could not constitutionally deny LGBT couples same-sex marriage was because the state had legalized adoption, custody, and visitation by same-sex partners and couples.[320]

Globally, the correlation between same-sex marriage and adoption by same-sex partners is notable. Out of 193 U.N. Member States in the world, only sixteen nations (counting Brazil, whose inclusion is very debatable) allow same-sex marriage, and another eighteen nations allow

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Couples and Partners, 63 ARK. L. REV. 31, 61–62 (2010) [hereinafter Wardle, *Comparative Perspectives*].

[318] *Compare infra* Table 6, *with infra* Table 4. *See generally* Jennifer B. Mertus, *Barriers, Hurdles, and Discrimination: The Current Status of LGBT Intercountry Adoption and why Changes Must Be Made to Effectuate the Best Interests of the Child*, 39 CAP. U. L. REV. 271, 288 (2011) (noting the same trend internationally).

[319] *See, e.g.*, Joanna L. Grossman, *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 AM. U. J. GENDER SOC. POL'Y & L. 671, 672 (2012); Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 216–17, 243 (2012); Clifford J. Rosky, Perry v. Schwarzenegger *and the Future of Same-Sex Marriage Law*, 53 ARIZ. L. REV. 913, 978 (2011); Susanna Birdsong, Comment, *Voiding Motherhood: North Carolina's Shortsighted Treatment of Subject Matter Jurisdiction in* Boseman v. Jarrell, 21 AM U. J. GENDER SOC. POL'Y & L. 109, 113 (2012). *Compare* William N. Eskridge, Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1969 (2012) (explaining that almost two-thirds of same-sex couples live in nonrecognition jurisdictions where the default rule is that only the biological parent may be a legal parent), *with* Lisa Shultz, *No Faith, No Credit, No Union*, 56 ADVOCATE 20, 21 (2013) (discussing the argument that "adoption by a same-sex partner is a 'gateway' to same-sex marriage," and the "harsh consequence" that children of same-sex parents suffer due to jurisdictions forbidding non-biological parents to adopt their same-sex partner's child).

[320] Mr. Olson, attorney for the Respondents:

> California's already made a decision that gay and lesbian individuals are perfectly suitable as parents, they're perfectly suitable to adopt, they're raising 37,000 children in California, and the expert on the other side specifically said and testified that they would be better off when their parents were allowed to get married.
>
> . . . .
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> . . . But the fact is that California can't make the arguments about adoption or child-rearing or people living together, because they have already made policy decisions. So that doesn't make them inconsistent.

Transcript of Oral Argument at 43–44, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144).

same-sex civil unions.[321] However, out of the thirty-four nations that allow some form of civil union, only fifteen of 193 U.N. Member States allow adoption by same-sex partners.[322] However, even some nations that allow some form of same-sex unions forbid some or all adoption by same-sex partners and couples.[323]

Table 3: Legal Allowance of Same-Sex Unions Globally (of 193 Nations)[324]

Jurisdictions Permitting Same-Sex Marriage (Sixteen Nations)	Argentina, Belgium, Brazil, Britain (England & Wales) (effective 2014), Canada, Denmark, France, Iceland, The Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, Uruguay
Jurisdictions Allowing Same-Sex Unions Equivalent to Marriage (Eighteen Nations)	Andorra, Australia, Austria, Colombia, Croatia, the Czech Republic, Ecuador, Finland, Germany, Greenland, Hungary, Ireland, Liechtenstein, Luxembourg, Scotland, Slovenia, Sweden, Switzerland

Similarly, the status of same-sex marriage in the United States has changed from no recognition just a decade ago to sixteen states that permit same-sex marriage today.[325]

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[321] *Compare infra* Table 3, *with UN at Glance*, THE UNITED NATIONS, http://www.un.org/en/aboutun/index.shtml (last visited Oct. 30, 2013).

[322] Fifteen nations allow adoption in some form by same-sex couples, though as of 2011 some only allow it indirectly through single parent adoption. *See infra* Table 5.

[323] *Compare* Bowen, *supra* note 97, at 6 & n.17, *with infra* Table 3.

[324] *The Freedom to Marry Internationally*, FREEDOM TO MARRY, http://www.freedomtomarry.org/landscape/entry/c/international (last updated Aug. 2013) (stating that Andora, Croatia, Czech Republic, Liechtenstein, Luxembourg, Slovenia, and Switzerland only "offer some spousal rights to same-sex couples, which are far from full marriage"). Brazil has not passed any laws legalizing same-sex marriage nationally, but the Brazilian Supreme Court recently ruled that defining the family narrowly violates the Brazilian Constitution. *See* Daniel De La Cruz, Comment, *Explaining the Progression of the Rights of Same-Sex Couples in South America*, 14 SAN DIEGO INT'L L.J. 323, 330 (2013). Same-sex "civil unions" or equivalent relationships are also allowed in some sub-jurisdictions in other nations such as the United States and Mexico. *See, e.g.*, David Agren, *Mexican States Ordered to Honor Gay Marriages*, N.Y. TIMES (Aug. 10, 2010), http://www.nytimes.com/2010/08/11/world/americas/11mexico.html?_r=2&; *Mexico City Passes Gay Union Law*, BBC NEWS (Nov. 20, 2006, 9:39 AM), http://news.bbc.co.uk/2/hi/6134730.stm; *Mexico City Recognizes Gay Civil Unions*, CBSNEWS.COM (Dec. 21, 2009, 7:14 PM), http://www.cbsnews.com/2100-202_162-2169987.html; *infra* Table 4.

[325] *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2715 (2013) (Alito, J., dissenting) (citing Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003)) ("In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution."); *Massachusetts Court Strikes Down Ban on Same-Sex Marriage*,

Table 4: Legal Allowance of Same-Sex Unions in the United States

Jurisdictions Allowing Same-Sex Marriage (Sixteen States and the District of Columbia)[326]	California (2010), Connecticut (2008), Delaware (2013), District of Columbia (2010), Hawaii (2013), Illinois (2013), Iowa (2009), Maine (2009), Maryland (2012), Massachusetts (2003), Minnesota (2013), New Hampshire (2009), New Jersey (2013), New York (2011), Rhode Island (2013), Vermont (2009), Washington (2012)
Jurisdictions Granting Same-Sex Couples Rights Similar to Marriage (Six States and the District of Columbia) [327]	Colorado (2013), District of Columbia (2002), Hawaii (2011), Illinois (2011), Nevada (2009), New Jersey (2006), Oregon (2007)

One legal commentator sympathetic to same-sex partner adoptions recently reported:

> Many countries have outright bans on homosexual adoption. Other countries have regulations that appear neutral on their face but in practice exclude LGBT adoption by banning single individuals from adopting. Thus, the only countries from which LGBT individuals or couples may adopt are those countries that either expressly allow

CNN.COM (Nov. 18, 2003, 10:16 AM), http://www.cnn.com/2003/LAW/11/18/gay.marriage.reut/. For the current number of states that allow same-sex marriage, see *infra* Table 4.

[326] Sixteen states plus the District of Columbia allow same-sex marriage. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1003–04 (N.D. Cal. 2010); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 482 (Conn. 2008); H.R. 75, 147th Gen. Assemb. (Del. 2013); Council 18-482, Council Period 18 (D.C. 2010); S. 1, 27th Leg., 2d Spec. Sess. (Haw. 2013); S. 10, 98th Gen. Assemb. (Ill. 2013); Varnum v. Brien, 763 N.W.2d 862, 906–07 (Iowa 2009); LD 1020, 124th Leg., First Reg. Sess. (Me. 2009); H.D. 438, 2012 Leg., 430th Sess. (Md. 2013); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969–70 (Mass. 2003); H.R. 1054, 2013 Leg., 88th Sess. (Minn. 2013); H.R. 436, 2009 Sess. (N.H. 2009); Garden State Equality v. Dow, No. L-1729-11, 2013 WL 5397372, at *25 (N.J. Super. Ct. Law Div. Sept. 27, 2013); Assemb. 8354, 2011–2012 Reg. Sess. (N.Y. 2011); H.R. 5015B, 2013 Reg. Sess. (R.I. 2013); S. 115, 2009-2010 Legis. Sess. (Vt. 2009); S. 6239, 62d Leg., 2012 Reg. Sess. (Wash. 2012).

[327] Six states plus the District of Columbia allow same-sex unions that are not equivalent to marriage but that grant rights similar to marriage. S. 13-011, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013); Council 14-459, Council Period 14 (D.C. 2002) (implementing the Health Care Benefits Expansion Act of 1992, Council 9-188, Council Period 9 (D.C. 1992)); S. 232, 26th Leg., Reg. Sess. (Haw. 2011); S. 1716, 96th Gen. Assemb., Reg. Sess. (Ill. 2011); S. 283, 75th Legis. Sess., Reg. Sess. (Nev. 2009); Assemb. 3787, 212th Leg. (N.J. 2006); H.R 2007, 74th Legis. Assemb., 2007 Reg. Sess. (Or. 2007).

> homosexual adoption, those that do not specify, or those that allow singles to adopt.[328]

In fact, "very few countries allow same-sex married couples to adopt jointly."[329] The same commentator noted that approximately eighty nations allow single individuals to adopt, about a half-dozen nations allow same-sex partners or couples to adopt in some cases, and at least seventeen nations have explicit prohibitions against LGBT joint adoptions.[330] None of the top five sending nations in 2009, for children being adopted in the United States, allow placement of children for adoption with LGBT individuals or couples.[331]

Many jurisdictions today distinguish between adoption by individuals and by gay or lesbian couples, allowing the former but not the latter. A distinction was drawn recently in 2008 by the European Court of Human Rights ("ECHR") in *E.B. v. France*, interpreting provisions of the European Convention on Human Rights.[332] The case involved a woman who had been in a lesbian relationship for about eight years, but she and her partner technically did not regard themselves as a couple.[333] The woman applied to the French Jura Social Service Department for authorization to adopt a child, but her application was

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[328] Mertus, *supra* note 318, at 281–82; *see also id.* at 292–93 ("[M]any countries allow single individuals to adopt," but some exclude single males, and "very few countries allow joint adoption [by] same-sex, or even heterosexual, unmarried couples.").

[329] *Id.* at 293 & n.149.

[330] *Id.* at 281–82 & nn.59–63. This produces a potential irony:

> LGBT couples, specifically married couples, have the most difficulty adopting internationally. The group that experiences the second most difficulty is unmarried same-sex couples. In other words, those members of the LGBT community that are in stable, committed, and sometimes legally recognized relationships may actually be at a disadvantage when it comes to adopting internationally.

Id. at 304 (footnotes omitted).

[331] *Id.* at 283–88. China and Ethiopia explicitly bar adoption by same-sex individuals or couples, and while Russia, South Korea, and the Ukraine do not explicitly ban such adoptions, a de facto ban exists that is enforced through other requirements. *Id.*

[332] *See* E.B. v. France, App. No. 43546/02, Eur. Ct. H.R. ¶ 49 (2008).

[333] *Id.* ¶¶ 8–10. This may have been a tactical rather than factual statement, as the applying partner wished to adopt a child from, *inter alia*, Asia, *id.* ¶ 9, where adoption by same-sex couples is usually expressly forbidden, *see* Luo & Smolin, *supra* note 9, at 607. Many lesbians have dissembled and have applied as single women to adopt Asian children, even though they are living in same-sex relationships, in order to circumvent the Asian nations' laws barring placement of children for adoption with same-sex couples. *See id.* at 607–08; Jessica L. Singer, Note, *Intercountry Adoption Laws: How Can China's One-Child Policy Coincide with the 1993 Hague Convention on Adoption?*, 22 SUFFOLK TRANSNAT'L L. REV. 283, 288 n.31 (1998); Glenn Schloss, *Americans Queue for Chinese Babies*, S. CHINA MORNING POST (Aug. 10, 1997, 12:00 AM), http://www.scmp.com/article/207030/americans-queue-chinese-babies.

denied and that decision was upheld by the French Court.[334] The ECHR ruled that the French decision to bar the adoption by the lesbian as a single person violated the European Convention on Human Rights since the ECHR concluded that she had been discriminated against due to her sexual orientation.[335] However, the ECHR decision left intact the French adoption policy by which *joint* adoption is reserved only for dual-gender, married couples.[336] This policy is reflected in a French National Assembly report, emphasizing that "a child has a right to grow up within a family," which should be "organized in accordance with the best interests of the child during his or her minority."[337] The report further acknowledged that "the form or organization of the couple constituted by the parents is not in fact neutral in its consequences for the child."[338]

That conclusion was reaffirmed just last year, in March 2012, when the ECHR held in *Gas v. France* that the refusal of France to allow a woman to adopt her same-sex partner's child did not violate the European Convention on Human Rights.[339]

A 2006 survey by Eurobarometer for the European Commission revealed that a majority of the population in only two European nations favored allowing legalized adoption by gay or lesbian couples, and support for gay adoption in eighteen of the nations was only thirty-three percent or less, with only single-digit support in four nations.[340] Likewise, a 2010 poll in the progressive South American nation of Brazil reported that fifty-one percent of Brazilians surveyed opposed allowing same-sex couples to adopt children while thirty-nine percent did not

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[334] *E.B.*, App. No. 43546/02, ¶¶ 9–10, 24–25.

[335] *Id.* ¶¶ 49, 95–98.

[336] *Id.* ¶ 49; *see* Assemblée Nationale [National Assembly], 1 RAPPORT FAIT AU NOM DE LA MISSION D'INFORMATION SUR LA FAMILLE ET LES DROITS DES ENFANTS [1 REPORT SUBMITTED ON BEHALF OF THE MISSION OF INQUIRY ON THE FAMILY AND THE RIGHTS OF CHILDREN], No. 2832, at 83 (2006) [hereinafter NATIONAL ASSEMBLY REPORT].

[337] NATIONAL ASSEMBLY REPORT, *supra* note 333, at 18.

[338] *Id.* at 50.

[339] Gas v. France, App. No. 25951/07, Eur. Ct. H.R. ¶ 69, 73 (2012); *see also* Donna Bowater, *Gay Marriage Is Not a Human Right, According to European Ruling*, TELEGRAPH (UK) (Mar. 21, 2102, 6:29 AM), http://www.telegraph.co.uk/news/religion/9157029/Gay-marriage-is-not-a-human-right-according-to-European-ruling.html.

[340] EUROPEAN COMM'N, EUROBAROMETER 66: PUBLIC OPINION IN THE EUROPEAN UNION 42 (2006), *available at* http://ec.europa.eu/public_opinion/archives/eb/eb66/eb66_en.pdf.

oppose.[341] However, more recent polls suggest public opinion has changed.[342]

V. HOW THE PLACEMENT OF CHILDREN WITH LGBT INDIVIDUALS, PARTNERS, AND COUPLES REDUCES BOTH INTERCOUNTRY AND DOMESTIC ADOPTION

A. Changing Policies Regarding Legalization of Same-Sex Partner Adoption

Reasonable persons may disagree about the merit of allowing LGBT individuals, partners, and couples to adopt children, especially children unrelated to either partner, and there is a lot of discussion about allowing or forbidding such adoptions.[343] In this Part, this Article considers the correlation between the adoption of the Hague Convention, the rise of the gay rights movement, and the decrease in intercountry adoptions.

During the drafting of the Hague Convention and as late as 1993, when the Hague Convention was approved,[344] adoptions by homosexual couples were generally prohibited worldwide and were allowed in only one American state.[345] Accordingly, the Hague Convention does not prohibit or require nations to place children for adoption with or approve

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[341] *Half of Brazilians Reject Adoption by Gay Couples*, ANGUS REID GLOBAL (July 22, 2010), http://www.angusreidglobal.com/polls/39318/half_of_brazilians_reject_adoption_by_gay_couples/.

[342] *Compare* sources cited *supra* notes 340–38, *with* Patricia Reaney, *Support for Gay Marriage High in Developed Nations: Poll*, REUTERS (Jun. 18, 2013), http://www.reuters.com/article/2013/06/18/us-gaymarriage-poll-idUSBRE95H09T20130618, *and Strong International Support (73%) Among Developed Nations for Legal Recognition of Same-Sex Couples: Majorities in All 16 Countries Support Recognition*, IPSOS (June 18, 2013), http://www.ipsos-na.com/news-polls/pressrelease.aspx?id=6151.

[343] The lead author of this Article has participated in this academic dialogue (generally opposed to placing children with same-sex partners and couples but not necessarily with LGBT individuals who otherwise qualify). *See, e.g.*, Wardle, *Comparative Perspectives*, *supra* note 317, at 32–33; Lynn D. Wardle, *The Disintegration of Families and Children's Right to Their Parents*, 10 AVE MARIA L. REV. 1, 34 (2011); Lynn D. Wardle, *Form and Substance in Parentage Law*, 15 WM. & MARY BILL RTS. J. 203, 204–05 (2006); Wardle, *HCIA Implementing Law*, *supra* note 51, at 114; Lynn D. Wardle, *The "Inner Lives" of Children in Lesbigay Adoption: Narratives and Other Concerns*, 18 ST. THOMAS L. REV. 511, 512 (2005) [hereinafter Wardle, *Inner Lives*]; Wardle, *Protecting Adoption*, *supra* note 51, at 323.

[344] *See* Mark T. McDermott, *Intercountry Adoptions: Hague Convention Update*, *in* ADOPTION LAW INSTITUTE 2006, at 379, 381–82 (2006); Peter H. Pfund, *The Hague Intercountry Adoption Convention and Federal International Child Support Enforcement*, 30 U.C. DAVIS L. REV. 647, 647 (1997).

[345] *See In re* Adoption of a Child by J.M.G., 632 A.2d 550, 551–52, 554–55 (N.J. Super. Ct. Ch. Div. 1993) (allowing the adoption of a child by the lesbian partner of the child's mother); *see e.g.*, sources cited *infra* notes 349–53 (noting the dates on which countries began to allow homosexual couples to adopt).

adoptions by LGBT individuals, same-sex partners, or same-sex couples. Rather, it leaves it to each nation to set its own standard for sending and receiving children for adoption.[346] That is governed by the domestic adoption policies of both the sending nation and the receiving nation. The Hague Convention merely requires that those standards be transparent, and out of respect for the sovereignty of each nation, the Hague Convention seeks to see that the policies of the nations are not circumvented or violated but are observed and enforced.[347]

Today, by contrast, adoption by lesbian and gay couples or partners is allowed in at least fifteen nations (mostly in Europe).[348]

Table 5: Nations That Generally Allow Adoption of Children by LGBT Partners and Couples[349]

Americas[350]	Argentina, Brazil, Canada, Uruguay
Europe[351]	Belgium, Denmark, France, Iceland, Netherlands, Norway, Spain, Sweden, United Kingdom

[346] *See* Wardle, *HCIA Implementing Law*, *supra* note 51, at 135.

[347] *See* Convention on Intercountry Adoption, *supra* note 15, arts. 4–5, 7, 9–12, 17–20, 23. *See generally* Wardle, *HCIA Implementing Law*, *supra* note 51, app. 1.

[348] *See infra* Table 5.

[349] Same-sex partner and couple adoptions are allowed in some non-sovereign, subordinate jurisdictions (such as particular cities or provinces), including jurisdictions within Australia and Mexico. *See, e.g.*, *Tasmanian Upper House Passes Gay Adoption Bill*, NEWS AUSTRALIA (June 27, 2013), http://www.news-australia.com/news/tasmanian-upper-house-passes-gay-adoption-bill-201306271840.html (noting that some, but not all, jurisdictions in Australia allow adoption by same-sex couples); Ignacio Pinto-Leon, *Mexico's Supreme Court Orders States to Recognize Same-Sex Marriages and Adoptions of Minors by Such Couples*, LAW TRENDS & NEWS, Fall 2010, *available at* http://www.americanbar.org/content/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/fl_feat1.html (noting that while not all jurisdictions in Mexico allow gay marriage or adoption, marriages and adoptions by same-sex couples must be honored throughout the country).

[350] *See Argentine Senate Backs Bill Legalising Gay Marriage*, BBC NEWS, http://www.bbc.co.uk/news/10630683 (last updated July 15, 2010) (noting that Argentina became "the first country in Latin America to legalise gay marriage" and that the law "also allows same-sex couples to adopt"); Saeed Kamali Dehghan, *Brazilian Gay Man Granted 'Maternity' Leave for Adopted Child*, GUARDIAN (Aug. 31, 2012, 11:58 AM), http://www.theguardian.com/world/2012/aug/31/brazilian-gay-man-maternity-leave (noting that the Supreme Court of Brazil gave same-sex partners all the legal rights enjoyed by heterosexual couples in May 2011); *Frequently Asked Questions About Adoption*, ADOPTION COUNCIL CAN., http://www.adoption.ca/faqs (last visited Oct. 30, 2013) (stating that there is no legal prohibition to same-sex adoption in Canada); *Uruguay Passes Same-Sex Adoption Law*, CNN.COM, http://www.cnn.com/2009/WORLD/americas/09/10/uruguay.gays/ (last updated Sept. 10, 2009) ("Uruguay became the first Latin American country to allow same-sex couples to adopt children . . . .").

Africa[352]	South Africa
Asia	(None)
Oceana[353]	New Zealand

Likewise, as noted previously, same-sex partner adoptions are permitted or likely to be allowed in at least twenty-one American states (compared to at least twenty-one states that ban or probably prohibit such adoptions).[354]

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[351] *See Belgium Passes Gay Adoption Law*, BBC NEWS, http://news.bbc.co.uk/2/hi/europe/4929604.stm (last updated Apr. 21, 2006); *Gay Adoption on the Lawbooks*, POLITIKEN.DK (May 4, 2010), http://politiken.dk/newsinenglish/ECE963619/gay-adoption-on-the-lawbooks (reporting that homosexual couples in Denmark are now able to adopt children); *François Hollande Signs Same-Sex Marriage into Law*, FRANCE 24 (May 18, 2013), http://www.france24.com/en/20130518-france-gay-marriage-law-adoption (reporting that France's legalization of same-sex marriage also legalized gay adoption); *Iceland, Intercountry Adoption*, U.S. DEP'T STATE, http://adoption.state.gov/country_information/country_specific_info.php?country-select=iceland (click "Who Can Adopt" tab) (last updated May, 2009) (reporting that same-sex couples have been able to adopt since 2006); Shane Opatz, *Gay Marriage Goes Dutch*, CBSNEWS.COM (Feb. 11, 2009, 9:27 PM), http://www.cbsnews.com/stories/2001/04/01/world/main283071.shtml (noting that homosexual couples were also given the right to adopt); *Norway Passes Law Approving Gay Marriage*, NBCNEWS.COM, http://www.nbcnews.com/id/25218048/#.Uk6IxYZwqG5 (last updated June 17, 2008, 8:41 PM) (reporting that homosexual couples were given right to marry and adopt children); *Gay Marriage Around the Globe*, BBC NEWS, http://news.bbc.co.uk/2/hi/americas/4081999.stm (last updated Dec. 22, 2005) (discussing, among other countries, Spain and its same-sex marriage law that also allows for the adoption of children); *Sweden Legalises Gay Adoption*, BBC NEWS (June 6, 2012), http://news.bbc.co.uk/2/hi/europe/2028938.stm; *Gay and Lesbian Adoption: Edwin Poots' Challenge Dismissed*, BBC NEWS, http://www.bbc.co.uk/news/uk-northern-ireland-23077516 (last updated June 27, 2013, 9:58 AM) (discussing Britain, including Northern Ireland, England, Scotland, and Wales).

[352] *South African Gays Can Adopt Children*, BBC NEWS (Sept. 10, 2002), http://news.bbc.co.uk/2/hi/africa/2248912.stm.

[353] Isaac Davison, *Same-Sex Marriage Law Passed*, NEW ZEALAND HERALD (Apr. 17, 2013, 11:00 PM), http://www.nzherald.co.nz/news/article.cfm?c_id=1&objectid=10878200.

[354] *See infra* Table 6.

Table 6: U.S. States That Allow, Probably Allow, Prohibit, Probably Prohibit, and Are Uncertain About Allowing/Prohibiting Adoption by Same-Sex Partners, Couples, and Individuals (November 2013)[355]

U.S. States That Allow Otherwise Qualified LGBT Singles to Adopt (49 + DC)	AL, AK, AZ, AR, CA, CO, CT, DE, DC, GA, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WA, WV, WI, WY
U.S. States That Probably Allow Otherwise Qualified LGBT Singles to Adopt (1)	FL
U.S. States That Allow Joint Adoption by Same-Sex Partners and Couples (17 + DC)	CA, CO, DE, DC, HI, IL, IN, IA, ME, MD, MA, NV, NJ, NY, OR, RI, VT, WA
U.S. States That Probably Allow Joint Adoption by Same-Sex Partners and Couples (3)	CT, NH, TX
U.S. States That Are Uncertain About Allowing/Prohibiting Joint Adoption by Same-Sex Partners and Couples (9)	ID, MN, MO, NE, NM, PA, SD, TN, VA
U.S. States That Prohibit Joint Adoption by Same-Sex Partners and Couples (4)	MS, NC, OH, UT
U.S. States That Probably Prohibit Joint Adoption by Same-Sex Partners and Couples (17)	AL, AK, AZ, AR, FL, GA, KS, KY, LA, MI, MT, ND, OK, SC, WV, WI, WY
U.S. States That Allow Second-Parent Adoption by Same-Sex Partners and Couples (14 + DC)	CA, CO, DE, DC, HI, IL, IN, IA, MA, NV, NY, OR, PA, RI, VT
U.S. States That Probably Allow Second-Parent Adoption by Same-Sex Partners and Couples (7)	CT, IA, ME, MD, NH, NJ, WA
U.S. States That Are Uncertain About Allowing/Prohibiting Second-Parent Adoption by Same-Sex Partners and Couples (5)	ID, LA, MN, MO, NM

[355] This table has been compiled from an analysis of the materials in Section IV.A above. *See supra* Part IV.A.

U.S. States That Prohibit Second-Parent Adoption by Same-Sex Partners and Couples (6)	KY, NE, NC, OH, UT, WI
U.S. States That Probably Prohibit Second-Parent Adoption by Same-Sex Partners and Couples (19)	AL, AK, AZ, AR, FL, GA, KS, MI, MS, MT, ND, OK, SC, SD, TN, TX, VA, WV, WY

Thus, even today, adoption by same-sex couples and partners is extremely controversial across the country and around the globe. Even now, only a very small minority of nations—just a handful of countries—allow same-sex partners or couples to adopt children.[356] However, parenting by gay and lesbian adults seems to be on the rise, and adoption by LGBT persons is small but significant. One report by the Urban Institute and the Williams Institute found that in the United States, more than one-third of lesbian women have given birth, about one-sixth of gay men have fathered or adopted a child, more than half of gay men and over forty percent of lesbian women are interested in being parents, and an estimated 65,500 adopted children are living with lesbian or gay parents in the United States.[357]

B. Why Legalization of Adoptions by Same-Sex Partners of Children Unrelated to Either Partner May Reduce the Number of Adoptions

One reason homosexual adoption remains a controversial issue of public policy may be because it deviates from the global ideal of children being raised by a mother and a father.[358] Some concerns that have been expressed include children being deprived of a male or female parenting influence due to lack of a father or mother, homosexual adoptions reflecting an adult-centric perspective (as opposed to the best interests of the child), and the premature hyper-sexualization of children.[359] Furthermore, given most religious traditions' moral objections to homosexuality, there remains substantial concerns about the moral and

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[356] *Supra* Table 5.

[357] *See* GARY GATES ET AL., ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES, Executive Summary (2007), *available at* http://www.urban.org/UploadedPDF/411437_Adoption_Foster_Care.pdf.

[358] *See* Lynn D. Wardle, *Parenthood and the Limits of Adult Autonomy*, 24 ST. LOUIS U. PUB. L. REV. 169, 178, 187 (2005).

[359] *Id.*; *see also* DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM 1 (1995) (arguing that separation of children from their fathers is "the engine driving our most urgent social problems, from crime to adolescent pregnancy to child sexual abuse to domestic violence against women"); Wardle, *HCIA Implementing Law*, *supra* note 51, at 131; Wardle, *Inner Lives*, *supra* note 343, at 515–16; Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 852–57 (1997).

religious implications and effects on children raised in homosexual households.[360] Concerns about exploitation of children by sexual predators are also relevant, as periodic, prominent scandals involving sexually-exploited adopted children demonstrate.[361] Moreover, concerns about the impact upon the integrity of the adoption system and of the willingness of parents to relinquish children they cannot care for must be considered.[362]

While legally authorizing same-sex partners to adopt probably will increase the total number of such adoptions, whether it is a good environment for the children being adopted remains controversial.[363] Furthermore, it may result in a net loss of adoptions due to reduction in placement of foreign children for adoption into a jurisdiction that permits same-sex partners to adopt, and as a result of domestic parents refusing to place their children for adoption out of concern that their children will be placed for adoption with homosexual partners or adults whose sexual values deeply offend the natural parents.[364] Thus, legalizing adoption by same-sex partners may have the effect of reducing (rather than increasing) the overall number of adoptions in particular jurisdictions.

Recent research has raised concerns about the "outcomes" for children raised by LGBT parents. For instance, one review of massive data that initially had been interpreted as supportive found that "[c]ompared with traditional married households, . . . children being raised by same-sex couples are 35% less likely to make normal progress through school; this difference is statistically significant at the 1% level."[365] Sociology Professor Mark Regnerus's study found that children of mothers who have had same-sex relationships were significantly

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[360] *See, e.g.*, Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L.J. 2475, 2495–502 (1997); Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 463 (2007) ("Most mainstream religions in the United States disapprove of homosexuality, and the Catholic Church, which is the country's largest single religious institution, has taken a particularly strong stance against homosexual conduct.").

[361] For an in-depth discussion of this topic, see this author's previous work, Wardle, *Inner Lives*, *supra* note 343, at 521–22.

[362] *See* Wardle, *Comparative Perspectives*, *supra* note 317, at 74–76; Wardle, *Inner Lives*, *supra* note 343, at 529.

[363] *See* Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 SOC. SCI. RES. 752, 766 (2012), *available at* http://www.sciencedirect.com/science/article/pii/S0049089X12000610 (reporting study outcomes for children in different family structures).

[364] Wardle, *Comparative Perspectives*, *supra* note 317, at 75.

[365] Douglas W. Allen et al., *Nontraditional Families and Childhood Progress Through School: A Comment on Rosenfeld*, 50 DEMOGRAPHY 955, 955, 960 (2013).

different (less advantaged) as young adults on twenty-five out of forty (or sixty-three percent) outcome measures compared with those who spent their entire childhood with both of their married, biological parents.[366] Likewise, Professor Loren Marks identified substantial methodological errors in the fifty-nine studies relied upon in the American Psychological Association's brief on lesbian and gay parenting, impairing the brief's validity.[367] In light of this data, it could be argued that the transnational adoption of children (especially children unrelated to either partner) by LGBT individuals, partners, and couples raises many serious policy issues.

Likewise, data collected by adoption agencies in America about adoption facilitation in the various states (and the District of Columbia) and compiled by the National Council for Adoption, a national clearinghouse allied with many national adoption agencies,[368] show that the most adoption-friendly states include a disproportionate number of states that forbid adoption by same-sex couples and partners, while states that allow adoption by same-sex couples appear to be disproportionately less adoption-friendly.[369] So the claim that allowing same-sex couples to adopt will expand the pool of eligible adopters and increase the number of adoptions ignores countervailing social influences that will likely result in reducing the overall number of adoptions.[370] Adoption thrives in communities that value dual-gender marriage, marital families, marital family child-rearing, and that prioritize marital family living.[371] Those nations and states are generally hesitant about allowing same-sex partners and couples to adopt.[372]

The purpose for noting those concerns and arguments here is not to justify or refute them (indeed, some or all of them ultimately may be proven false), but to note that they exist in many nations in the world at this time. Thus, nations that allow same-sex partners and couples (and in some cases LGBT individuals) to adopt may be seen as defying the cultural norms in other countries from which potential adoptive children

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366 Regnerus, *supra* note 363 at 764.

367 Loren Marks, *Same-Sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's Brief on Lesbian and Gay Parenting*, 41 SOC. SCI. RES. 735, 748 (2012), *available at* http://www.sciencedirect.com/science/article/pii/S0049089X12000580.

368 *See History*, NAT'L COUNCIL FOR ADOPTION, http://www.adoptioncouncil.org/who-we-are/history.html (last visited Oct. 30, 2013); *see also* Wardle, *Comparative Perspectives*, *supra* note 317, at 75–76.

369 Wardle, *Comparative Perspectives*, *supra* note 317, at 76.

370 *Id.* at 74–75.

371 *Id.* at 76.

372 *Id.*

may come. Consequently, this conflict may reduce the likelihood of those nations with conservative cultural and family values allowing their children to be placed for adoption in other nations that allow same-sex adoption.

VI. CONCERNS ABOUT ABUSE, DECEPTION, AND FRAUD IN SOME INTERNATIONAL ADOPTIONS IN VIOLATION OF SENDING-NATION POLICIES HAVE CONTRIBUTED TO THE DECREASE IN INTERNATIONAL ADOPTIONS

Apart from the debate surrounding the policy of allowing children to be placed for adoption with gays and lesbians, disreputable international adoption practices by some gays and lesbians and their supporters in some adoption agencies and service providers have added to the controversy surrounding international adoptions by gays and lesbians. "Because society discourages gay adoptions, homosexuals often conceal their sexual orientation when attempting to adopt."[373]

For example, "Chinese regulations explicitly prohibit adoption by homosexual persons."[374] Yet, as Professors Smolin and Luo write:

> A significant number of gay or homosexual individuals reportedly have been adopting Chinese orphans under the form of single parent adoption. It appears that some social workers within the United States are willing to create "home studies" of homosexual individuals and couples that portray the home simply as that of a "single" person, thus permitting gay individuals and couples largely to escape the force of laws or customs in sending nations prohibiting or disfavoring gay adoption. Social workers within the United States may perceive these actions as supported by principles related to equal rights for gay persons, the best interests of children, or simply privacy. The result is that the United States sends over documents key to the intercountry adoption process that could be viewed from a Chinese perspective as fraudulent or at least as uninformative. Under these circumstances, one practical means for China to enforce its limit on gay adoption is to limit adoption by single persons. Thus, it is possible that the Chinese policy on single parent adoption is, at least in part, a means of enforcing its prohibition of gay adoption.[375]

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[373] David P. Russman, Note, *Alternative Families: In Whose Best Interests?*, 27 SUFFOLK U. L. REV. 31, 31 n.2 (1993); *see also* Evall, *supra* note 95, at 355 n.46 (noting that some homosexuals conceal homosexuality when adopting); Wendell Ricketts & Roberta Achtenberg, *The Adoptive and Foster Gay and Lesbian Parent*, *in* GAY AND LESBIAN PARENTS 89, 92–93 (Frederick W. Bozett ed., 1987) (noting that gay and lesbian potential adoptive and foster parents often decline to disclose their homosexuality).

[374] Luo & Smolin, *supra* note 9, at 607.

[375] *Id.* at 608. China's policy on single parent, intercountry adoptions provides "that only eight percent . . . of placements may be to such persons." *Id.* at 607.

This kind of deception and fraud has been going on for at least a decade.[376] There are numerous reports of this dishonesty in the adoption process.[377]

In 2011, a respectable professor writing in a reputable law review noted the need for LGBT couples to engage in "some degree of forum shopping" and careful "selection of the right adoption agency" to adopt children from abroad,[378] and advised:

> [I]f the laws of the sending country permit an individual to adopt but do not permit an unmarried couple to adopt, the report would be best received if it described the prospective adoptive parent as a single person with a roommate. Again, this is not meant to be fraudulent or deceitful, but is merely an attempt to eliminate any bias that may exist on the part of the reviewing parties in relation to sexual orientation.[379]

These "practices represent precisely the kind of manipulation, misuse, and exploitation of intercountry adoption that the Hague

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[376] *See* Singer, *supra* note 333, at 289 (showing that ten years ago China's adoption policies were flexible); Schloss, *supra* note 333.

[377] *See, e.g.*, William L. Pierce, *In Defense of the Argument That Marriage Should Be a Rebuttable Presumption in Government Adoption Policy*, 5 J.L. & FAM. STUD. 239, 253 (2003) ("It seems, from the experience that China had with single and mostly female adoptive applicants, that there is no practical way to limit single parent adoptions to heterosexuals. A variety of innovative techniques were used by single persons who were GLBT to appear to be heterosexual for purposes of adopting. And even the imposition of the requirement that single persons certify that they are heterosexual is essentially unenforceable if people choose to lie. Although . . . such dishonesty [might be cautioned against,] . . . there are no cases the author is aware of when finalized intercountry adoptions have been revoked because a GLBT individual was dishonest."); Jordan Downing, et al., *Choices, Challenges, and Tensions: Perspectives of Lesbian Prospective Adoptive Parents*, AM. FERTILITY ASS'N, http://www.theafa.org/article/choices-challenges-and-tensions-perspectives-of-lesbian-prospective-adoptive-parents/ (last visited Oct. 30, 2013) (stating that due to laws barring both partners from adopting jointly, one same-sex partner often "remain[s] hidden through this important life transition"); *Gay and Lesbian Adopters*, FAM. EDUC., http://life.familyeducation.com/adoption/nontraditional-families/45789.html (last visited Oct. 30, 2013) (noting many gay and lesbian potential adopters "still don't reveal their sexual orientation to others, often because they fear that they'll be turned down by agencies (despite what they say) or because they want to retain their privacy."); *In 2010, International Adoption Closed to Same-Sex Couples and GLBT Individuals*, GLBT L. BLOG (Jan. 11, 2010), *available at* http://glbtlaw.wordpress.com/2010/01/11/in-2010-international-adoption-closed-to-same-sex-couples-and-glbt-individuals/ ("Gay individuals have successfully adopted from foreign countries for years by concealing their sexual orientation, and same-sex couples have been forced to renounce their partnered status and adopt as single individuals." In recent years, however, new transparency ethics have reduced the opportunity to use such practices. The result is that the "international adoption option is essentially now closed to same-sex couples and GLBT individuals.").

[378] Mertus, *supra* note 318, at 281, 301.

[379] *Id.* at 303–04.

Convention was intended to eliminate."[380] The perpetuation of such practices stains the integrity of intercountry adoption and is another likely reason why such transnational adoptions have been falling.

VII. THE POTENTIAL OF "SIDEWAYS" STATUS (ADOPTIVE "UNCLE" OR "AUNT") TO RECONCILE THE COMPETING INTERESTS

One conceptually possible solution to the conflict in values would be to legalize what can be called "sideways" adoption. That is: to allow a legal process that creates in law the legal status of "uncle-nephew/niece" or "aunt-niece/nephew" between the adult partner of the adopting parent and the child. The adult partner (or the adoptive co-parent) would have legal responsibilities similar to those of an adoptive parent except that they would be secondary to those of the legal adoptive parent. That means the biological or legal adoptive parent would have first priority in parenting decisions and first liability for parenting responsibility. The adoptive co-parent (perhaps called adoptive aunt or uncle) would have secondary priority in parenting decisions and in parenting responsibilities including financial responsibilities, but would move up to first priority in case the legal parent were unavailable, incapacitated, or dead.

This would give the second adult, the partner of the adopting parent, a legal status and legally-protected parental relationship with the child. It would ensure full access to the resources (including insurance) of the adoptive co-parent if those of the legal parent were inadequate. It would ensure full legal responsibility of a second adult co-parent in case the legal parent were unable to fulfill those responsibilities. It would avoid the kinds of litigation that arise between co-parents upon breaking up as the parental priority would already be established in law. This might be less objectionable to nations, agencies, and parents with strong moral, religious, sociological, or cultural objections to sending children to be raised in homes of same-sex couples, just as allowing adoption by qualified LGBT individuals who live alone is more widely accepted than allowing those persons to adopt together if they are living in a same-sex partnership or marriage.[381] The fact that the adopting parent has a relative, like a sibling, who has same-sex orientation might not be of the same concern, for many people know a relative, close family friend, or an "uncle" or "aunt" who also has same-sex orientation. It could lead to more openness and transparency.

Many nations do not permit same-sex marriage but have created an alternative legal relationship ("civil unions" or "domestic partnerships,"

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[380] Wardle, *HCIA Implementing Law*, *supra* note 51, at 132.

[381] *See* Wardle, *Comparative Perspectives*, *supra* note 317, app. II.

for example) with similar rights and legal effects as marriage for same-sex partners.[382] Those nations consider dual-gendered marriage to be a unique and uniquely valuable social institution deserving unique legal status, but they also allow for same-sex partners to have equivalent or similar legal status and protections.[383] Similarly, recognizing the unique relationship and value of dual-gender parenting while conferring similar or equivalent legal status, rights, and responsibilities upon other couples, including same-sex couples, might resonate in some nations that object to LGBT parental adoption.

VIII. TIME TO AMEND AND IMPROVE THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTION AND TO MODERATE STATE ADOPTION LAW

Like the Universal Declaration of Human Rights,[384] the Convention on the Rights of the Child ("CRC") emphasizes that "the family [is] the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children."[385] The CRC provides that children deprived of parents are entitled to special protection including "adoption,"[386] specifically including "inter-country adoption" in appropriate cases.[387] The Hague Convention was "intended to facilitate and promote adoptions for children in need of families."[388] However, "in practice, this does not always occur."[389] Recent data shows clearly that the well-intentioned Hague Convention is actually depressing intercountry adoption.[390] The current state of the Hague Convention allows our society to continue living at the expense of its children and that immediate reform is required. Dr. Selman's admonition provides a sound basis to begin the reform of the Hague Convention:

> It is critical for governments . . . to recognize and uphold each child's right to a family. . . . For children who have no home, no family willing or able to care for them, and no realistic in-country permanent care option, intercountry adoption may represent their only chance for

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[382] *See* Lynn D. Wardle, *Equality Principles as Asserted Justifications for Mandating the Legalization of Same-Sex Marriage in American and Intercountry-Comparative Constitutional Law*, 27 BYU J. PUB. L. 489, 494–95, 498, 525 (2013).

[383] *See id.* at 498–99.

[384] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 16(3) (Dec. 10, 1948).

[385] Convention on the Rights of the Child, G.A. Res. 44/25, Annex, U.N. GAOR, 44th Sess., U.N. Doc. A/RES/44/25, pmbl. (Nov. 20, 1989).

[386] *Id.* art. 20(3).

[387] *Id.* art. 21(b).

[388] Selman, *Global Trends*, *supra* note 20, at 16.

[389] *Id.*

[390] *See supra* Part III.

> a safe, loving, permanent family of their own. Tragically, the decline in intercountry adoption means that too many of these children will never realize their intrinsic right to a family . . . .[391]

Some realistic recognition and respect for the traditional-family cultural values of the sending nations is a practical necessity to address the problem of decreasing intercountry adoptions. It also is necessary to increase regulation in order to ensure transparency and to prevent concealment, deception, and misrepresentation regarding adoption of children by same-sex couples and partners in international adoption. The integrity of the international adoption process is at stake, and the whole system of intercountry adoption suffers when abuses occur. Failure to disclose same-sex partner or same-sex couple status facilitates false, fraudulent, and illegal adoption activity.

The first question is not whether adoption by same-sex couples should or should not be allowed as a matter of adoption policy, but whether behavior that conceals, deceives, and misrepresents the facts in order to evade or circumvent national, agency, or parental adoption policies will be permitted. The current, fraudulent situation resembles those that gave rise to the Hague Convention in the first place. It is no more excusable or tolerable than deceptive baby-buying or the well-intentioned mass baby-saving deceptions in Romania after the fall of Ceauşescu.[392] It makes a mockery of the Hague Convention to turn a blind eye to this kind of deception and is hypocrisy to excuse such a double standard. Reasonable persons certainly can disagree about what policy regarding adoption by same-sex couples and partners is in the best interests of children. But as a matter of international comity and systems, there must be respect for differing policies that are properly adopted.

Similarly, one consequence of legalizing unrestricted adoption by gay and lesbian adults and couples seems to be a reduction in the number of children being sent by traditional sending nations to western, morally "liberal," receiving nations. Ironically, the legalization of adoption by gay and lesbian couples, which has been promoted in part because it will lead to more needy children being adopted, seems to have had the opposite effect. That seems to cause many sending countries, which usually have very traditional notions about sexual morality and childrearing, to be more cautious about sending their orphaned and needy children, who cannot be placed for adoption within the country, into homes in western nations where they may end up being raised by

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[391] Selman, *Global Trends*, *supra* note 20, at 16.

[392] Gail Kligman, Commentary, *Abortion and International Adoption in Post-Ceausescu Romania*, 18 FEMINIST STUD. 405, 411, 413, 416 (1992).

gay and lesbian adults. Thus, the legalization by more and more states of adoption by LGBT partners and couples may be one reason for the dramatic, continuing reduction in intercountry adoptions into the United States in the past decade. States in which the facilitation of adoption of poor, needy, and orphaned or abandoned children from third-world nations is deemed to be a public-policy priority might consider rethinking and redesigning their adoption laws to eliminate the concern that seems to be causing a reduction of intercountry adoptions. That might be accomplished by imposing tighter restrictions on who is eligible to adopt children (or, at least, also controversially, on who is eligible to adopt children from other nations). Alternatively, it might be accomplished by creating "sideways adoption" legal procedures that effect the creation of uncle/aunt-niece/nephew relationships with clear, legal, full-but-secondary-parental status, standing, and authority. Giving a second adult some legal, quasi-parental responsibilities that have succession value but that are not identical to parental authority might provide an openness, candor, and structure that could reduce adoption integrity concerns and reconcile some of the competing interests.

This Article has suggested reforms of the Hague Convention, and/or reform of United States federal regulations for the implementation of the Hague Convention, as well as reforms of American states' substantive and procedural domestic adoption laws to prevent placement of adoptive children into environments that are offensive to and deemed dangerous by many third-world cultures and societies. Such reforms, or even part of them, could revive dwindling intercountry adoption in the years ahead. That would benefit tens of thousands of parentless children who are living in deplorable conditions and might also enrich the lives and hearts of tens of thousands of American couples who are anxious and willing to adopt into their homes such needy children. Certainly, that is a goal worth pursuing diligently.

TINKERING WITH ALITO'S CODE TO *MORSE*'S LIMITS: WHY ALITO'S CONCURRENCE IS CRUCIAL TO PRESERVING *TINKER* AND STUDENTS' RIGHT TO FREE SPEECH

INTRODUCTION

Does freedom expand or contract with time, or does it oscillate? The natural starting point to look for the answer is past experience, but we ask the question because we are interested in the future. Naturally, we want this year to be better than the last. We want life to be better for our children than it has been for us. Freedom and progress are often considered together. This Note does not answer, not even for the subject of student free speech, whether we are becoming or are destined to become freer with the passage of time. Rather, it works from the assumption common in the American psyche and experience that freedom is never free from encroachment by foe or well-meaning friend, nor is its progress guaranteed; freedom must be sought and maintained each generation.

In 1969, the Supreme Court, in *Tinker v. Des Moines Independent Community School District*, declared in broad terms that First Amendment[1] freedom of speech applies to public school students.[2] Since then, the Supreme Court has found three exceptions to this broad articulation of student free speech[3] that do not apply to the general adult population.[4] These expectations are: speech that is lewd or indecent,[5] speech that could reasonably be seen as school-sponsored,[6] and speech that could reasonably be understood as advocating illegal drug use.[7] Whether the Supreme Court was right in stating these exceptions, it is

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1 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

2 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

3 Hardwick v. Heyward, 711 F.3d 426, 435 (4th Cir. 2013); *see also* Morse v. Frederick, 551 U.S. 393, 410, 417–18 (2007) (Thomas, J., concurring) (identifying *Morse* as creating a third exception to the *Tinker* standard).

4 *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (stating that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings").

5 *Id.* at 685–86.

6 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988). Any regulation of student speech justified by *Kuhlmeier* must be for pedagogical reasons. *Id.*

7 *Morse*, 551 U.S. at 397.

unmistakable that the 1969 articulation of broad free speech rights for students has been steadily scaling back.

Particularly, there are concerns that the analysis in the most recent exception, *Morse v. Frederick*,[8] opened the door to further erosion of the *Tinker* standard.[9] While *Morse* is most naturally read as pertaining only to student speech advocating illegal drug use,[10] the analysis could arguably be used to analogize "advocating illegal drug use" to other issues, thereby expanding *Morse*'s application[11] and reducing the breadth of student free speech. However, there is hope that Justice Alito's controlling concurring opinion, stating that *Morse* should be read narrowly, will preserve the *Tinker* standard as it was before *Morse*.[12]

This Note argues that *Morse* should be applied narrowly, according to Alito's concurrence, to protect student speech under the First Amendment as articulated in *Tinker*, and qualified no further than the narrow holdings in *Tinker*'s progeny. Part I sets the context by reviewing *Tinker* and its progeny. Part II examines the problem by considering the concerns flowing from *Morse*, looking at cases from federal courts to illustrate these concerns. Finally, Part III looks at the solution in Alito's concurring opinion, why this opinion controls the limits of *Morse*, and other reasons why *Morse* should be applied narrowly.

I. CONTEXT: *TINKER* AND ITS PROGENY

A. Tinker v. Des Moines Independent Community School District

In *Tinker*, the Supreme Court ruled against a school policy prohibiting students from wearing armbands to protest the Vietnam War.[13] After being suspended, the students sued the school district.[14] In its decision, the Court stated, "First Amendment rights, applied in light of the special characteristics of the school environment, are available to

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[8] *Id.*

[9] *See id.* at 422, 425 (Alito, J., concurring); Erwin Chemerinsky, *How Will* Morse v. Frederick *Be Applied?*, 12 LEWIS & CLARK L. REV. 17, 21–22 (2008); *cf. Morse*, 551 U.S. at 422 (Thomas, J., concurring) ("I join the Court's opinion because it erodes *Tinker*'s hold in the realm of student speech . . . .").

[10] *Morse*, 551 U.S. at 397 (holding "that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use"); *see also* Melinda Cupps Dickler, *The* Morse *Quartet: Student Speech and the First Amendment*, 53 LOY. L. REV. 355, 357 (2007) ("By its plain language, *Morse*'s holding is narrow in that it expressly applies only to student speech promoting illegal drug use.").

[11] *Morse*, 551 U.S. at 425 (Alito, J., concurring); Chemerinsky, *supra* note 9, at 21–22.

[12] *See infra* Part III.A.

[13] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

[14] *Id.* at 504.

teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[15] The Court expounded that wearing the armbands for this purpose "was closely akin to 'pure speech' which . . . is entitled to comprehensive protection under the First Amendment."[16] The Court also recognized "the need for affirming the comprehensive authority . . . of school officials . . . to prescribe and control conduct in the schools,"[17] but this must be done "consistent with fundamental constitutional safeguards."[18] The Court clarified that the issue in *Tinker* did "not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment."[19] Despite the technical anachronism in terminology,[20] the issue in *Tinker* dealt only with content-based speech.[21]

The Court adopted the substantial disruption standard to determine whether the school officials violated the students' right to free speech.[22] Essentially this standard provides that schools cannot restrict student speech except when it can be reasonably forecast that the speech would cause a substantial disruption to "the requirements of appropriate discipline in the operation of the school."[23] In applying the test, the Court found, "There is here no evidence whatever of petitioners' interference . . . with the schools' work or of collision with the rights of other students . . . ."[24]

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[15] *Id.* at 506.

[16] *Id.* at 505–06.

[17] *Id.* at 507.

[18] *Id.*

[19] *Id.* at 507–08.

[20] *See* DANIEL A. FARBER, THE FIRST AMENDMENT 21 (2d ed. 2003) ("The content distinction found its first clear expression in [1972].").

[21] *Tinker*, 393 U.S. at 508 ("Our problem involves direct, primary First Amendment rights akin to 'pure speech.'"); *see also* Geoffrey A. Starks, Tinker's *Tenure in the School Setting: The Case for Applying* O'Brien *to Content-Neutral Regulations*, 120 YALE L.J. ONLINE 65, 71–72 (2010), http://yalelawjournal.org/images/pdfs/901.pdf (arguing that *Tinker* applies only to student content-based speech).

[22] *Tinker*, 393 U.S. at 509, 514. A similar standard had been articulated in *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966).

[23] *Tinker*, 393 U.S. at 509. In some formulations of the standard, the Court seemed to add a "rights of others" prong. *Id.* at 508, 509, 513. In *Saxe v. State College Area School District*, then-Judge Alito wrote that "[t]he precise scope of *Tinker*'s 'interference with the rights of others' language is unclear," and that "at least one court has opined that it covers only independently tortious speech like libel, slander or intentional infliction of emotional distress." 240 F.3d 200, 217 (3d Cir. 2001); *see also* Bowler v. Town of Hudson, 514 F. Supp. 2d 168, 176 (D. Mass. 2007).

[24] *Tinker*, 393 U.S. at 508. While Justice Black in the dissent disagreed, finding in the record that students were distracted because of the armbands and that one class's

The Supreme Court criticized the district court's rationale that the school officials acted reasonably because they had "fear of a disturbance."[25] For "school officials to justify prohibition of a particular expression of opinion, [they] must be able to show that [the] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[26] They must be able to show that the action prohibiting the speech meets the substantial disruption standard.[27] Since it was not met, the school officials' actions violated the students' right to free speech.[28]

The Court also found it "relevant that the school authorities did not . . . prohibit the wearing of all symbols of political or controversial significance" but allowed symbols from political campaigns, as well as symbols associated with Nazism.[29] However, the Court would have reached the same result even without the viewpoint discrimination.[30] Furthermore, prohibiting even *viewpoint-based* speech would be permitted if "it is necessary to avoid material and substantial interference with schoolwork or discipline," but not because of the viewpoint expressed.[31]

The Court then described the extent of its holding in the school setting: it is not confined to classroom discussion but extends to "the cafeteria, or on the playing field, or on the campus during the authorized hours."[32] The Court reasoned, "Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots."[33] So broad did *Tinker* construe students' right to free speech that Justice Stewart thought the majority was assuming students' First Amendment rights were "co-extensive with those of adults," an assumption he could not share despite joining the majority.[34]

"lesson period [was] practically 'wrecked' chiefly by disputes with Mary Beth Tinker, who wore her armband for her 'demonstration,'" *id.* at 517–18 (Black, J., dissenting), the majority was evidently satisfied that these instances of disruption did not rise to the level of substantial disruption.

[25] *Id.* at 508 (majority opinion).

[26] *Id.* at 509.

[27] *Id.*

[28] *Id.* at 514.

[29] *Id.* at 510.

[30] The Court articulated the substantial disruption test four times before considering this factor. *See id.* at 505, 508, 509.

[31] *Id.* at 511.

[32] *Id.* at 512–13.

[33] *Id.* at 513.

[34] *Id.* at 514–15 (Stewart, J., concurring).

One final point is called for to fully explain the substantial disruption standard: the *same speech* could pass or fail the test depending on the circumstances. This is illustrated by comparing *Burnside v. Byars*[35] with its companion case, *Blackwell v. Issaquena County Board of Education*.[36] Both cases were decided by the same court on the same day and dealt with the same kind of speech, but the results were different because the facts were different. In *Burnside*, there was no substantial disruption when students wore "freedom buttons," but in *Blackwell* there was "much disturbance" caused by students harassing other students who were not wearing the buttons.[37]

B. Bethel School District No. 403 v. Fraser

It was seventeen years before the Court took up its next significant student speech case in *Bethel School District No. 403 v. Fraser*.[38] At a mandatory school assembly, a high school student delivered a speech consisting of "an elaborate, graphic, and explicit sexual metaphor."[39] In reaction, "[s]ome students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent's speech. Other students appeared to be bewildered and embarrassed by the speech."[40] Furthermore, "[o]ne teacher . . . found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class."[41] The student was suspended and removed from consideration to speak at graduation.[42]

Despite the effects of the speech, neither the district court nor the Ninth Circuit found that the speech caused a substantial disruption under *Tinker*, ruling instead that the school officials "violated respondent's right to freedom of speech."[43] The Supreme Court reversed but not by applying *Tinker*.[44] Instead, while maintaining "that students do not 'shed their constitutional rights to freedom of speech or expression

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35 363 F.2d 744 (5th Cir. 1966).

36 363 F.2d 749 (5th Cir. 1966).

37 *Tinker*, 393 U.S. at 505 n.1 (discussing both cases).

38 478 U.S. 675 (1986).

39 *Id.* at 678.

40 *Id.*

41 *Id.*

42 *Id.* However, following an injunction from the district court, the student was again allowed for consideration to speak at graduation. *Id.* at 679.

43 *Id.*

44 The Court in *Hazelwood School District v. Kuhlmeier* explicitly said that its holding in *Fraser* was not based on the *Tinker* analysis. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 n.4 (1988).

at the schoolhouse gate,'"[45] the Court stated "that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[46] Thus, the Court ruled that schools have the discretion to prohibit "offensively lewd and indecent speech,"[47] even though adults would not necessarily be prohibited from expressing the same speech elsewhere.[48]

C. Hazelwood School District v. Kuhlmeier

Only a year and a half after its decision in *Fraser*, the Court issued its next significant student speech decision in *Hazelwood School District v. Kuhlmeier*.[49] In *Kuhlmeier*, a principal deleted two pages from a school-sponsored student newspaper before it went to press because he had concerns about two articles dealing with teen pregnancy and divorce.[50]

The district court found the students' free speech rights had not been violated.[51] The Eighth Circuit disagreed, holding that the newspaper could not be censored except as necessary under *Tinker*, finding "no evidence . . . that the principal could have reasonably forecast that the censored articles . . . would have . . . given rise to substantial disorder in the school."[52]

The Supreme Court reversed.[53] While affirming that students "do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,'"[54] the Court drew the distinction that the question in *Tinker* was "whether the First Amendment requires a school to tolerate particular student speech."[55] The question it now faced was "whether the First Amendment requires a school affirmatively to promote particular student speech."[56] The Court held that schools may

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[45] *Fraser*, 478 U.S. at 680 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

[46] *Id.* at 682.

[47] *Id.* at 685.

[48] *Id.* at 682.

[49] 484 U.S. 260 (1988). The short form is sometimes seen as "*Hazelwood*," but this Note uses "*Kuhlmeier*."

[50] *Id.* at 262–64. The principal was concerned that the articles did not provide sufficient anonymity or a chance for the other side to respond when people were named. Rather than allow corrections, the principal deleted the pages because he believed there was no time for such corrections to be made. *Id.* at 263–64.

[51] *Id.* at 264–65.

[52] *Id.* at 265 (internal quotation marks omitted).

[53] *Id.* at 266.

[54] *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)).

[55] *Id.* at 270.

[56] *Id.* at 270–71.

exercise "editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[57] This includes "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[58]

D. Morse v. Frederick

It was not until nearly twenty years after *Kuhlmeier* that the Court decided its next student speech case in *Morse v. Frederick*.[59] Joseph Frederick and a few other high school students displayed a fourteen-foot-long banner that read "BONG HiTS 4 JESUS" at a school event to watch the Olympic torch go by the school.[60] Principal Morse saw the banner and demanded the students take it down.[61] Frederick refused and was suspended.[62]

The district court found that Morse did not violate Frederick's right to free speech since she "reasonably interpreted the banner as promoting illegal drug use—a message that 'directly contravened the Board's policies relating to drug abuse prevention.'"[63] The Ninth Circuit reversed, applying the *Tinker* substantial disruption standard and finding that Frederick's right to free speech had been violated, since he was punished without a showing "that his speech gave rise to a 'risk of substantial disruption.'"[64]

As in *Kuhlmeier*, after the court of appeals applied the substantial disruption test, the Supreme Court reversed.[65] Although the Court reaffirmed that "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,'"[66] the Court also stated that students' rights in school[67] are not coextensive with

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[57] *Id.* at 273.

[58] *Id.* at 271.

[59] 551 U.S. 393 (2007).

[60] *Id.* at 397.

[61] *Id.* at 398.

[62] *Id.*

[63] *Id.* at 399 (citation omitted).

[64] *Id.* (citation omitted).

[65] *Id.* at 410.

[66] *Id.* at 396 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

[67] The Court found that, since the Olympic torch event was a school-sanctioned event, Frederick could not "claim he [was] not at school," even though he was not on school property when he displayed the banner. *Id.* at 401.

those of adults.[68] Instead, "the rights of students must be applied in light of the special characteristics of the school environment."[69]

With the tension of these two principles, the Court moved forward to discuss the points relevant to reach its holding. First, Frederick's banner could reasonably be understood as advocating illegal drug use, even if he did not so intend.[70] Second, the school had a policy against expression in support of "the use of substances that are illegal to minors."[71] Third, the Court found that "deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest,"[72] since "[d]rug abuse can cause severe and permanent damage to the health and well-being of young people" and that "[t]he problem remains serious today."[73] Fourth, Congress has said that "part of a school's job is educating students about the dangers of illegal drug use" and has provided funding for this purpose to those schools that "convey a clear and consistent message that . . . the illegal use of drugs [is] wrong and harmful."[74] Therefore, "[t]he 'special characteristics of the school environment' and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use."[75] The Court concluded that Morse did not violate Frederick's First Amendment rights, holding that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."[76]

II. REASONS FOR CONCERN IN *MORSE*

The overriding concern about *Morse v. Frederick* considered by this Note is that *Morse* will be viewed and applied broadly. A broad application of *Morse* would be one in which *Morse* would not be confined to student speech that could reasonably be seen as advocating illegal drug use but would also be applied to restrict other kinds of speech, including speech that would not, and should not, be restricted under the *Tinker* standard. Perhaps the most likely way this could happen is

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68 *Id.* at 396–97 (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).

69 *Id.* at 397 (internal quotation marks omitted).

70 *Id.* at 401–02. Frederick claimed that the banner was "just nonsense meant to attract television cameras." *Id.* at 401 (internal quotation marks omitted).

71 *Id.* at 398.

72 *Id.* at 407 (citation omitted).

73 *Id.*

74 *Id.* at 408 (alteration in original) (internal quotation marks omitted).

75 *Id.* (citation omitted).

76 *Id.* at 397.

through the effect that a broad view of *Morse* would have on the relationship between *Tinker* and its progeny. Regarding this relationship, the prevailing view sees *Tinker* as the general rule for student speech with its progeny as limited exceptions to that rule.[77] Thus, *Tinker* held that schools cannot restrict student speech unless school officials can reasonably forecast that the speech would cause a substantial disruption to the operation of the school.[78] *Fraser* and *Kuhlmeier* each held narrow exceptions to this rule for speech that is lewd[79] or that can be reasonably understood as school-sponsored.[80] A plain reading of *Morse* adds just another narrow exception: school officials can restrict student speech reasonably understood as advocating illegal drug use.[81]

However, an alternate view has seen *Tinker* and its progeny as equals, that is, each case pertaining to a certain category of speech with no case setting a general rule.[82] In this view, there is no general rule: *Morse* pertains to advocating illegal drug use, *Kuhlmeier* to school-sponsored speech, and *Fraser* to lewd and indecent speech. The marked difference between the alternate and the prevailing views is that the alternate does not see *Tinker* as the main rule and pertinent to most student speech, but instead as applying only to political speech such as was directly at issue in *Tinker* regarding students wearing armbands to protest the Vietnam War.

The problem with this alternate view, besides simply being inaccurate, is that it leaves uncharted much that was previously regarded as protected student speech under *Tinker*. It opens the door to restricting student speech for reasons that would not have held up under *Tinker*.

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77 *See* Hardwick v. Heyward, 711 F.3d 426, 435 n.11 (4th Cir. 2013); D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. # 60, 647 F.3d 754, 760–61 (8th Cir. 2011); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 927 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012); Doninger v. Niehoff, 642 F.3d 334, 353–54 (2d Cir. 2011); DeFabio v. E. Hampton Union Free Sch. Dist., 623 F.3d 71, 78 (2d Cir. 2010); Barr v. Lafon, 538 F.3d 554, 563–64 (6th Cir. 2008); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2001); J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1101 (C.D. Cal. 2010); *see also* Travis P. Hughes, *What You Need to Know to Have an Intelligent Conversation About Student Cyber-Speech: Balancing Schools' Authority with Students' Free Speech*, 17 HOLY CROSS J.L. & PUB. POL'Y 9, 25 (2013) ("When addressed with an issue of student speech, it is important to be able to categorize the speech as either under *Tinker*, or under an exception.").

78 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

79 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

80 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270–71 (1988).

81 *Morse*, 551 U.S. at 397.

82 *See, e.g.*, Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 326 (2d Cir. 2006).

The Court's decision in *Morse* may contribute, even inadvertently, to this alternate view. The analysis the Court used to reach its decision arguably could be analogized to create further restrictions on student free speech. By appealing to "[t]he 'special characteristics of the school environment' and the governmental interest in stopping student drug abuse,"[83] a broad view of *Morse* would only need to analogize other areas of speech to student drug use in order to throw the weight of the Supreme Court behind restrictions of these other areas of student speech.

The majority opinion does not clearly delineate the limits of its holding.[84] Analogizing to *Morse* could broaden the impact of its holding in such a way that *Morse* would no longer be just another exception to *Tinker* but would apply to issues far afield from student drug use. *Tinker* would be diluted to the point of being relegated to just one among many on a list of rules that pertain to student speech. Instead of *Tinker* being regarded as an important recognition of the First Amendment's protection of student speech,[85] it would be placed as an equal among other cases that restrict student speech. Rather than finding whether the student speech in question could reasonably be forecast to cause a substantial disruption to the operation of the school, courts would consider merely whether the speech falls under any of a number of categories, or whether there is yet another governmental interest (or one to be created) that may rationalize further student speech restrictions. Even Justice Stewart in his concurrence in *Tinker*—expressing reservation to what he thought was the majority's assumption that children's rights are "co-extensive with those of adults"—specified that where children's rights are not coextensive, these need to be "precisely delineated areas."[86] A broad reading of *Morse* erases the carefully-drawn line set forth in *Tinker* and opens the door to a confusing array of a growing body of exceptions to no general rule.[87] But as one court recently

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[83] *Morse*, 551 U.S. at 408 (citation omitted).

[84] *See id.* at 426 (Breyer, J., concurring in part and dissenting in part).

[85] *See* FARBER, *supra* note 20, at 193 (describing *Tinker* as "[t]he Court's first significant opinion on the rights of public school students.").

[86] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514–15 (1969) (Stewart, J., concurring).

[87] To be sure, these would be exceptions to the rule of the First Amendment; but under the prevailing view, *Tinker* served as the articulation of the First Amendment regarding student speech. There was no exception to the protection of the First Amendment to any type of speech uttered by students except that which could reasonably be forecast to cause a substantial school disruption. *Tinker*'s progeny, by contrast, puts certain *kinds* of student speech outside the protection of the First Amendment as articulated in *Tinker*. Thus, although the progeny exceptions would still have the First Amendment as the rule to which they are exceptions, there would no longer be the *Tinker*

observed, "[T]he Supreme Court in recent Terms has made it clear that the First Amendment has a broad reach, limited only by narrow, traditional carve-outs from its protection."[88]

A further observation helps to understand the difference between *Tinker* and *Morse* (and the other progeny) and why they should not be put on the same plane: *Tinker* is about protecting student speech[89] while *Morse* is about protecting students *from* certain speech.[90] The latter may be necessary sometimes. However, by allowing *Morse* to be broadened by analogizing illegal drug use to other things from which students are thought to be in need of protection, school officials can, in paternalistic fashion, restrict student speech as part of any given agenda. Although it may be well-intentioned, in many cases this would run afoul of the First Amendment as applied to students under *Tinker*. Since students transact in "the marketplace of ideas"[91] in the school environment more than anywhere else, it would be improper for school officials to regulate this market to protect students from ideas the officials believe are dangerous. *Tinker* already sufficiently protects students from dangerous effects of expressing ideas (when substantial disruption is reasonably forecast)[92] without straight-jacketing students from engaging in the marketplace of ideas in the search for meaning and truth. After all, it is through free and unfettered participation in this market that a student can best buy truth and own it—not having it imposed, or hidden, by an authority figure who thinks she knows better (and often does).[93]

Well-intentioned school officials—and judges—may analogize *Morse*'s "advocating illegal drug use" to such issues as racist speech,

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standard as the general rule articulating the application of the First Amendment to student speech.

[88] Morgan v. Swanson, 659 F.3d 359, 403 n.10 (5th Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 2740 (2012). The Supreme Court has been clear about this: "There are certain *well-defined and narrowly limited* classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (emphasis added).

[89] *Tinker*, 393 U.S. at 512–13.

[90] Morse v. Frederick, 551 U.S. 393, 410 (2007). Indeed, so is *Fraser*, but *Morse*'s analysis, which perhaps more clearly than *Fraser* allows broadening by analogy, threatens to dilute *Tinker* even more.

[91] *Tinker*, 393 U.S. at 512.

[92] *See id.* at 514.

[93] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.").

bullying speech, and speech indicating or threatening school violence.[94] It may be thought that some or all of these should always be restricted as pertains to students. Assuming that is so, it is equally important *why* such speech should be restricted. If the rationale is merely to protect students, then any well-intentioned school official could also think she is justified in restricting student speech promoting or opposing Communism, a political candidate,[95] abstinence before marriage, abortion, homosexuality, Christ as the only way to salvation, universal Islam as the only hope for peace, or regulation of soft drinks.

To be sure, many, if not all, of these examples could be regarded as political and/or religious speech, which *Morse* indicates as specially protected.[96] But could not people on either side of these issues consider that students legitimately need protection from the opposing side of the given issue? Without *Tinker*'s substantial disruption test, what is the standard? Actual violence? Opponents who merely take offense? Could it easily slide back to school officials restricting views out of "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,"[97] hiding behind protecting students[98] without a clear standard of when they need protection? Rather than trying to protect people from certain speech, the First Amendment is meant to protect people's speech from government[99]—in this case, students' speech from school officials. And when it is necessary for student speech to be restricted, clear standards and limits are called for. *Tinker* articulates that standard. Relegating it as pertaining only to one kind of speech would be a mistake.

The impact of a broad reading of *Morse* is illustrated in two Confederate flag cases from the Sixth Circuit. In *Barr v. Lafon*, the Sixth Circuit appropriately recognized *Tinker* as the general rule and its

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[94] In fact, some courts have already done so. *See infra* notes 181–183 and accompanying text.

[95] David Duke comes to mind as a controversial, oftentimes political candidate. *See* DAVIDDUKE.COM: FOR HUMAN FREEDOM AND DIVERSITY, http://www.davidduke.com/ (last visited Oct. 10, 2013). It does not take one long on his website to realize that he is not for either freedom or diversity, but why should students who believe otherwise not be allowed to say so—short of leading to a substantial disruption, of course—and participate in the marketplace of ideas?

[96] *Morse*, 551 U.S. at 409; *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (stating that the political speech in question "was closely akin to 'pure speech' which . . . is entitled to comprehensive protection under the First Amendment").

[97] *Tinker*, 393 U.S. at 509.

[98] *See Morse*, 551 U.S. at 408.

[99] *Tinker*, 393 U.S. at 513.

progeny as exceptions to *Tinker*.[100] The case was brought by students who objected to a principal enforcing a school policy against wearing clothing bearing the Confederate flag.[101] The court applied *Tinker* and upheld the policy, finding it appropriate given recent racial tension and physical altercations.[102] Furthermore, the court stated that *Morse* does "not modify [the] application of the *Tinker* standard to the instant case,"[103] and that *Morse* "resulted in a narrow holding: a public school may prohibit student speech . . . that the school 'reasonably view[s] as promoting illegal drug use.'"[104]

However, only two years later, in a different Confederate flag case, the Sixth Circuit applied a broad view of *Morse* in *Defoe ex rel. Defoe v. Spiva* (*Defoe I*).[105] Although there was evidence of racial tension and recent incidents,[106] the court decided that "the law does not require . . . *Tinker*."[107] Tellingly, the court departed from the proper view that the progeny to *Tinker* are exceptions: "[I]t is not at all clear that *Tinker* must be read as providing the general rule for all student speech, limited only by subsequent categorical 'exceptions' to that general rule."[108] Instead, the court flipped it completely:

> A fair look at *Tinker*, *Fraser*, [*Kuhlmeier*], and *Morse* thus suggests that *the general rule is that school administrators can limit speech* in a reasonable fashion to further important policies at the heart of public education. *Tinker provides the exception*—schools cannot go so far as to limit nondisruptive discussion of political or social issues that the administration finds distasteful or wrong.[109]

The court went down this fateful path by making the unfortunate analogy to *Morse* as seen in two revealing statements. First, "A . . . school that can put reasonable limits on drug-related speech . . . can put reasonable and even-handed limits on racially hostile or contemptuous speech, without having to show that such speech will result in disturbances."[110] Second,

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[100] Barr v. Lafon, 538 F.3d 554, 563–64 (6th Cir. 2008).

[101] *Id.* at 556–57.

[102] *Id.* at 568.

[103] *Id.* at 564.

[104] *Id.* (alteration in original) (citation omitted).

[105] 625 F.3d 324, 342 (6th Cir. 2010).

[106] *Id.* at 326–28.

[107] *Id.* at 341. The court justifies its disregard of the *Tinker* standard by analogizing "racial tension in today's public schools" to "a concern on the order of the problem of drug abuse." *Id.* at 340. Because "no *Tinker* showing was required in *Morse*," the court states that "such a showing is not required in this case." *Id.* at 340–41.

[108] *Id.* at 341.

[109] *Id.* at 342 (emphasis added).

[110] *Id.* at 338.

> If we substitute "racial conflict" or "racial hostility" for "drug abuse," the analysis in *Morse* is practically on all fours with this case. The inescapable conclusion is that a school may restrict racially hostile or contemptuous speech in school, when school administrators reasonably view the speech as racially hostile or promoting racial conflict.[111]

Judge Boggs, dissenting from the court's denial of rehearing en banc, said the opinion in *Defoe I* "eviscerates the core holding of *Tinker*."[112] He points out that the second statement above, from *Defoe I*, "is grammatically true, but it is equally true if [for 'drug abuse'] you substitute 'religious dogma,' 'Republican propaganda,' or 'seditious libel.' *Morse* does not authorize suppression on . . . those grounds either, but the panel's *ipse dixit* reading of *Morse* would support such a holding just as strongly as the one it makes."[113]

Even under the prevailing view that *Tinker* is the general rule to which its progeny are narrow exceptions, *Morse* limits *Tinker* by its very existence as another exception. According to Professor Erwin Chemerinsky, "Over the three decades of the Burger and Rehnquist Courts, there have been virtually no decisions protecting rights of students in schools,"[114] and "in the almost forty years since *Tinker*, schools have won virtually every constitutional claim involving students' rights."[115] However, this Note does not argue whether *Morse* was wrongly decided, only that a broad application of it would be wrong.

III. WHY *MORSE* SHOULD BE APPLIED NARROWLY

A. Justice Alito's Controlling Concurrence

Justice Alito was concerned about the erosion of *Tinker*, and this was the reason he wrote his concurring opinion, joined by Justice Kennedy.[116] When *Morse v. Frederick* came before the Supreme Court, Alito recognized that a broad reading of the majority opinion could threaten the *Tinker*-progeny framework through analogizing to subjects

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[111] *Id.* at 339.

[112] Defoe *ex rel.* Defoe v. Spiva (*Defoe II*), 674 F.3d 505, 506 (6th Cir. 2011) (Boggs, J., dissenting from denial of petition to rehear en banc). It was Judge Boggs, as will be seen, who described Alito's concurrence as "decisive." *See infra* note 164 and accompanying text.

[113] *Defoe II*, 647 F.3d at 506–07.

[114] Chemerinsky, *supra* note 9, at 25.

[115] *Id.*

[116] *See* Morse v. Frederick, 551 U.S. 393, 422–23 (2007); Dickler, *supra* note 10, at 357 (footnote omitted) (citing commentators who see *Morse* as demonstrating "a division amongst the Justices on student speech rights and continued *Fraser*'s and *Kuhlmeier*'s erosion of students' First Amendment rights").

of speech other than advocating illegal drug use.[117] Specifically, Alito recognized that "the special characteristics of the public schools [could be used to] justify . . . other speech restrictions."[118] Since he joined the majority, it is clear that Alito agreed that school administrators do not violate the First Amendment when they prohibit speech advocating illegal drugs. But, in two related senses, he wanted the erosion of *Tinker* to stop there.

First, Alito expressed that he did "not read the [majority] opinion to mean that there are necessarily any grounds for such regulation that are not already recognized in the holdings of [the] Court," referring to *Tinker* and its exceptions in *Fraser* and *Kuhlmeier*.[119] In other words, although *Tinker* is the general rule with a couple recognized exceptions, and the Court has now recognized a third exception, it does not follow that there are more exceptions to be found—in fact, adding new exceptions would be unnecessary and detrimental. Any need for restricting student speech is covered by these four cases.[120]

Second, Alito and Kennedy made it clear that they would not have joined the majority if *Morse* were understood as allowing for restrictions on student speech beyond its plain reading. As Alito expressed in the opening words of his concurrence:

> I join the opinion of the Court on the understanding that (1) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (2) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as "the wisdom of the war on drugs or of legalizing marijuana for medicinal use."[121]

Justice Alito recognized other threats to the majority opinion. For example, he explained that the majority opinion "does not endorse the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student

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[117] *See* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2001) (summarizing then-Judge Alito's clear understanding of the rule-exceptions framework for *Tinker* and its progeny).

[118] *Morse*, 551 U.S. at 423 (Alito, J., concurring).

[119] *Id.* at 422.

[120] Admittedly, by using the word "necessarily," *see id.*, Alito does not seem to foreclose the possibility that there may be other exceptions; but if there are, they are not to be incorporated through *Morse*. Furthermore, Alito's tenor seems to be that there is no open window to allow other exceptions; this newly-recognized exception is as far as it can go. Alito demonstrates this by his conclusion "that the public schools may ban speech advocating illegal drug use. But I regard such regulation as standing at the far reaches of what the First Amendment permits. I join the opinion of the Court with the understanding that the opinion does not endorse any further extension." *Id.* at 425.

[121] *Id.* at 422 (citation omitted).

speech that interferes with a school's 'educational mission.'"[122] Since school officials could define the educational mission of a school to include "the inculcation of whatever political and social views are held" by the officials, this would be an inappropriately broad and uncertain test by which to determine the contours of student speech protected by the First Amendment.[123] It would "strike[] at the very heart of the First Amendment."[124]

Justice Alito also argued against Justice Thomas's concurring opinion. Thomas joined the majority because *Morse* does not follow the *Tinker* standard, and Thomas believes that *Tinker* was wrongly decided.[125] Thomas admirably looks to the meaning of the First Amendment as it pertains to public schools in early American history as well as at the time the Fourteenth Amendment was ratified,[126] arguing that schools had authority to restrict student speech according to "the legal doctrine of *in loco parentis*."[127] However, Thomas admits that "*in loco parentis* originally governed the legal rights and obligations of tutors and private schools."[128] As the transition to public schools occurred, many aspects of the private understandably carried over to the public, as would be expected since public schools originated "as a way to educate those too poor to afford private schools."[129] However, as public schools have transitioned to become more and more "organs of the State" and public school authorities to be "agents of the State,"[130] and as public schools have come to resemble less and less an extension of the right "of parents . . . to direct the upbringing and education of children,"[131] it is

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[122] *Id.* at 423.

[123] *Id.*

[124] *Id.*

[125] *Id.* at 410 (Thomas, J., concurring). This is why Justice Thomas's concurrence is not controlling, even though he also constituted an essential member in the five-four decision. Because Thomas disagrees with *Tinker* and joined the majority since it was a decision in favor of school officials and inconsistent with *Tinker*, Thomas would likely have joined the opinion of the Court had it been written by Alito, at least insofar as Alito agreed with the majority in favor of the school officials.

[126] *Id.* at 410–12.

[127] *Id.* at 413.

[128] *Id.*

[129] *Id.* at 411.

[130] *Id.* at 424 (Alito, J., concurring).

[131] Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) (quoting Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925)). Although Justice Thomas dismisses *Pierce* as simply upholding "the right of parents to send their children to private school," *Morse*, 551 U.S. at 420 n.8 (Thomas, J., concurring), it nevertheless stands that parents have the right to direct the education and upbringing of their children, and that school officials act as agents of the State.

difficult to maintain that public schools in their current form continue to validly exercise *in loco parentis*.[132] As Justice Alito asserts,

> It is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities. It is even more dangerous to assume that such a delegation of authority somehow strips public school authorities of their status as agents of the State.[133]

Therefore, Alito argues, any justification for allowing restrictions to student speech can be based neither on the "educational mission" of the school[134] nor "on a theory of [parental] delegation."[135] Rather, it "must . . . be based on some special characteristic of the school setting."[136] Alito joined the majority opinion "on the understanding that [it] does not hold that the special characteristics of the public schools necessarily justify *any other* speech restrictions."[137] It is justified in this case because "[t]he special characteristic that is relevant . . . is the threat to the physical safety of students."[138] Since school attendance creates a captive audience, "[s]tudents may be compelled on a daily basis to spend time at close quarters with other students who may do them harm."[139] This nation has become all too well aware "that schools can be places of special danger."[140]

However, given this justification for prohibiting student speech that can reasonably be understood as advocating illegal drug use, why can *Morse* not be used to prohibit student speech that advocates, for example, school violence? After all, as Alito points out, even though *Brandenburg v. Ohio*[141] recognizes that "the First Amendment strongly limits the government's ability to suppress speech on the ground that it presents a threat of violence,"[142] nevertheless, "the special features of the

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[132] This, of course, is not to suggest that parents can have no say in the operation of public schools. To the contrary, like any other government organ, and especially ones that touch so close to home, parents' involvement should be considered at least on par with other duties of good citizenship to influence government that is by the people. But insofar as public schools are operated as "organs of the state," the First Amendment prohibition of government restricting free speech should apply to student protection as well.

[133] *Morse*, 551 U.S. at 424 (Alito, J., concurring).

[134] *Id.* at 423; *see also supra* notes 122–124 and accompanying text.

[135] *Morse*, 551 U.S. at 424 (Alito, J., concurring); *see also supra* notes 125–132 and accompanying text.

[136] *Morse*, 551 U.S. at 424 (Alito, J., concurring).

[137] *Id.* at 423 (emphasis added).

[138] *Id.* at 424.

[139] *Id.*

[140] *Id.*

[141] 395 U.S. 444 (1969).

[142] *Morse*, 551 U.S. at 425 (Alito, J., concurring).

school environment . . . [give] school officials . . . greater authority to intervene before speech leads to violence."[143]

The answer is that, in most situations, "*Tinker*'s 'substantial disruption' standard permits school officials to step in before actual violence erupts."[144] The more harmful an activity is, the more likely speech about that activity will provide "facts which might reasonably [lead] school authorities to forecast substantial disruption."[145] The difference in *Morse*, as Alito recognized, was that "[s]peech advocating illegal drug use poses a threat to student safety that is just as serious, if not always as immediately obvious."[146] Although it could reasonably be argued that not taking action against the Bong Hits banner could lead students to think that the school "tolerate[s] such behavior," which could make students "more likely to use drugs,"[147] which could lead to a "drug-infested school" in which "the educational process is disrupted,"[148] that view is too attenuated from "facts which might reasonably [lead] school authorities to forecast substantial disruption."[149] The difference between *Morse* and *Tinker* is not the harm; it is the attenuation from student speech to the harm. Granted, from one angle it is seen that the greater the harm, the more likely it will fall under the underlying justification in *Morse*, but even then, *only if* the link is sufficiently attenuated that it would not fall under *Tinker* first. And from a different angle, it is clear that the greater the harm, the more likely any speech advocating it will be able to provide a forecast of substantial disruption, thus clearly falling under *Tinker*. Alito is careful to point out that this "stand[s] at the far reaches of what the First Amendment permits."[150] He concludes his concurrence, "I join the opinion of the Court with the understanding that the opinion does not endorse any further extension."[151]

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[143] *Id.*

[144] *Id.*

[145] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

[146] *Morse*, 551 U.S. at 425 (Alito, J., concurring).

[147] *Id.* at 408 (majority opinion).

[148] *Id.* at 407 (quoting Vernonia Sch. Dist. 47J v. Acton *ex rel.* Acton, 515 U.S. 646, 662 (1995)).

[149] *Tinker*, 393 U.S. at 514.

[150] *Morse*, 551 U.S. at 425 (Alito, J., concurring).

[151] *Id.* It is worth a final note here to provide some context of Justice Alito's record on free speech. In two particular cases in which the Court decided the speech was protected First Amendment speech (though not decided in the school context), Alito stood alone. In these two cases, *United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010) (involving animal crush videos), and *Snyder v. Phelps*, 131 S. Ct. 1207, 1222 (2011) (involving Westboro Baptist members demonstrating at a soldier's funeral), Justice Alito was the sole dissenter. It is clear, then, that Alito is willing to stand alone against what the other eight justices perceive as protected speech.

B. Five Reasons Morse *Should Be Applied Narrowly*

Apart from being accurate, *Morse* should be applied narrowly because a broad reading would erode *Tinker* to the detriment of student free speech. This section provides reasons why *Morse* should be read narrowly and, specifically, why Justice Alito's concurrence should be followed.

The first reason to follow a narrow view of *Morse* as set forth in Alito's concurrence is that the concurrence is the controlling opinion in *Morse*, at least concerning the limits of the holding. While some disagree, several scholars and some courts have expressly recognized the logic of the controlling nature of Alito's concurrence. Judge Posner disagrees. Writing the decision in *Nuxoll ex rel. Nuxoll v. Indian Prairie School District # 204*, he asserts that Justices Alito and Kennedy "were expressing their own view of the permissible scope of such regulation."[152] The concurrence is not controlling, Posner thinks, because "they joined the majority opinion, not just the decision."[153] However, it is by joining the majority opinion and not just the decision, that Justices Alito and Kennedy actually made the concurrence controlling in this case. Right at the outset, the concurrence makes clear that the two justices "join *the opinion* of the Court *on the understanding that*" certain restrictions apply to the majority opinion.[154] That is, they do not quarrel with the opinion. They agree with it *on condition that* it means what they understand it to mean, writing the separate opinion to express their interpretation of the majority opinion. Their opinion would not have this impact on the majority opinion if they concurred in the judgment only. Thus, in this five-four decision, two of the justices would not have joined the opinion if it applied to speech beyond "advocating illegal drug use."[155] If the holding had been broader, would they have concurred in the judgment? Would they have dissented? Would they have been able to fashion a very different majority with the three Justices in Justice Stevens's dissent? What is clear is that each of these two justices was vital to the majority, and both joined the majority expressly on the understanding that *Morse* articulated a narrow holding not to be expanded.

Unlike Judge Posner, Eugene Volokh understands Justice Alito's concurrence as seeming "to offer the controlling legal rule," since it provides "the narrowest grounds offered by any of the Justices whose

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[152] 523 F.3d 668, 673 (7th Cir. 2008).

[153] *Id.*

[154] *Morse*, 551 U.S. at 422 (Alito, J., concurring) (emphasis added).

[155] *Id.*

votes were necessary for the majority."[156] Similarly, Erwin Chemerinsky hopes that Alito's concurrence will be followed, noting that "two of the Justices in the majority . . . emphasized that the holding is just about the ability of schools to punish student speech encouraging drug use."[157] He asserts that "[t]he opinion should be read no more broadly than that."[158] Furthermore, Kenneth Starr, who represented the petitioners (the school officials' side) before the Supreme Court in *Morse*,[159] has since written, "Chief Justice Roberts, writing for the majority, sought to keep the decision quite narrow. The case, in his view, was limited to the issue of public school administrators' ability to keep the educational process free from messages about illegal drugs."[160] Starr further expressed his view of the narrowness of *Morse* by describing Justices Alito and Kennedy as "[t]wo pivotally important members of the majority . . . [who] sounded a pro-free speech warning."[161]

In addition to scholars, some courts, as well as judges writing separately, have explicitly expressed the controlling nature of the Alito concurrence. In *Ponce v. Socorro Independent School District*, the Fifth Circuit described Alito's opinion as "controlling."[162] Subsequent Fifth Circuit panels have followed suit.[163]

In *Defoe ex rel. Defoe v. Spiva* (*Defoe II*), Judge Boggs, dissenting from the decision not to rehear en banc, describes Alito's concurrence as "Justice Alito's decisive concurring opinion."[164] It is also interesting to note that, although the *Defoe* cases rejected a narrow view of *Morse* and thus failed to accept Alito's concurrence as controlling, *Defoe I* itself was governed by a controlling concurrence.[165] Judge Clay delivered the judgment of the court at the end of a full-fledged opinion,[166] and yet

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[156] Eugene Volokh, *What Did* Morse v. Frederick *Do to the Free Speech Rights of Students Enrolled in K-12 Schools?*, THE VOLOKH CONSPIRACY (June 26, 2007, 12:09 AM), http://www.volokh.com/posts/1182830987.shtml.

[157] Chemerinsky, *supra* note 9, at 25.

[158] *Id.*

[159] *Morse*, 551 U.S. at 395.

[160] Kenneth W. Starr, *Our Libertarian Court:* Bong Hits *and the Enduring Hamiltonian-Jeffersonian Colloquy*, 12 LEWIS & CLARK L. REV. 1, 2–3 (2008).

[161] *Id.* at 3.

[162] 508 F.3d 765, 768 (5th Cir. 2007). However, *Ponce* ended up applying *Morse* broadly, which might be due to the procedural posture of the case. *Id.* at 771–72.

[163] *See* Morgan v. Plano Indep. Sch. Dist., 589 F.3d 740, 746 n.25 (5th Cir. 2009); Palmer *ex rel.* Palmer v. Waxahachie Indep. Sch. Dist., 579 F.3d 502, 508 n.8 (5th Cir. 2009).

[164] 674 F.3d 505, 506 (6th Cir. 2011) (Boggs, J., dissenting from denial of petition to rehear en banc).

[165] Defoe *ex rel.* Defoe v. Spiva (*Defoe I*), 625 F.3d 324, 326 (6th Cir. 2010).

[166] *Id.* at 326, 338.

stated, "[t]o the extent that there are any differences between this opinion and the concurring opinion, the concurring opinion shall govern as stating the panel's majority position."[167] The ACLU indicated this irony in its amicus brief supporting the appellants' petition for rehearing en banc by recognizing "Justice Alito's controlling concurrence"[168] and soon after describing Judge Clay's opinion as the "lead (but not controlling) opinion."[169]

Similarly, Judge Moore, dissenting in *Morrison v. Board of Education*, recognized the narrow scope of *Morse* by noting that "[o]f the five [J]ustices in the majority, two who joined the Court's opinion construed it [narrowly]," making *Morse* "inapplicable" to *Morrison*.[170] By disagreeing with the application of *Morse* to this case in which a student wished to express his religious opposition to homosexuality contrary to a school policy, Judge Moore recognized the narrow scope of *Morse* as defined by the Alito concurrence.[171]

A second reason to follow the narrow view of *Morse* is that it maintains *Tinker* as the general rule to which its progeny are narrow exceptions. This reflects the understanding that the First Amendment is the rule with only limited and well-defined exceptions.[172] To remove *Tinker* as the general rule would leave uncharted much that was previously protected student speech with more and more coming under regulation of a growing number of exceptions to no general rule.

A third reason to follow the narrow holding of *Morse* is that it helps school officials better predict whether a proposed policy or course of action would wrongly infringe on student speech. As the majority noted in *Morse*, "[s]chool principals have a difficult job" that sometimes requires them to make important decisions on the spot.[173] A narrow reading of *Morse* allows school officials to quickly determine whether student expression advocates illegal drug use,[174] is lewd or indecent,[175] is

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[167] *Id.* at 326.

[168] Brief for American Civil Liberties Union and American Civil Liberties Union of Tennessee as Amici Curiae Supporting Appellants' Petition for Rehearing En Banc, at 7, Defoe *ex rel.* Defoe v. Spiva (*Defoe II*), 674 F.3d 505 (6th Cir. 2011) (No. 09-6080), 2010 WL 7326270.

[169] *Id.* at 8. However, the ACLU was factually wrong therein to label Justice Alito's opinion as "concurring in the judgment." *Id.*

[170] Morrison v. Bd. of Educ., 521 F.3d 602, 623–24 (6th Cir. 2008) (Moore, J., dissenting).

[171] *Id.* at 611, 623–24.

[172] *See supra* note 88 and accompanying text.

[173] Morse v. Frederick, 551 U.S. 393, 409–10 (2007).

[174] *Id.* at 397.

[175] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

or appears to be school-sponsored,[176] or can be reasonably forecast to cause a substantial disruption to the "the requirements of appropriate discipline in the operation of the school."[177]

A fourth reason to follow the narrow holding of *Morse* is that it better helps students, as citizens who will soon be voting and otherwise participating in our free democracy, to learn how to exercise their right to free speech responsibly. As the Court said in *West Virginia State Board of Education v. Barnette*, "That [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[178] Again, the Court has said:

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.[179]

A related but different account for the purpose of the marketplace of ideas was given by Justice Holmes. Rather than the notion that truth is discovered from "a multitude of tongues," as if its discovery were necessarily dependent on a variety of viewpoints, Holmes wrote "that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[180] Even when truth is found, it does not justify forcing it on others, but, rather, if it is the truth, then others who have yet to recognize it as such can choose to accept it—or reject it. Such is the beauty of the marketplace of ideas, not that all ideas are true but that the true ones can be trusted to stand their ground without authoritarian imposition.

Finally, a fifth reason to follow a narrow reading of *Morse* is that a broad reading is unnecessary. Some courts have thought it necessary to broadly apply *Morse* to restrict student speech that could be interpreted as racist,[181] bullying,[182] or violent.[183] However, although a narrow reading

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[176] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

[177] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (internal quotation marks omitted).

[178] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

[179] *Tinker*, 393 U.S. at 512 (alteration in original) (citations omitted) (internal quotation marks omitted).

[180] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[181] *See* Defoe *ex rel.* Defoe v. Spiva, 625 F.3d 324, 338 (6th Cir. 2010).

[182] Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 572 (4th Cir. 2011) *cert. denied*, 132 S. Ct. 1095 (2012); Harper *ex rel.* Harper v. Poway Unified Sch. Dist., 545 F. Supp. 2d 1072, 1101 (S.D. Cal. 2007), *aff'd in part, vacated in part*, 318 F. App'x 540 (9th Cir. 2009).

of *Morse* would not cover such speech, *Tinker* would, insofar as such speech in given circumstances could be reasonably forecast to cause a substantial disruption. This can be shown using cases from both before and after *Morse*.

For example, in *West v. Derby Unified School District No. 260*, which was decided before *Morse*, the Tenth Circuit dealt with the case of a seventh grade student who had been suspended for drawing the Confederate flag in class, in violation of the school's "Racial Harassment and Intimidation" policy.[184] The court had no problem applying the *Tinker* substantial disruption standard to find that the school had not violated the student's right to free speech by suspending him for the drawing.[185] Crucial to its determination was the fact that "[t]he evidence in this case . . . reveals that based upon recent past events, Derby School District officials had reason to believe that a student's display of the Confederate flag might cause disruption and interfere with the rights of other students to be secure and let alone."[186] As the district court had reasoned,

> The history of racial tension in the district made . . . concerns about future substantial disruptions from possession of Confederate flag symbols at school reasonable. The fact that a full-fledged brawl had not yet broken out . . . does not mean that the district was required to sit and wait for one. . . . In this case, the district had a reasonable basis for forecasting disruption from display of such items at school, and its prohibition was therefore permissible . . . .[187]

Although the student's drawing "could well be considered a form of political speech to be afforded First Amendment protection outside the educational setting,"[188] in this case it was justified because of the reasonable threat of creating a substantial disruption.[189] Although a broad application of *Morse* could have yielded (anachronistically) the same result, such a broad application could also prohibit this normally-protected political speech even in the absence of a reasonable belief that

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Some could view the message on the students' shirts against homosexuality as a type of bullying. The court seemed to think so without saying as much. *Harper ex rel. Harper*, 545 F. Supp. 2d at 1101 (asserting that "the speech . . . was properly restricted based on the harm it might cause to homosexual students due to its demeaning nature").

[183] Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 771–72 (5th Cir. 2007).

[184] West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1361 (10th Cir. 2000).

[185] *Id.* at 1365–67.

[186] *Id.* at 1366.

[187] West v. Derby Unified Sch. Dist. # 260, 23 F. Supp. 2d 1223, 1232–33 (D. Kan. 1998).

[188] *West*, 206 F.3d at 1365.

[189] *Id.* at 1366.

the speech will cause a substantial disruption. Such an outcome would be contrary to *Tinker*, as demonstrated in the next case.

In *Bragg v. Swanson*, also decided before *Morse*, a federal district court dealt with a case of a high school student who was disciplined for wearing clothing bearing the Confederate flag.[190] The court held for the student, finding that his right to free speech had been violated.[191] Although the principal of the school had encountered disruptive events involving the Confederate flag at other schools,[192] crucial to the court's decision in this case was that "there exists at the school an environment in which people of both races mix freely together and form good relationships."[193] An African-American student who testified claimed that "[i]n her three-plus years at the school [she] ha[d] not witnessed any disputes of a racial magnitude involving the flag."[194] Additionally, the principal "conceded that prior to her arrival at the school the flag was a permissible mode of expression and no complaints or incidents ever attended its display."[195] While the outcome of this case is different from that in *West*, it is not inconsistent. As the court in *Bragg* stated,

> [T]his opinion should not be interpreted as offering a safe haven for those bent on using the flag in school as a tool for disruption, intimidation, or trampling upon the rights of others. Should that occur, or be reasonably forecast by the school, the very ban struck down today might be entirely appropriate.[196]

Although a broad reading of *Morse* would arrive at the same outcome reached in *West*, it could also extend, erroneously, to an opposite outcome from that reached in *Bragg*.

In *A.M. ex rel. McAllum v. Cash*, the Fifth Circuit dealt with the case of students who were prohibited from bringing their purses emblazoned with the Confederate flag to school.[197] The plaintiff-appellants claimed their right to free speech was violated.[198] This occurred in the context of the school witnessing several racial incidents, both before and after the purse incident—from a fight before a

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[190] Bragg v. Swanson, 371 F. Supp. 2d 814, 816, 819 (S.D. W. Va. 2005). Note that the Federal Supplement indicates that this is in the Western District of West Virginia, but no such district exists, nor does it appear to ever have existed.

[191] *Id.* at 829–30.

[192] *Id.* at 817.

[193] *Id.* at 827.

[194] *Id.*

[195] *Id.* at 819.

[196] *Id.* at 829.

[197] A.M. *ex rel.* McAllum v. Cash, 585 F.3d 214, 217 (5th Cir. 2009).

[198] *Id.*

basketball game that required police to restore order,[199] to "a homemade Confederate battle flag . . . raised on the [school] flagpole and graffiti representing the flag . . . drawn on the sidewalk below" on Martin Luther King, Jr., Day,[200] to "a white . . . student [who] attempted to wrap his belt around an African-American student's neck while using racial epithets and threatening to hang him."[201]

Note that this case was decided after *Morse*. However, not only did the court not apply a broad interpretation of *Morse* in exonerating the school administrators for enforcing the school's policy in the racially-charged atmosphere, the court did not even mention *Morse* once in its opinion.[202] Instead, the court applied the *Tinker* substantial disruption standard to reach its decision in favor of the defendant school officials.[203] A broad interpretation of *Morse* is not necessary to meet such situations; it is inconsistent with Justice Alito's controlling concurrence, and it is inconsistent with the standard laid down in *Tinker* and the narrow exceptions carved out in *Fraser*, in *Kuhlmeier*, and in *Morse* itself.

CONCLUSION

Does freedom expand or contract over time? It is not necessary to answer that question in order to recognize threats, even well-meaning threats, to freedom. And once recognized, measures should be taken to protect freedom. This is what Justice Alito attempted to do in his concurring opinion in *Morse v. Frederick*. Recognizing that *Morse* had the potential to upset the relationship between *Tinker* (as the general rule) and its progeny (as narrow exceptions), Alito made it clear that he and Justice Kennedy understood *Morse* as going no further than applying to student speech that could be reasonably understood as advocating illegal drug use. What is more, these two justices made it clear that they joined the *Morse* decision on the condition that it went no further. Since they were two essential members in the five-four decision, the Alito concurrence has binding effect to control the limits of *Morse*. Unfortunately, some federal courts have either not recognized or have rejected applying *Morse* according to Alito's concurrence. The Supreme Court should recognize this threat to the freedom of student speech and take measures to protect it by clarifying that *Tinker* is the general rule pertaining to student speech, and its progeny—*Fraser*, *Kuhlmeier*, and

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[199] *Id.* at 218.
[200] *Id.* at 219.
[201] *Id.*
[202] *Id.* at 214–27.
[203] *Id.* at 222.

Morse—are narrow exceptions to it that need not and should not be expanded.

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[*] Winner of the sixth annual Chief Justice Leroy Rountree Hassell, Sr., Writing Competition, hosted by the Regent University Law Review. Special thanks to my wife, Jana Cate Smith, for her love, encouragement, and patience as I wrote this Note.

WILL VIRGINIA'S NEW EMINENT DOMAIN AMENDMENT PROTECT PRIVATE PROPERTY?

INTRODUCTION

Most toddlers respect private property as private until they want it, at which point they feel justified in asserting their superior rights. The Norfolk Housing Authority recently has not behaved much differently. In fact, the Housing Authority is forcing local businessman Bob Wilson to give up his private property for an approved redevelopment plan to provide "retail space" for Old Dominion University student housing.[1] Bob's property is neither primarily residential nor an object of blight in the neighborhood. On the contrary, Bob has owned and operated Central Radio Company on the property for fifty years, employing 100 taxpaying citizens to produce radio and surveillance parts for the United States Navy. In Mr. Wilson's words, "You shouldn't be able to take land from one business and give it to another. . . . That's not fair. It's not morally correct, it's not legally correct."[2] Nevertheless, the Housing Authority may legally be able to proceed because the Supreme Court in *Kelo v. City of New London* defined public use as encompassing economic development.[3]

The Supreme Court's opinion in *Kelo* strayed far from the intention of the constitutional Framers and early judicial adherence to a narrow, more literal interpretation of the public use requirement of the Fifth Amendment's Takings Clause. The idea that the government cannot take from *A* and give it to *B* has been an established, bedrock principle since the nation's founding.[4] The trend toward a broad view of public use that culminated in *Kelo* has triggered an overwhelming response from

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[1] Rob Bell, *Preventing Abuses of Eminent Domain*, VIRGINIAN-PILOT, Oct. 23, 2012, at Hampton Roads 7; Douglas Kennedy, *People Speak: Business Fights to Shield Property from Eminent Domain in Virginia*, FOXNEWS.COM, July 12, 2012, http://www.foxnews.com/politics/2012/07/12/people-speak-business-fights-to-keep-property-from-eminent-domain-in-virginia/#ixzz2Fi6KfrRi; Brian Koenig, *Businesses, Investors Protest Eminent Domain in Virginia and California*, NEW AM. (July 14, 2012), http://www.thenewamerican.com/economy/sectors/item/12076-businesses-investors-protest-eminent-domain-in-virginia-and-california.

[2] Kennedy, *supra* note 1.

[3] 545 U.S. 469, 483–84 (2005).

[4] *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798).

> An ACT of the Legislature (for I cannot call it a *law*) contrary to the *great first principles* of the *social compact*[,] cannot be considered a *rightful exercise* of *legislative* authority. . . . [A] law that takes *property* from A and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.

Id.

state legislatures. Virginia initially took modest measures to strengthen its protection of property rights but finally placed a constitutional eminent domain amendment on the ballot this past November. Virginia voters approved the amendment, which took effect on January 1, 2013, and has made Virginia the twelfth state to change its constitution to bolster private property rights.[5]

Good intentions do not automatically beget good policy, however. The purpose of this Note is to analyze the efficacy of Virginia's new constitutional amendment. First, this Note provides context by examining the Framers' understanding of property rights as a central aim of government and why James Madison put this understanding into the Takings Clause. From that starting point, the practice of takings and courts' treatment of the public use requirement have evolved from a narrow, literal definition to a broad definition of what constitutes public use. Second, this Note analyzes how the Supreme Court solidified this progression in recent cases, most notably *Kelo*, and the reason behind the unparalleled response from state legislatures. Finally, this Note focuses on Virginia's post-*Kelo* actions and the amendment itself, including the Virginia courts' trend of deferring to the legislature, and will recommend a bright line rule on just compensation in order to strengthen efforts to protect property rights.

I. BACKGROUND TO *KELO V. CITY OF NEW LONDON*

A. The Framers' Intent

The Fifth Amendment's Takings Clause constitutionalized a right already considered an embedded common law principle. Since the nation's founding, Americans had largely believed that property rights protected all other rights.[6] In fact, the colonists revolted partly due to British infringement of their property rights when King George III would not heed colonists' appeals to the British constitution[7] and their

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[5] John Kramer, *Virginians Protect Property Rights*, INST. FOR JUST. (Nov. 7, 2012), http://www.ij.org/virginians-protect-property-rights-release-11-7-2012.

[6] JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT 17–18, 43 (3d ed. 2008). "The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty." ARTHUR LEE, AN APPEAL TO THE JUSTICE AND INTERESTS OF THE PEOPLE OF GREAT BRITAIN IN THE PRESENT DISPUTES WITH AMERICA 14 (4th ed. 1776). "[I]n a free government, almost all other rights would become utterly worthless, if the government possessed an uncontrollable power over the private fortune of every citizen." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 661 (1833); *see* ANDREW C. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 59 (Student's ed. 1935).

[7] The British constitution refers to the collection of their founding documents, including the Magna Carta and the English Bill of Rights.

inherited rights as Englishmen.[8] After the failure of the Articles of Confederation, the states refused to ratify the Constitution without a formal surety of their rights, not content to rely solely on structural safeguards such as separation of powers and checks and balances.[9] James Madison led the way in solidifying numerous rights Americans considered inherent in the Bill of Rights and inserted the Takings Clause into the Fifth Amendment.[10] The Takings Clause declares, "nor shall private property be taken for public use, without just compensation."[11]

The Framers thus did not render private property rights absolute[12] but prescribed two prerequisites before the government could exercise eminent domain: the property had to be taken for public use, and just compensation was required.[13] No notes exist of discussion or debate on the Clause itself at its formation or ratification,[14] but the common law and ideological influences surrounding the Clause's formation demonstrate the Framers' complex understanding of how secure property rights should be, beyond their general belief that the government should protect private property.[15] Justice Joseph Story called the Takings Clause the "affirmance of the great doctrine established by the common law for the protection of private property."[16]

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[8] *See* MCLAUGHLIN, *supra* note 6, at 59; 3 STORY, *supra* note 6, at 661.

[9] Bret Boyce, *Property as a Natural Right and as a Conventional Right in Constitutional Law*, 29 LOY. L.A. INT'L & COMP. L. REV. 201, 245–46 (2007). The constitutional committee also thought creating a government of enumerated powers rendered a bill of rights superfluous. Henry Steele Commager, *The Achievement of the Framers*, AM. POLITICAL SCI. ASS'N (1985), http://www.apsanet.org/imgtest/AchievmentsofFramers.pdf.

[10] Boyce, *supra* note 9, at 246–48.

[11] U.S. CONST. amend. V.

[12] *See* Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 616 (1940) ("Surely if the framers of the Constitution had meant that property should not be taken for private use at all, they should have said so.").

[13] U.S. CONST. amend. V.

[14] Boyce, *supra* note 9, at 248.

[15] *Id.* at 231–32.

[16] 3 STORY, *supra* note 6, at 661. American property law, in time, developed from the English common law. ELY, *supra* note 6, at 10–11. American law did not represent a perfect transplant, however.

> The inferences are fairly strong that during most of the seventeenth century the colonists were too busy with the mundane, often grim, aspects of securing a beachhead on a hostile shore to reflect much upon the law as a science. A modicum of law and order was a utilitarian necessity, and that was about it.

William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393, 409 (1968). In legal matters, the settlers relied heavily on divine law as set forth in the Bible. PAUL SAMUEL REINSCH, ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES (1899), *reprinted in* AMERICAN CONSTITUTIONAL AND LEGAL HISTORY

The Framers cherry-picked common law principles suitable to their situation, however.[17] The competing influences of republicanism[18] and

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14 (Leonard W. Levy ed., De Capo Press 1970). For example, in a 1657 Massachusetts case, *Giddings v. Brown*, (Mass. County Ct. 1657), *reprinted in* 2 HUTCHINSON PAPERS 1 (Joel Munsell ed., 1865), the court held that the plaintiff's property could not be taken by public vote for private use. *Id.* at 19. The judge, who admired the English common law, appealed to God with support from the common law, *id.*, and declared property rights a fundamental law for every subject, whose property could not be made for "the use or to be made the right or property of another man, without his owne [sic] free consent," *id.* at 2. As society developed and Britain's interest in the colonies increased, around 1700, the colonists turned more attention to the workings and sophistication of the common law. Stoebuck, *supra*, at 409–10.

Colonists understood the common law through Sir Edward Coke's writings. *Coke on Littleton*, the first volume of the *Institutes of the Laws of England* (1600–1615), served as the colonial lawyer's main treatise and source for the rights of Englishmen. Stoebuck, *supra*, at 406; BERNARD H. SIEGAN, PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT 12 (2001). Early English law revolved around the land and ultimately the king's prerogative, since all landowning subjects held tenurial rights in relation to the sovereign. ELY, *supra* note 6, at 11. As the sovereign, the king could take land according to his pleasure, but King John's unparalleled abuse resulted in the Magna Carta. By signing the Magna Carta, "the birthright of the people of England," 1 WILLIAM BLACKSTONE, COMMENTARIES *128, the king agreed not to commit its enumerated grievances, many of which dealt with property, SIEGAN, *supra*, at 8 (quoting ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 112 (1966)). Coke brought the forgotten provisions of the Magna Carta into the limelight through the *Institutes*, including Chapters 19 and 21 prohibiting government agents from taking specific goods without payment, 1 EDWARDO COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, 33–34 (photo. reprint 1986) (1797), and implementing partial recognitions of the compensation principle. ELY, *supra* note 6, at 23.

Sir William Blackstone's *Commentaries* (1765–1769) gained popularity in the colonies as another source of authority on the common law. Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 450, 456 (2006). Blackstone admired Coke and agreed with Coke's interpretation of property rights, the absolute right of which should be among the principal aims of society. BLACKSTONE, *supra*, at *138. Blackstone affirmed the compensation principle, as society's best interests lie in protecting private property rights; an owner could be separated from those rights only through "full indemnification and equivalent for the injury thereby sustained." *Id.* at *139. Blackstone described property as an "absolute right, inherent in every Englishman . . . which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution." *Id.* at *138. Despite these statements on property, Blackstone possessed a strong view of sovereignty and the absolute authority of the sovereign to take private property, a view that the Framers eventually rejected. *Id.* at *160 (describing sovereignty as an "absolute despotic power"); *see also* Timothy Sandefur, *Mine and Thine Distinct: What* Kelo *Says About Our Path*, 10 CHAP. L. REV. 1, 5–7 (2006) (discussing Blackstone's views and contrasting them with James Madison's essay on property rights).

17 Van Ness v. Pacard, 27 U.S. (2 Pet.) 137, 143–44 (1829). Features of the colonial landscape necessitated customization of the common law. For instance, the abundance of land in America rendered property ownership a real possibility for the layman, whereas English land remained concentrated in the hands of a few, thus resulting in differing assumptions about property. ELY, *supra* note 6, at 11. According to Justice Joseph Story,

emerging Lockean liberalism[19] played important roles in the quality of property rights.[20] Framers subscribing to republicanism found government takings more acceptable than those leaning toward the more liberal Lockean view because republicans believed that individuals must sacrifice for the necessity of society.[21] Lockean liberalism, by contrast, emphasized the rights of the person, and that the government existed mainly to defend those sacred rights.[22] Despite the diversity in the quality of property rights influenced by these trending ideas, which often impacted the Framers' statements regarding property, the Framers generally held a high regard for private property and sought to maintain a limited government through the Takings Clause.[23]

The Framers conveyed this high regard for property and the government's limited role during the Philadelphia Convention of 1787. For instance, delegate Gouverneur Morris stated, "Life and liberty were generally said to be of more value than property. An accurate view of the matter would, nevertheless, prove that property was the main object of

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"The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation." *Van Ness*, 27 U.S. (2 Pet.) at 144.

[18] William Michael Treanor, *Supreme Neglect of Text and History*, 107 MICH. L. REV. 1059, 1063 (2009). Rooted in English oppositional thought, republicanism represented the idea that individual interests stood subservient to the state, which must promote virtue. *Id.* Benjamin Franklin demonstrated the republican perspective when he wrote: "Private Property . . . is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it, even to its last Farthing." Benjamin Franklin, Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania (1789), *in* 10 THE WRITINGS OF BENJAMIN FRANKLIN 54, 59 (Albert Henry Smyth ed., 1907).

[19] Thomas P. Peardon, *Introduction* to JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, at xix (Thomas P. Peardon ed., The Liberal Arts Press, Inc. 1952) (1690). Beginning with the premise that a person first holds property rights in his person, Locke reduced all rights to the right of property, which led him to conclude that "[t]he great and chief end . . . of men's uniting into commonwealths and putting themselves under government is the preservation of their property." JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 70–71 (Thomas P. Peardon ed., The Liberal Arts Press, Inc. 1952) (1690).

[20] *See* Boyce, *supra* note 9, at 231–32. Republicanism exalted virtue and sacrifice for the good of society, whereas Lockean liberalism emphasized the individual. *Id.* at 233–34. For republicanism, property rights derived from society; property rights came from nature for Lockean liberalists. *See id.* at 237. While the Framers did not identify themselves to either of the ideologies, their statements tend to give away their leaning on the subject of property rights. *Id.* at 235. Republicanism and Lockean liberalism do not represent distinct categories but rather trending philosophies of the day. *See id.* at 233.

[21] *Id.* at 235.

[22] *Id.* at 239.

[23] *See id.* at 231–32; William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 827, 836 (1995) [hereinafter *Original Understanding*].

society."[24] John Rutledge agreed: "The gentleman last up had spoken some of his sentiments precisely. Property was certainly the principal object of society."[25] Later during the Convention, Pierce Butler and Charles Pinckney both declared that government was instituted mainly to protect property.[26]

Other Founding Fathers further supported the importance of property rights. Madison stated, "Government is instituted to protect property of every sort; . . . [t]his being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*."[27] Jefferson's conception of private property fluctuated, but in the end, he ultimately agreed with Locke's view of property, writing that "a right to property is founded in our natural wants, in the means with which we are endowed to satisfy these wants, and the right to what we acquire by those means without violating the similar rights of other sensible beings."[28] According to John Adams, "The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."[29] Adams stated further that "[p]roperty must be secured, or liberty cannot exist."[30]

B. Historical Exercise of Eminent Domain

The historical exercise of eminent domain mirrors the complexity of the Framers' opinions regarding the quality of property as courts have navigated the treatment of takings. On the rare occasions when colonial governments exercised the power of eminent domain before the Revolution, the governments used the power primarily to establish

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[24] 5 JAMES MADISON, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, IN THE CONVENTION HELD AT PHILADELPHIA, IN 1787, at 278–79 (Jonathan Elliot ed., J. B. Lippincott Company 1891).

[25] *Id.* at 279.

[26] *Id.* at 296, 303. According to Pierce Butler, "[G]overnment . . . was instituted principally for the protection of property, and was itself to be supported by property." *Id.* at 296.

[27] James Madison, Property (1792), *in* 6 THE WRITINGS OF JAMES MADISON 101, 102 (Gaillard Hunt ed., 1906).

[28] Letter from Thomas Jefferson to P.S. Dupont de Nemours (Apr. 24, 1816), *in* 11 THE WORKS OF THOMAS JEFFERSON 519, 522 (Paul Leicester Ford ed., 1905).

[29] JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA, *in* 6 THE WORKS OF JOHN ADAMS 3, 9 (Charles Francis Adams ed., 1851).

[30] JOHN ADAMS, DISCOURSES ON DAVILA, *in* 6 THE WORKS OF JOHN ADAMS 227, 280 (Charles Francis Adams ed., 1851).

public roads or buildings.[31] In fact, appropriating private land for public roads comprised the most common taking.[32] In so doing, the colonists simply carried on a norm from their English roots that aligned with the prevailing ideology—republicanism.[33] Unimproved land presented an acceptable target for eminent domain because the abundance of land rendered unimproved land less valuable; thus, the benefit of a public road would likely outweigh the landowner's loss.[34] Unimproved land increased in value as the colonies developed, however, and many began to think that takings of even unimproved land should require compensation similar to that provided for takings of improved land.[35]

No colonial charter expressly required compensation for a taking,[36] but, by the beginning of the Revolution, land values had increased and compensation for takings "was well established and extensively practiced."[37] The first mandated compensation appeared in the 1641 Massachusetts Body of Liberties, which required compensation for taking personal property.[38] Soon after, the Province of Carolina contemplated adoption of the Fundamental Constitutions of Carolina, which required compensation for the seizure of real property.[39] As time progressed and land values increased, compensation became the norm. For instance, New Jersey awarded compensation for land taken to build main highways in 1765, and Virginia compensated a taking for building the town of Suffolk.[40] Just compensation clauses then appeared in the Vermont Constitution of 1777, the Massachusetts Constitution of 1780, the Northwest Ordinance of 1787,[41] and, of course, the United States Constitution.[42]

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[31] Kelo v. City of New London, 545 U.S. 469, 512 (2005) (Thomas, J., dissenting); ELY, *supra* note 6, at 24.

[32] William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 695 (1985).

[33] *Id.* at 694.

[34] ELY, *supra* note 6, at 24.

[35] *Id.*

[36] *See Original Understanding*, *supra* note 23, at 785–86.

[37] William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 579 (1972).

[38] *Original Understanding*, *supra* note 23, at 785.

[39] *Id.*

[40] ELY, *supra* note 6, at 24.

[41] Daniel A. Ippolito, Comment, *An Originalist's Evaluation of Modern Takings Jurisprudence*, 26 SETON HALL L. REV. 317, 327 (1995).

[42] U.S. CONST. amend. V.

After the Constitution's ratification in 1787, federal and state courts grappled with the definition of public use.[43] The modest exercise and development of eminent domain came primarily from the states, not the federal government.[44] The few projects the federal government undertook requiring assertion of eminent domain over private property clearly required compensation.[45] State courts, however, navigated the area of eminent domain with little precedent or authority beyond their state constitutions.[46] Originally, private property takings could only satisfy the public use requirement of the Takings Clause by fitting into the category of public ownership or direct use by the public.[47]

Under the first takings category—public ownership—the government takes private property "for its own public uses."[48] For example, in *Kohl v. United States*, the first federal eminent domain case appearing before the Supreme Court,[49] the Court upheld a taking in Cincinnati to build a post office.[50] Acknowledging the government's eminent domain power as "the offspring of political necessity" to execute its functions, the Court listed several qualifying public uses, including "forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses."[51]

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[43] Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 504–05 (2006). Public use became a new addition to most state constitutions after the Revolutionary War. It was not until 1868 that the Fourteenth Amendment made the Fifth Amendment applicable to the states. Kelo v. City of New London, 545 U.S. 469, 511–12 (2005) (Thomas, J., dissenting).

[44] Derek Werner, Note, *The Public Use Clause, Common Sense and Takings*, 10 B.U. PUB. INT. L.J. 335, 342 (2001).

[45] ELY, *supra* note 6, at 76.

[46] Cohen, *supra* note 43, at 504–505.

[47] Kelo v. City of New London, 545 U.S. 469, 508–09, 511–12 (2005) (Thomas, J., dissenting); Werner, *supra* note 44, at 342 ("[C]ourts read the public use requirement fairly literally.").

[48] Kohl v. United States, 91 U.S. 367, 374 (1875).

[49] *See Kohl*, 91 U.S. at 373; Werner, *supra* note 44, at 342 & n.49 (noting that *Kohl* was the first eminent domain decision reviewed by the Supreme Court).

[50] *Kohl*, 91 U.S. at 374, 378.

[51] *Id.* at 371–72. "[T]he takings power has been used to facilitate a direct public use like creating parks, supplying safe drinking water, or providing means of transport like railroads, canals, or roads." Roy Whitehead, Jr. & Lu Hardin, *Government Theft: The Taking of Private Property to Benefit the Favored Few*, 15 GEO. MASON U. C.R. L.J. 81, 85 (2004); *see also* Rindge Co. v. County of L.A., 262 U.S. 700, 707–08 (1923) (highway); Chi., Milwaukee & St. Paul Ry. Co. v. City of Minneapolis, 232 U.S. 430, 441 (1914) (canal); Hairston v. Danville & W. Ry., 208 U.S. 598, 605, 608 (1908) (railroad); Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685, 689 (1897) (taking of a privately owned water supply system); Shoemaker v. United States, 147 U.S. 282, 322 (1893) (land for a public park).

The second type of taking—public use—allows the government to appropriate and transfer private property to a private entity, but only for its use in serving the public.[52] For example, railroad companies and utilities qualified *because* they supplied services equally to the general public.[53] The government could not merely transfer private property from one private party to another. As the Supreme Court emphasized in *Calder v. Bull*:

> An ACT of the Legislature (for I cannot call it a *law*) contrary to the *great first principles* of the *social compact;* cannot be considered a *rightful exercise* of *legislative* authority. . . . [A] law that takes *property* from A and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.[54]

In adherence to this fundamental principle and their high regard for private property rights, courts initially held to the standard that public use required actual use, or right to use, by the public.[55] For instance, in *Missouri Pacific Railroad Co. v. Nebraska*, the Supreme Court negated the state's eminent domain power because the taking was not for a public use.[56] Additionally, in *Cincinnati v. Vester*, the Court barred an excess condemnation, since the purpose of widening the road would not reach the full extent of the property sought.[57]

Common carriers and public utilities, such as mills, fit this public use description.[58] At the founding, corporations faced an easier time meeting the public use description because most corporations were formed through government charters for the purpose of serving the

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[52] *See* Kelo v. City of New London, 545 U.S. 469, 497–98 (2005) (O'Connor, J., dissenting).

[53] Werner, *supra* note 44, at 343.

[54] Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798). Chief Justice John Marshall wrote: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation." Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810).

[55] *See Calder*, 3 U.S. (3 Dall.) at 388 (discussing analogous situations that would equate to a nonpublic use taking without just compensation); Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310, 315–16 (1795) (stating that just compensation must be given for a public use taking and that takings should only occur in "cases of absolute necessity, or great public utility"); Cohen, *supra* note 43, at 505; Werner, *supra* note 44, at 343.

[56] 164 U.S. 403, 416–17 (1896).

[57] 281 U.S. 439, 440–41, 448–449 (1930).

[58] *See* Cohen, *supra* note 43, at 501–02.

public; laws of incorporation were only beginning to develop.[59] The Mill Acts effectively authorized mill owners to condemn upper riparian owners' land by flooding and to pay compensation in order to construct their dams.[60] These mills have been called "public utilities" because state governments heavily regulated them and required that they serve the general public.[61] Courts justified these private-to-private transfers because of their mandate to serve all customers and the consequent benefit to the general public.[62]

The narrow definition soon expanded to fit the demands of industrialization as state legislatures sought to encourage economic progress.[63] Courts upheld public use reaching an ultimate purpose or benefit as state legislatures stretched the Mill Acts to encompass non-mill entities.[64] Judicial concern for property rights sparked a small movement to return to the narrow view of public use in the mid-nineteenth century.[65] Scholars disagree on the success of that movement,[66] but by the twentieth century, the broad view crowded out narrow interpretations of the public use.[67] The Supreme Court did not grant certiorari to many eminent domain cases, but when it did, the Court reaffirmed this trend toward the broad view, signaling the march down the slippery slope to today's loose takings approach.[68] In fact, Justice Holmes declared in *Mt. Vernon-Woodberry Cotton Duck Co. v.*

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[59] Kelo v. City of New London, 545 U.S. 469, 514 (2005) (Thomas, J., dissenting) (explaining that the connection to a government charter made fitting the public use category easier.).

[60] *Id.* at 512.

[61] Cohen, *supra* note 43, at 501–02.

[62] *Id.* at 502.

[63] Werner, *supra* note 44, at 343.

[64] Cohen, *supra* note 43, at 506–07; *see, e.g.*, Boston & Roxbury Mill Dam Corp. v. Newman, 29 Mass. (12 Pick.) 467, 480 (1832) (stating that individual property "protected in its enjoyment, saving only when the public want it . . . for some necessary and useful purposes."); Scudder v. Trenton Del. Falls Co., 1 N.J. Eq. 694, 729 (Ch. 1832).

[65] Cohen, *supra* note 43, at 507.

[66] *Id.* at 507–08.

[67] *Id.* at 508–09.

[68] *See, e.g.*, Hairston v. Danville & W. Ry. Co., 208 U.S. 598, 607 (1908); Chi., Burlington & Quincy R.R. Co. v. City of Chi., 166 U.S. 226, 252 (1897); Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685, 689 (1897). In *Hairston*, the Supreme Court affirmed a Virginia ruling upholding a public use taking of land for a railway spur track. *Hairston*, 208 U.S. at 605, 609. The Court's deference to the state court shows stirrings of the broad approach: "[t]he propriety of keeping in view by this court, while enforcing the Fourteenth Amendment, the diversity of local conditions and of regarding with great respect the judgments of the state courts upon what should be deemed public uses in that State is expressed [in precedent]." *Id.* at 607.

Alabama Interstate Power Co. that—when analyzing public use—merely evaluating use *by* the general public is "inadequa[te]."[69]

Rindge Co. v. County of Los Angeles further illustrates the Supreme Court's step toward the broad view and foreshadowed the Court's broad deferential approach.[70] First, the Supreme Court declared, "[t]he necessity for appropriating private property for public use is not a judicial question. This power resides in the legislature."[71] Second, the Supreme Court held that the government could take private property in anticipation of future public use, even if that use never materialized.[72] This standard permitted the government to condemn property, not by a showing of necessity, but rather by a showing of possible future need.[73] Finally, the Supreme Court reiterated that public use did not require direct, or even substantial, public enjoyment in an improvement.[74]

The broad view of public use continued to expand, fitting easily with the 1920s urban redevelopment movement and later New Deal projects.[75] The government initiated many programs to encourage economic development and erase blight from neighborhoods.[76] These programs increased during the Great Depression and continued, with courts approving the takings as public use because the programs achieved a public advantage.[77]

C. Modern Exercise of Eminent Domain: The Legislature Knows Best

1. *Berman v. Parker*

Berman v. Parker signaled a culmination of the trend toward the broad view, as the Supreme Court took a backseat to the legislature's determination of public use, which in *Berman* meant blight removal.[78] In *Berman*, the Court held that the government could take and transfer the

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69 240 U.S. 30 (1916).

70 262 U.S. 707 (1923); Werner, *supra* note 44, at 344 ("The deferential modern view began to take shape in 1923 with the Supreme Court's decision in *Rindge Co. v. County of L.A.*").

71 *Rindge Co.*, 262 U.S. at 709.

72 *Id.* at 707; *see also* Werner, *supra* note 44, at 344 (explaining the practical effect of the Court's holding in *Rindge Co.*).

73 *See Rindge Co.*, 262 U.S. at 707.

74 *Id.*

75 *See* Cohen, *supra* note 43, at 510.

76 *Id.*

77 *Id.*

78 348 U.S. 26, 32–33 (1954); *see also* Daniel C. Orlaskey, *The Robin Hood Antithesis—Robbing from the Poor to Give to the Rich: How Eminent Domain is Used to Take Property in Violation of the Fifth Amendment*, 6 U. MD. L.J. RACE RELIGION GENDER & CLASS 515, 518 (2006); Whitehead & Hardin, *supra* note 51, at 86–87.

plaintiff's property to a private redeveloper because the legislature decided the entire area needed to be redeveloped.[79] Congress passed the District of Columbia Redevelopment Act authorizing, among other things, redevelopment of "substandard housing and blighted areas."[80] The first project under the Act, "Area B," entailed redeveloping a Washington, D.C. slum housing community in which 64.3% of all the dwellings could not be repaired, and many others lacked basic functions such as bath and heating.[81] The plaintiff, Berman, owned a department store within the designated area that did not imperil the health or safety of the public or otherwise contribute to the surrounding slum conditions.[82]

Berman argued that condemnation of his well-kept store could not be a constitutional taking because it amounted to "taking from one businessman for the benefit of another businessman," a transfer for private use.[83] The Supreme Court, however, rejected the argument, stating that the judiciary only checks for a public end.[84] Courts must defer to the legislature's expertise in determining the means to achieve the end, which could include private ownership.[85] "[T]he means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established."[86] Because blight removal fell within the purview of public welfare, the Court left the taking of Berman's commercial property to the legislature's judgment.[87] Thus, the Court upheld the Act as constitutional.[88] In a sense, Berman simply came to be in the wrong place at the wrong time.

2. *Hawaii Housing Authority v. Midkiff*

The next private takings case before the Supreme Court, *Hawaii Housing Authority v. Midkiff*,[89] followed *Berman*'s lead, but this time public use included correcting a market deficiency.[90] In *Midkiff*, the Court upheld the government's scheme to take property from the landowning few and redistribute it in order to even out the residential

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79 *Berman*, 348 U.S. at 31, 36.

80 *Id.* at 28.

81 *Id.* at 30.

82 *Id.* at 31, 34.

83 *Id.* at 33.

84 *See id.* at 32–34.

85 *Id.*

86 *Id.* at 33.

87 *Id.* at 32–33.

88 *Id.* at 31, 36.

89 467 U.S. 229 (1984).

90 *Id.* at 232–33; *see also* Orlaskey, *supra* note 78, at 518.

fee simple market as a "conceivable public purpose" and a valid public use taking.[91] In reviewing and reversing the Court of Appeals, which held that no public use existed due to a lack of government use, the Supreme Court stated, "The Court long ago rejected any literal requirement that condemned property be put into use for the general public. . . . [I]t is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause."[92] The Court was content to leave the means completely to the determination of state legislatures.[93]

II. *KELO V. CITY OF NEW LONDON*

A. Kelo v. City of New London

Kelo v. City of New London effectively deleted the public use requirement from the Takings Clause by asserting that takings for economic development provide "incidental public benefits" and, therefore, qualify as a public use, or more accurately "public purpose."[94] In *Kelo*, a five-to-four majority upheld a private property taking by the New London City Council according to a carefully prepared, comprehensive plan to revitalize a "distressed municipality" because the taking "unquestionably serve[d] a public purpose."[95] Just as in *Berman* and *Midkiff*, the Court asserted the need for judicial review to take a backseat and "afford[] legislatures broad latitude in determining what public needs justify the use of the takings power."[96]

To address New London's economic decline as a distressed municipality, the New London Development Corporation ("NLDC") acquired ninety acres pursuant to a development plan in January 1998.[97] Under the plan, the NLDC would lease the property to private developers for the construction of Fort Trumbull State Park, a riverwalk, hotel and conference center, residences, a museum, parking, and other facilities to revitalize the economy.[98] The NLDC expected these developments to generate up to 2,300 permanent jobs and annual property tax revenues between $680,000 and $1.2 million.[99] The very

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91 *Midkiff*, 467 U.S. at 233, 241.

92 *Id.* at 244–45.

93 *Id.* at 244.

94 545 U.S. 469, 494, 498 (2005) (O'Connor, J., dissenting).

95 *Id.* at 470, 473, 484 (majority opinion).

96 *Id.* at 483.

97 *Id.* at 473–75.

98 *Id.* at 474 & n.4.

99 *See* Kelo v. City of New London, 843 A.2d 500, 510 (Conn. 2004), *aff'd*, 545 U.S. 469 (2005).

next month, the Pfizer Corporation announced that it would build a research facility next to Fort Trumbull.[100] "The NLDC intended the development plan to capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract."[101] Susette Kelo and eight other homeowners lost their property, not due to blight, but simply because they were located within the plan's perimeter.[102]

In protesting the condemnation as an abuse of public use takings, the homeowners first argued that the Court should adopt a bright line rule that economic development could never constitute a valid public use, otherwise no distinction would remain between private and public takings.[103] The homeowners argued that the economic development rationale is also dangerous because it justifies any taking that would put the property in the hands of a party with higher revenue potential.[104] Second, the homeowners argued that even if the Court did not institute a bright line rule, the Court should link the taking to a showing of "'reasonable certainty' that the expected public benefits will actually accrue."[105]

In rejecting each of the homeowners' arguments, the Court explicitly acknowledged its broad approach and rephrased the issue as to whether the development plan meets a public purpose, instead of a public use.[106] The Court affirmed the government's traditional interest in economic development and its belief in deferring to the city's determination on the means, which might include ownership by a private entity, to meet the public end.[107] The Court asserted that "'[w]hen the legislature's purpose is legitimate,'" the reasonable certainty standard only adds layers of impracticality and delays to accomplishing a benefit for the public.[108] The Court left the window open, however, for states to impose greater limits on eminent domain if they chose to do so.[109]

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[100] *Kelo*, 545 U.S. at 473.

[101] *Id.* at 474.

[102] *Id.* at 475.

[103] *See id.* at 484–85.

[104] *Id.* at 486–87.

[105] *Id.* at 487.

[106] *Id.* at 480.

[107] *Id.* at 482 (citing Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241–42, 244 (1984)).

[108] *Id.* at 488 (quoting *Haw. Hous. Auth.*, 467 U.S. at 242–43).

[109] *Id.* at 489.

B. Kelo's *Legacy*

1. Implications and States' Response

Kelo effectively handed the wild card to the government by making public use—or more accurately public purpose—mean whatever the legislature wants it to mean. The broad view in *Berman*, *Midkiff*, and finally *Kelo* has effectively erased any semblance of restriction the Framers intended through the public use limitation. By completely deferring to the legislature, the Court has surrendered its role, intended by the Framers, as protector of minority interests and property rights, has opened the door to new abuses, and has introduced inefficiencies into the market. The implications of the Court's decision unhinge the foundation of property rights, and thus have generated a strong response from the states.

In just one year after *Kelo*, 5,783 actual or threatened government condemnations of private property occurred, compared to just 10,282 over the five-year period between 1998 and 2002.[110] Of these 5,783 actual and threatened condemnations, threatened takings have increased while actual condemnations have decreased, likely because homeowners feel no hope of winning after *Kelo*.[111] No property, whether residential or commercial, is safe when economic development qualifies as public use.[112]

All property now stands vulnerable unless states intervene, and many have. To combat the assault on private property rights, states have taken advantage of their freedom to craft stronger restrictions on the government's ability to take and transfer private property for private uses under the banner of public purpose.[113] Eleven states (besides Virginia) have amended their constitutions,[114] and almost all of the states have passed legislation on eminent domain.[115]

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[110] DANA BERLINER, OPENING THE FLOODGATES: EMINENT DOMAIN ABUSE IN THE POST-*KELO* WORLD 2 (2006), *available at* http://www.castlecoalition.org/pdf/publications/floodgates-report.pdf.

[111] *See id.* at 2–3.

[112] *See, e.g.*, *id.* at 3–4.

[113] DICK M. CARPENTER II & JOHN K. ROSS, DOOMSDAY? NO WAY: ECONOMIC TRENDS AND POST-*KELO* EMINENT DOMAIN REFORM 9 (2008), *available at* http://www.ij.org/images/pdf_folder/other_pubs/doomsday-no-way.pdf.

[114] *See* CASTLE COALITION, 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE *KELO* 50 (2007), *available at* http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf.

[115] *See* CARPENTER II & ROSS, *supra* note 113, at 2 (noting that forty-two states had passed some form of eminent domain reform by the end of 2007).

The Virginia legislature responded to *Kelo* initially with modest statutory measures.[116] In 2006, the General Assembly passed minor measures affecting the Housing Authorities Law, but did nothing to modify the broad definition of what could qualify as blight.[117] Blight thus remained an expansive vehicle for private entities to obtain private property through eminent domain and call it a public purpose because of economic development. In 2007, the General Assembly narrowed the definition of blight and public use to refer to traditional public uses.[118] The Norfolk Redevelopment Housing Authority received an exemption until July 1, 2010, however.[119] Overall, the Castle Coalition survey awarded Virginia with a B+ for its efforts post-*Kelo* but ended its analysis by suggesting a need for permanent change in the form of an amendment to the constitution,[120] which still allowed the General Assembly to define "public use."[121]

2. *Hoffman Family, L.L.C. v. City of Alexandria*

In the most recent takings case to reach the Supreme Court of Virginia, the Court took an approach similar to the *Kelo* Court, despite explicit statements in a footnote that *Kelo* did not apply.[122] In *Hoffman Family, L.L.C. v. City of Alexandria*, the Court affirmed the taking as a valid public use because, regardless of incidental benefits accruing to a neighboring developer, the property would be exclusively utilized for a storm water sewer system pursuant to the city's comprehensive development plan.[123] The General Assembly allows local governments to condemn private property for public uses, provided that the government first passes a resolution stating the public use and the necessity of that use.[124] To meet this requirement, the city stated that it needed Hoffman's commercial property in order to implement its master development plan, including completion of the approved Mill Race project.[125]

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[116] CASTLE COALITION, *supra* note 114, at 50. In the year following *Kelo*, the Virginia General Assembly tweaked its takings law, but the broad definition of blight did little to restrict private property takings for economic development. *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] VA. CONST. art. I, § 11 (amended 2013).

[122] Hoffman Family, L.L.C. v. City of Alexandria, 634 S.E.2d 722, 731 & n.7 (Va. 2006).

[123] *Id.* at 730–31.

[124] VA. CODE ANN. § 15.2-1903(B) (2012).

[125] *Hoffman*, 634 S.E.2d at 725.

Under the Mill Race project, Hoffman's neighbor and private developer, Trammell Crow Company, would erect a high-rise residential apartment building on Trammell's adjacent property.[126] A four by six foot, underground storm box culvert, however, sat on Trammell's property.[127] Building around the culvert would have forced Trammell to decrease the apartment building's square footage and thus prevent Trammell from realizing $2.09 million.[128] The city would not allow Trammell to construct on top of the culvert, so Trammell turned its attention to acquiring a portion of Hoffman's property in order to move the culvert.[129] When Hoffman refused to sell, Trammell enlisted the city's help in condemnation, agreeing to cover the city's condemnation and legal expenses.[130]

During trial, Hoffman argued that but for the Mill Race project (and thus a private use), the city would not have attempted to move the box culvert.[131] Expert testimony showed that the box culvert functioned properly and at full capacity at its pre-condemnation location.[132] In fact, moving the box culvert would decrease the storm water system's capacity.[133] The city said it preferred to situate utilities along public streets, but one expert admitted that a road grid could have been built while leaving the old box culvert in place.[134] Hoffman argued that the city did not have a public purpose.[135]

The Supreme Court of Virginia rejected Hoffman's argument, primarily because the city met the requirement of passing a resolution stating its public purpose.[136] The court specified that public use would be a facts and circumstances test, but facts and circumstances related only to the property itself, not any effect the project might have on neighboring properties.[137] Second, the statement of the use's necessity was a legislative function not open to judicial review unless an arbitrary decision or fraud appeared.[138] The court declared:

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126 *Id.* at 731 (Hassell, C.J., dissenting).
127 *Id.*
128 *Id.* at 733.
129 *Id.* at 731.
130 *Id.* at 731, 733.
131 *Id.* at 725, 727 (majority opinion).
132 *Id.* at 732 (Hassell, C.J., dissenting).
133 *Id.*
134 *Id.* at 725–26 (majority opinion).
135 *Id.* at 725.
136 *Id.* at 727–28.
137 *Id.* at 729.
138 *Id.* at 728.

> Courts do not inquire into the issue of a locality's good faith in initiating condemnation proceedings if the locality's purpose is clearly stated in the resolution or ordinance. Thus, condemnation proceedings are not decided based on "the purposes and plans that may be hidden in the minds of the [locality] undertaking to condemn for a public purpose, but by the validity of what is to be done and may be done as shown by the record in the proceedings."[139]

Starting from the premise that legislative determinations of public use are correct, the court affirmed the condemnation because the focus of the public use must be on the condemned property, not on the effect on neighboring properties.[140] "Thus, if the record supports a conclusion that the property proposed for condemnation will be a public use acquired for a public purpose, the fact that neighboring property owners will benefit from that use *is irrelevant*."[141] The court concluded that the box culvert met the public use test because it was part of the city's storm water sewer management system.[142]

Justice Hassell dissented, referring back to the precedent of Virginia courts holding that public purpose takings pose an appropriate question for judicial review.[143] To decide whether the taking satisfies a public use, Virginia courts must analyze the surrounding circumstances to ascertain whether public interest dominates any private gain.[144] Examining surrounding circumstances, precedent shows that the inquiry includes property not subject to the condemnation.[145] Thus, by limiting the inquiry only to the condemned property, Justice Hassell concluded that the majority deviated from precedent and rendered judicial review meaningless.[146] "[T]he majority applied an incorrect test when determining whether public benefit . . . dominated the private gain to the developer."[147]

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[139] *Id.* (alteration in original) (citations omitted) (quoting Light v. City of Danville, 190 S.E. 276, 282 (Va. 1937)).

[140] *Id.* at 729.

[141] *Id.* (emphasis added).

[142] *Id.*

[143] *Id.* at 733–34 (Hassell, C.J., dissenting) (quoting Ottofaro v. City of Hampton, 574 S.E.2d 235, 237 (Va. 2003)).

[144] *Id.* at 734.

[145] *See id.* at 736; City of Richmond v. Dervishian, 57 S.E.2d 120, 123–24 (Va. 1950).

[146] *Hoffman*, 634 S.E.2d at 736 (Hassell, C.J., dissenting).

[147] *Id.* at 731.

III. ANALYSIS OF VIRGINIA'S EMINENT DOMAIN AMENDMENT

A. Virginia's Eminent Domain Amendment

Public concern for private property rights in the wake of *Kelo* and for limited government finally prompted Virginia to address eminent domain through a constitutional amendment.[148] Virginia's eminent domain amendment replaces the current language, "nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term 'public uses' to be defined by the General Assembly,"[149] with:

> That the General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use. No private property shall be damaged or taken for public use without just compensation to the owner thereof. No more private property may be taken than necessary to achieve the stated public use. Just compensation shall be no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking. The terms "lost profits" and "lost access" are to be defined by the General Assembly. A public service company, public service corporation, or railroad exercises the power of eminent domain for public use when such exercise is for the authorized provision of utility, common carrier, or railroad services. In all other cases, a taking or damaging of private property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except for the elimination of a public nuisance existing on the property. The condemnor bears the burden of proving that the use is public, without a presumption that it is.[150]

Virginia's eminent domain amendment makes laudable improvements to protect private property rights from the abusive takings tendencies by the government. It demonstrates a strong beginning by acknowledging private property as a fundamental right. The amendment also provides for lost revenue and property, adds language to communicate clearly to the judiciary that a condemnor must prove public use, and states what cannot constitute public use.[151]

B. Legislative Deference Weakens Virginia's Eminent Domain Amendment

In light of the judicial trend of deference to the legislature, the phrase "[n]o more private property may be taken than necessary to

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[148] *See* Fredrick Kunkle, *Eminent Domain Vote May Affect Public Projects*, WASH. POST, Nov. 8, 2012, at A45.

[149] VA. CONST. art. I, § 11 (amended 2013).

[150] VA. CONST. art. I, § 11.

[151] *Id.*

achieve the stated public use"[152] represents one of the amendment's most glaring loopholes. In *Berman*, *Midkiff*, and *Kelo*, the Supreme Court executed its "extremely narrow" role of ensuring that a public purpose existed and deferred to the legislature on the means necessary to accomplish that purpose.[153] Similarly, the *Hoffman* majority limited its inquiry of the judicial question of public use to the facts and circumstances of the property, and not facts and circumstances pertinent to the condemnation.[154] The *Hoffman* majority emphasized deference to the legislature's definition of necessity.[155] Virginia's new constitutional provision restricts takings only to those "*necessary* [for] public use," but provides no standards or definitions for what is or is not "necessary."[156] Thus, the phrase does little to prevent abuse, since the Virginia courts will likely still defer to the legislature to define what is necessary. The amendment does not arrest the judiciary from diluting its duty to keep the legislature in check to protect the property rights of individuals.

The last clause placing the burden of proving public use on the condemnor also does not counteract this error. The clause helps to remove the presumption of the correctness of legislative public use determinations.[157] The effectiveness of the clause, however, depends on the definition of public use, which can toughen or ease the burden of proof. Virginia's amendment increases the condemnor's burden by specifically naming uses that cannot qualify as public, such as private gains, private benefits, or economic development.[158] The amendment, however, does not do enough to increase the burden of proof when it states, "not for public use if the primary use is for . . . private benefit."[159] As a result, the *Hoffman* decision likely would remain unchanged under the new amendment because the majority interpreted precedent to restrict the *Hoffman* inquiry to the property itself, and not all circumstances surrounding the taking. Because the city planned to take Hoffman's property for a public use, the court refused to inquire into the neighboring developer's substantial gain.[160] Therefore, the amendment does not sufficiently increase the burden on the condemnor because it

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[152] *Id.*

[153] Berman v. Parker, 348 U.S. 26, 32 (1954); *see* Kelo v. City of New London, 545 U.S. 469, 482–83 (2005); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984).

[154] Hoffman Family, L.L.C. v. City of Alexandria, 634 S.E.2d 722, 729 (Va. 2006).

[155] *Id.* at 728.

[156] VA. CONST. art. I, § 11 (emphasis added).

[157] *See Hoffman*, 634 S.E.2d at 729.

[158] VA. CONST. art. I, § 11.

[159] *Id.*

[160] *Hoffman*, 634 S.E.2d at 730.

would not rectify the cases that gave rise to the amendment in the first place.

Societies are wise to follow the subsidiarity principle, keeping decision-making within local governments situated the closest to the citizens affected by those decisions. Empowered local governments still need to be held accountable, however. The delegates to the Constitutional Convention in 1787 did not include a bill of rights in their draft for a number of reasons, an important one being the structural safeguards, such as checks and balances.[161] Accountability between the branches comprised one of the strongest lines of defense in the Framers' understanding.[162] Relying wholly on the subsidiarity principle and deferring to the legislature's definition of public use results in careless neglect of an essential check on abusive legislative powers that the Framers intended the judiciary to exercise.

Further, a correctly functioning republic of limited government committed to individual liberty requires a judiciary to guard minority rights from encroachment by the majority. The Framers respected the will of the majority, but knew that a democratic republic could not exist without keeping individual rights equal, independent of a person's majority or minority stance.[163] Because the majority can easily suffocate minority interests, the judiciary's structure, with lifetime tenure to make it sufficiently independent of conflict, pressures, and trends of the time, renders Article III judges uniquely situated to handle the task of keeping the legislative body and the majority in check.[164] Justice O'Connor refers to this necessary check in *Kelo*:

> We give considerable deference to legislatures' determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction,

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[161] Boyce, *supra* note 9, at 245–46; Shlomo Slonim, *The Federalist Papers and the Bill of Rights*, 20 CONST. COMMENT. 151, 151–52 (2003).

[162] *See* Boyce, *supra* note 9, at 246.

[163] *See* THE FEDERALIST NO. 10, at 75 (James Madison) (Clinton Rossiter ed., 1961). "In Republics, the great danger is, that the majority may not sufficiently respect the rights of the minority." James Madison, Speech in the Virginia State Convention of 1829–'30, on the Question of the Ratio of Representation in the Two Branches of the Legislature (Dec. 2, 1829), *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON: FOURTH PRESIDENT OF THE UNITED STATES 51, at 51–52 (Philadelphia, J.B. Lippincott & Co. 1865). Madison did not try to create a system where the minority could halt the majority on a whim but rather a system where individual minority rights would not be destroyed. *See* THE FEDERALIST NO. 10 *supra*, at 75–76.

[164] THE FEDERALIST NO. 78, at 464–65 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Alexander Hamilton stated that constitutional protections and limitations could "be preserved in practice no other way than through the medium of courts of justice," which must "guard the Constitution and the rights of individuals from the effects of those ill humors which . . . sometimes disseminate among the people themselves." *Id.* at 465, 468.

> the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning.[165]

Removing the judiciary's ability to review legislative determinations results in a defenseless minority in the face of majority will. Experience confirms the Founders' fears and demonstrates the necessity of judicial review.

First, eminent domain decisions most often affect minority groups, such as low-income individuals[166] and nonprofit organizations that do not generate much revenue relative to other entities. For instance, churches make easy targets. Pastors concerned with leading their congregations and relying on voluntary giving to remain fiscally viable often remain segregated from other pastors and do not have the resources to lobby the government for certain outcomes.[167] Because churches are often poorly equipped or unable to present strong opposition to eminent domain, they become popular, easy takings victims when local governments decide that the church property could be better used by a profit-generating enterprise. These groups desperately need the judiciary to fulfill its role and ensure minority interests have a voice in the midst of the majority's will.

Second, deferring to the legislature for its expertise neglects an important safeguard needed because of the fallibility of human nature. Imperfect individuals comprise the legislature, so it would be foolish to treat the body of those individuals as politically omnipotent. Powerful positions attract a certain corresponding ambition, and the judiciary must take a more active role to ensure against a superseding will. Imperfect people likewise compose the judiciary, but the safeguard lies in using "ambition . . . to counteract ambition."[168] The legislature makes the laws, whereas the judiciary reviews cases and controversies.[169] With these different roles, the two branches also remain accountable to different sources; the people can elect a new legislature, and the

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[165] Kelo v. City of New London, 545 U.S. 469, 497 (2005) (O'Connor, J., dissenting).

[166] *See* H.R. REP. NO. 112-401, at 11, 13 (2012).

[167] *See City to Seize Church by Eminent Domain*, WORLDNETDAILY.COM (Mar. 11, 2006), http://www.wnd.com/2006/03/35198/. In addition, churches are at a unique disadvantage because attempts to influence legislation may threaten their tax exempt status. *See* I.R.C. § 501(c)(3) (2006).

[168] THE FEDERALIST NO. 51, at 318–19 (James Madison) (Clinton Rossiter ed., 1961). "But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition." *Id.*

[169] *See* VA. CONST. art IV, § 1, art VI, § 1.

legislature can impeach members of the judiciary.[170] Thus, the structure of the two branches allows a healthy power struggle to effect checks and balances on power. While human error remains possible, our system of government requires checks and balances to offset the danger of tyranny by the majority.[171]

The Supreme Court of Virginia did not act to protect Hoffman's minority rights when the court sidestepped all external, surrounding circumstances, an integral part of the public use inquiry.[172] The majority failed to consider the motivating reason for taking Hoffman's property to relocate the box culvert, even when testimony and evidence unequivocally demonstrated that only the Mill Race project motivated the taking.[173] The box culvert did not need repair; in fact, relocating the culvert would have reduced the storm water system's capacity.[174] The court refused to consider this evidence because it determined that "the question of the necessity . . . of resorting to the exercise of the power of eminent domain is a legislative function."[175] As a result, the court failed to protect a minority interest against an interested developer and the city council.

This deference to the legislatures appears even more troubling considering the deference legislatures afford the judiciary. The view that the courts decide constitutionality and the meaning of the Constitution represents the dominant view in today's society.[176] In an exchange between Professor Bradley Jacob and United States House Representative Jerrold Nadler during a hearing before the Constitution Subcommittee of the House Judiciary Committee, Nadler stated: "The courts will tell us exactly what our authority is and whatever it is, it is, and that is how far it will go."[177]

When both branches defer to the other, no checks and balances come to bear at all, and minority interests stand unprotected. If Virginia courts hold to *Hoffman*'s precedent, the question of necessity will remain with the legislature without effective judicial review. Additional

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[170] *See* VA. CONST. art IV, §§ 2, 3, 17, art VI, § 10.

[171] THE FEDERALIST NO. 51, *supra* note 168, at 319. "In republican government, the legislative authority necessarily predominates." *Id.*

[172] Hoffman Family, L.L.C. v. City of Alexandria, 634 S.E.2d 722, 734–36 (Va. 2006) (Hassell, C.J., dissenting).

[173] *Id.* at 733.

[174] *Id.* at 732.

[175] *Id.* at 728 (majority opinion).

[176] Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2706 (2003).

[177] Bradley P. Jacob, *Free Exercise in the "Lobbying Nineties"*, 84 NEB. L. REV. 795, 826 n.131 (2006).

language in the constitutional amendment might marginally counteract that outcome. Currently, the more constrictive definition of public use somewhat narrows the definition, and thus what might be necessary under that definition. The language, however, does not specifically address the question of necessity and leaves room for courts to continue the broad view of legislative deference to a likely deferential legislature. Another clause with requirements for what the judiciary cannot consider "necessary" could be a valuable addition to the amendment, if at the very least, to emphasize the point that the judiciary must take a more active approach to ensure that the taking is in fact necessary.

C. Toward a More Adequate Solution Through Just Compensation

The courts' acceptance of the broad view of public use has eroded the limitation purpose of the public use requirement as intended by the Framers. Their track record of legislative deference demonstrates that courts cannot be trusted to protect minority interests from eminent domain abuse. Virginia's eminent domain amendment does not sufficiently prevent the courts from deferring to the legislature. The current inadequacy of the public use requirement therefore compels attention to the just compensation limitation to protect property rights.

In the interest of fully protecting property rights, Virginia's legislature should propose a constitutional amendment defining "value of the property taken"[178] to mean 150% of the fair market value, instead of simply fair market value. Virginia's Constitution includes as just compensation "lost profits and lost access, and damages to the residue caused by the taking" but allows the General Assembly to define what "lost profits" and "lost access" mean.[179] In the end, the General Assembly itself determines what it must pay.[180] Other states stipulate a bright line rule for compensation; for example, Indiana requires the condemnor to compensate takings of principal residences with 150% of the fair market value and takings of agricultural land with 125% of the property's fair market value.[181] Michigan also requires compensation of 125% of the fair market value for principal residences.[182] A better safeguard for property

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[178] VA. CONST. art. I, § 11.

[179] *Id.*

[180] *See id.*

[181] IND. CODE ANN. § 32-24-4.5-8(1)(A)(i), (2)(A) (Westlaw through 2013 Legis.). Despite this provision, Indiana earned a "B" on its Castle Coalition report card for property protection because of a loophole allowing economic development takings for certified technology parks. CASTLE COALITION, *supra* note 114, at 18.

[182] MICH. COMP. LAWS ANN. § 213.23(3)(5) (Westlaw through P.A. 2013, No. 106, 2013 Reg. Sess.).

rights in Virginia lies in a bright line rule for the value of the property for three reasons.

First, compensation of 150% of the fair market value better accounts for the owner's subjective value than fair market value compensation alone. Subjective value cannot be quantified. According to principles of opportunity cost, an owner in possession of property values holding it more than the money the owner might receive in exchange. Otherwise, the owner would already have put the property on the market. The reasons an owner could hold onto the property are numerous. For instance, an owner might have sentimental value in a home,[183] find the location best suitable for a business venture, or be too busy to sell. An owner who chooses to hold the property communicates that the owner does not value the current fair market value more than maintaining possession. Thus, a mark-up on fair market value focuses on providing more full compensation to an owner who prefers to keep the property but must give it up when the government exercises eminent domain.

Second, compensation of 150% of the fair market value secures property rights by preserving property prices. Many view society's power of eminent domain and an owner's property rights as opposing interests that must be balanced. For example, one scholar purports that "[e]minent domain procedures . . . seek[] to limit the harm to individual property owners while procuring increased social utility for the community."[184] In actuality, though, one taking of private property directly and proportionately affects all other property rights because eminent domain renders property rights insecure and affects investment choices. Owners have less incentive to make substantial investments in their property when the government wields the threat of eminent domain, so the uncertainty would tend to lower market prices. A 150% mark-up would benefit society by reducing the number of takings and restraining the government to take only necessary property, thus preserving property values.

Third, the 150% mark-up from fair market value provides just compensation because of the unequal bargaining power between the government and the individual citizen. Judge Posner stated that the only

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[183] *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 494–95 (2005) (O'Connor, J., dissenting). One petitioner's home had been in her family for more than 100 years; in fact, she was born in that home in 1918. *Id.* That petitioner's son owned the home next door, which he received as a wedding gift. *Id.*

[184] Ryan Frampton, Kelo v. New London *and the State Legislative Reaction: Evaluating the Efficacy and Necessity of Restricting Eminent Domain for Economic Redevelopment at the State Level*, 4 RUTGERS J.L. & PUB. POL'Y 730, 730 (2007); *see also id.* at 735.

justification for eminent domain rested in the holdout problem.[185] Experience shows, however, that the government has exercised its power of eminent domain as a threat and not solely a measure of last resort. For example, the Supreme Court denied certiorari of *Didden v. Village of Port Chester*,[186] in which the Second Circuit affirmed dismissal of a property owner's claim for relief from a condemnation proceeding because the statute of limitations had expired.[187] A pharmacy chain approached the owner looking to set up its business on the owner's premises, situated partially within a redevelopment district designated four years earlier.[188] No condemnation proceedings occurred, however.[189] Soon after the discussions, the designated developer threatened the owner with condemnation if the owner did not meet the developer's demand for $800,000 and a partnership in the pharmacy project.[190] When the owner refused, the developer initiated the condemnation process two days later.[191]

Even when the condemnor does not make overt threats, the citizen knows that the government wields the power of eminent domain and will exercise it if the parties cannot come to a favorable agreement. The property owner faces an uneven playing field. The government, naturally, will not offer more than the property's fair market value and will likely argue for a lower amount. The government's access to eminent domain gives the government more leverage in negotiations; thus, property owners are automatically disadvantaged. Requiring compensation of 150% of the fair market value would help to even that imbalance. If the government acted arbitrarily in taking private property by channeling it toward more private uses,[192] then at least the property owner's interests would be more secure because the owner, at a minimum, would receive more than the fair market value.

CONCLUSION

The Framers intended the public use and just compensation requirements to serve as important limitations to protect private

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[185] GARY S. BECKER & RICHARD A. POSNER, UNCOMMON SENSE 57 (2009) (describing holdout problem as the situation that may arise from a landowner holding out and refusing to sell except for an exorbitant price).

[186] 173 F. App'x 931 (2d Cir. 2006), *cert. denied*, 549 U.S. 1166 (2007).

[187] *Id.* at 932–33.

[188] *Id.*

[189] *Id.*

[190] *Id.* at 933.

[191] *Id.*

[192] *See* Hoffman Family, L.L.C. v. City of Alexandria, 634 S.E.2d 722, 730–31 (Va. 2006). Incidental benefits motivated the taking. *Id.*

property rights. They also envisioned a judiciary that would act to ensure that the majority did not overpower the minority. The courts, however, have since loosened the public use definition to the point where economic development qualifies as public use and each individual property owner's minority rights do not receive effective protection. The Virginia legislature has made good progress toward regaining ground in defending property rights, and the recent constitutional amendment represents an important move in that direction. Virginia's property rights will not be as secure as intended, however, until the legislature turns its attention to creating a bright line rule for just compensation.

Another amendment to the constitution requiring compensation of 150% of the fair market value would be the best measure to protect private property rights in Virginia, especially considering the trend of the judiciary and the legislature to defer to the other branch. A 150% mark-up of the fair market value of the property would alleviate some of the loss in subjective value that governments can neither quantify nor compensate. The mark-up would also better preserve property prices for all homeowners. Finally, the bright line compensation would counteract the government's bargaining advantage and would ensure that the homeowner would receive more value when facing the likely inevitable property taking. The automatic compensation of 150% of the fair market for takings of private property provides the best strategy to reinforce private property rights for the citizens of Virginia.

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