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Civil Rights

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CIVIL RIGHTS

INTRODUCTION

Civil rights law attempts to resolve tension between inconsistent individual and public interests.[1] This Survey examines how the Tenth Circuit has balanced these important interests in several decisions handed down from September 1994 to September 1995. Part I analyzes three cases involving the constitutional right to privacy. Two of these cases addressed the privacy right to avoid state dissemination of personal information.[2] For the first time, the Tenth Circuit found a state action violating this right.[3] The other case[4] addressed whether a Utah abortion statute violated the right to be free from government intrusion into intimate decisionmaking in light of *Planned Parenthood v. Casey*.[5]

Part II focuses on two decisions addressing discrimination under the Fair Housing Act.[6] In these cases, the Tenth Circuit joined other circuits in recognizing disparate impact as a way to prove housing discrimination.

I. THE CONSTITUTIONAL RIGHT TO PRIVACY

A. *Background*

Although the United States Constitution does not explicitly recognize a right to privacy, its philosophical origins derive from the Bill of Rights.[7] Privacy issues play a pivotal role in such areas as reproductive rights,[8] freedom from technological surveillance,[9] and freedom of association.[10]

Defining constitutional "privacy" is perhaps impossible.[11] In attempts to capture the essence of the privacy right, scholars have termed it "the right to

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1. Robert A. Destro, *The Hostages in the 'Hood*, 30 ARIZ. L. REV. 785, 820 (1994).

2. Nilson v. Layton City, 45 F.3d 369 (10th Cir. 1995); Sheets v. Salt Lake County, 45 F.3d 1383 (10th Cir.), *cert. denied*, 116 S. Ct. 74 (1995). Although not featured in this article, the Tenth Circuit also decided F.E.R. v. Valdez, 58 F.3d 1530, 1534-36 (10th Cir. 1995) (granting qualified immunity to defendants who allegedly violated the plaintiffs' right to privacy when they seized the plaintiffs' medical records).

3. *Sheets*, 45 F.3d at 1383.

4. Jane L. v. Bangerter, 61 F.3d 1493 (10th Cir. 1995), *rev'd sub nom.* Leavitt v. Utah, No. 95-1242, 1996 WL 327446.

5. 505 U.S. 833 (1992).

6. Bangerter v. Orem City Corp., 46 F.3d 1491 (10th Cir. 1995); Mountain Side Mobile Estates Partnership v. Secretary of HUD, 56 F.3d 1243 (10th Cir. 1995).

7. Roe v. Wade, 410 U.S. 113, 152 (1973). *See generally* DARIEN A. MCWHIRTER & JON D. BIBLE, PRIVACY AS A CONSTITUTIONAL RIGHT 33-88 (1992) (discussing the philosophical, constitutional, and common law foundations of the right to privacy); ALAN F. WESTIN, PRIVACY AND FREEDOM 330-403 (1967) (discussing the history of privacy in American law).

8. *See* Planned Parenthood v. Casey, 505 U.S. 833, 869-70 (1992); *Roe*, 410 U.S. at 153.

9. *See* Katz v. United States, 389 U.S. 347, 353 (1967).

10. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958).

11. Phillip Kurland, *The Private I*, U. CHI. MAG., Autumn 1976, at 7, 12.

be let alone," freedom "from unwanted intrusion," "the sum of all 'private rights,'"[12] "personality," "personhood," "autonomy," and "anonymity."[13] In short, one cannot find a single operative definition for constitutional privacy. The concept's meaning clearly changes in different settings.

Scholars credit an 1890 article by Louis D. Brandeis and Samuel D. Warren as the first source entreating courts to recognize a common law right to privacy in the United States.[14] A response to such intrusive new technologies as still photography, *The Right to Privacy* defined legal privacy as "the right to be let alone."[15] Although at the time no legal precedent supported the recognition of privacy as a substantive right,[16] this work spawned a concept that now pervades American legal theory.

Years later, Justice Brandeis emerged as the first member of the Court to advocate a constitutional right to privacy.[17] His famous dissent in *Olmstead v. United States*[18] urged the majority to broadly interpret the express liberties of the Bill of Rights to include an implied right to privacy.[19] He viewed the "right to be let alone" as a fundamental liberty deserving of constitutional protection.[20] Although this effort proved unsuccessful,[21] Brandeis's dissent in *Olmstead* laid the analytical foundation for *Griswold v. Connecticut*,[22] in which the Court finally recognized a general right to privacy.[23]

Justice Douglas, writing for a plurality in *Griswold*, explained that a general right to privacy can be inferred from the overlapping "zones" or "penumbras" emanating from the liberties expressly reserved by the Bill of Rights.[24]

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12. *See* Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1419 (1974).

13. *See* Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1337-38. Still others have attempted to organize privacy rights into taxonomies like "solitude," "intimacy," and "reserve," WESTIN, *supra* note 7, at 31, or "secrecy, anonymity, and solitude." Gormley, *supra*, at 1338.

14. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). For more information about the historical antecedents of constitutional privacy, see MORRIS L. ERNST & ALAN U. SCHWARTZ, PRIVACY: THE RIGHT TO BE LET ALONE 1-23 (1962); MCWHIRTER & BIBLE, *supra* note 7, at 61-62; Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 240 n.26 (1977).

15. *See* ERNST & SCHWARTZ, *supra* note 14, at 49.

16. DAVID M. O'BRIEN, PRIVACY, LAW, AND PUBLIC POLICY 5 (1979).

17. VINCENT J. SAMAR, THE RIGHT TO PRIVACY: GAYS, LESBIANS, AND THE CONSTITUTION 23 (1991).

18. 277 U.S. 438 (1928) (Brandeis, J., dissenting), *overruled by* Katz v. United States, 389 U.S. 347 (1967).

19. *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

20. *Id.* ("[The framers of the Bill of Rights] conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.").

21. *See id.* at 455-56, 465 (refusing to expand the Fourth Amendment's protection against unreasonable searches and seizures to include warrantless government surveillance of private telephone conversations).

22. 381 U.S. 479 (1965).

23. *Griswold*, 381 U.S. at 484.

24. *Id.* at 483-84. These "penumbras" or "zones of privacy" emanated from the First, Third, Fourth, Fifth, and Ninth Amendments. *Id.* at 484. For a discussion on the historical meaning of the word "penumbra" and its use by Justice Douglas in *Griswold*, see Henry T. Greely, *A Footnote to "Penumbra" in* Griswold v. Connecticut, 6 CONST. COMMENTARY 251 (1989). *Webster's* definitions for "penumbra" include: "a space of partial illumination between the perfect shadow on all sides and the full light," and "an area containing things of obscure classification: an uncertain middle ground between fields of thought or activity." WEBSTER'S NEW INTERNATIONAL DICTIO-

Despite division over the source of the new privacy right,[25] the Court recognized a general right of privacy encompassing freedom from state intrusion into the marriage relationship and struck down a law forbidding married couples' use of contraceptives.[26]

Today, debate continues regarding the *scope* of the general right to privacy.[27] The prevailing modern view concerning constitutional privacy's *source* is that the right to privacy is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment.[28]

After *Griswold*, the Supreme Court recognized two distinct privacy interests arising out of the general right to privacy: "the individual interest in avoiding disclosure of personal matters" and "the interest in independence in making certain kinds of important decisions."[29] Lower courts have characterized the first of these interests as the "confidentiality" branch of privacy, and the second as the "autonomy" branch.[30] The Tenth Circuit issued several decisions during the survey period that addressed these two privacy rights.

NARY UNABRIDGED 1673 (3d ed. 1981).

25. Justices Harlan and White believed that the statute violated substantive Due Process under the Fourteenth Amendment. *Griswold*, 381 U.S. at 500, 502 (Harlan, J., concurring, and White, J., concurring in judgment). Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, wrote a separate concurring opinion emphasizing the Ninth Amendment's guarantee of fundamental liberties not expressly reserved in the Constitution. *Id.* at 486-99 (Goldberg, J., concurring). Justices Black and Stewart dissented. *Id.* at 507, 527 (Black & Stewart, JJ., dissenting). For a critical analysis of these theories, see Helen Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of* Lochner, 61 WASH. L. REV. 293, 304-12 (1986); Henkin, *supra* note 12, at 1416-24.

26. *Griswold*, 381 U.S. at 485-86.

27. *See* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 748-49 (1989) (criticizing the Supreme Court's more recent holding in Bowers v. Hardwick, 478 U.S. 186 (1986), where the Court held that homosexual sodomy fell outside the boundary of private activities protected from government intrusion).

28. *See* Roe v. Wade, 410 U.S. 113 (1973) (finding a right to privacy based on the "Fourteenth Amendment's concept of personal liberty"); *see also* Whalen v. Roe, 429 U.S. 589, 598 n.23 (1977) (quoting the *Roe* Court's determination that the right to privacy stems from the Fourteenth Amendment). *But see* Gerety, *supra* note 14, at 239-40 n.25 (arguing that cases following *Griswold* did not settle the "question of constitutional derivation" of the general right to privacy); Henkin, *supra* note 12, at 1422 (arguing that subsequent decisions did not revisit the analyses justifying privacy as a constitutional right but have assumed the existence of such a right).

29. *Whalen*, 429 U.S. at 599-600. The *Whalen* Court cited Professor Kurland's article discussing "three facets" of privacy, one of which is protected directly by the Fourth Amendment. *Id.* at 599 n.24; *see also* Gormley, *supra* note 13, at 1339-40 (organizing legal privacy into five categories, three of which parallel the constitutional privacy rights set out in *Whalen*); Rubenfeld, *supra* note 27, at 740 (distinguishing between "informational" privacy, or limiting the ability of others to access to information about the private aspects of one's life, and "substantive" privacy, or limiting government interference with personal autonomy); *cf.* MCWHIRTER & BIBLE, *supra* note 7, at 104 (identifying "the right to engage in sex and marriage, the right to have an abortion and the right to be free from searches that invade privacy" as the three major subdivisions of privacy).

30. *See* Borucki v. Ryan, 827 F.2d 836, 840 (1st Cir. 1987).

B. *Informational Privacy: The Constitutional Right to Confidentiality*

1. Supreme Court Decisions

The first category of privacy rights lurking within the "penumbras" of Fourteenth Amendment privacy involves the individual's interest in avoiding disclosure of personal matters. The Supreme Court expressly recognized this right in *Whalen v. Roe*.[31] The Supreme Court did not, however, recognize a violation of the Fourteenth Amendment right on the facts of *Whalen*, nor has it done so in any subsequent decision.[32]

The plaintiffs in *Whalen* challenged a statute requiring physicians to compile prescription records containing detailed patient information for dangerous drug prescriptions.[33] During a five-year period, a limited number of health officials could access these records.[34] The Court held that the patient-identification provisions did not violate the right to privacy.[35] Given the limited access and statutory safeguards against unwarranted disclosure, the importance of providing necessary medical information to health care officials outweighed the minimal risk of erroneous or fraudulent disclosure of personal information.[36]

In *Nixon v. Administrator of General Services*,[37] the Court recognized the right to avoid disclosure of personal matters, but as in *Whalen*, the Court refused to find a violation of that right on the facts of the case.[38] President

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31. *Whalen*, 429 U.S. at 599.

32. *See id.* 429 U.S. at 600; Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 455-56 (1977). Lower courts commonly cite *Whalen* and *Nixon* as the authority for the existence of the "informational" privacy right. *See, e.g.*, Igneri v. Moore, 898 F.2d 870, 873 (2d Cir. 1990); Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986).

33. *Whalen*, 429 U.S. at 591-93.

34. *Id.* at 593-95.

35. *Id.* at 591.

36. *Id.* at 600-04. Critics assert that in Paul v. Davis, 424 U.S. 693, 695-96 (1976), the Court rejected a general right to privacy protecting individuals from state dissemination of personal information by the state. *See* J.P. v. DeSanti, 653 F.2d 1080, 1090 (6th Cir. 1981). In *Paul*, police officers distributed flyers identifying as an "active shoplifter" a man charged with shoplifting but later acquitted. The Court refused to recognize the plaintiff's claim that the action infringed on one of the "zones of privacy" protected by the Bill of Rights. *Paul*, 424 U.S. at 696. The majority of courts and commentators, however, feel comfortable in construing *Paul* and *Whalen* as consistent. *See* Bruce W. Clark, Note, *The Constitutional Right to Confidentiality*, 51 GEO. WASH. L. REV. 133, 140 (1982) (offering a limited reading of *Paul* as merely rejecting an attempt to extend the autonomy strand of privacy); Bruce E. Falby, Comment, *A Constitutional Right to Avoid Disclosure of Personal Matter: Perfecting Privacy Analysis in* J.P. v. DeSanti, 71 GEO. L.J. 219, 222-24 (1982) (pointing out that *Paul* does not explicitly reject a right against disclosure in all cases but only as against disclosure "of an official act such as an arrest" already appearing on the public record); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 15-16, at 1396 (2d ed. 1988) (interpreting *Paul* as imposing "federalism-based limits" on § 1983 liability rather than repudiating "deep substantive principles under the Fourteenth Amendment").

37. 433 U.S. 425 (1977).

38. *Nixon*, 433 U.S. at 465. Critics have rejected *Nixon* as authority for a privacy right to avoid disclosure of personal matters. *See DeSanti*, 653 F.2d at 1089 n.4 ("[The Court's] analysis of the privacy issue in *Nixon* appears to be based on the Fourth Amendment requirement that all searches and seizures be reasonable, not on the scope of a general constitutional right to privacy."); *cf.* Falby, *supra* note 36, at 234 n.136, 240-41 n.185 (arguing that the *Nixon* court seemed to confuse Fourth and Fourteenth Amendment privacy). Both *Whalen* and *Nixon*, however, in-

Richard Nixon claimed that the Presidential Recordings and Materials Preservation Act, which compelled him to disclose materials compiled during his official activities as President, violated his right to privacy.[39] Recognizing a "legitimate expectation of privacy"[40] in any personal communications, the Court balanced Nixon's interest in confidentiality against the public's interest in the majority of the materials, Nixon's status as a public figure, the small percentage of material not relating to official presidential duties, and the difficulty in separating official from private material without a comprehensive screening process.[41] Finding that the screening process which the act contemplated would cause minimal intrusion into Nixon's private affairs, the Court found that the act did not violate Nixon's right to privacy.[42]

The *Nixon* Court's analysis suggests little about what types of information fit within the definition of "personal matter." The Court's balancing analysis, however, suggests an intermediate standard to review the government's justification for compelled disclosure.[43] This standard falls somewhere between the strict scrutiny standard applicable in equal protection cases involving fundamental rights and suspect classes[44] and the minimum rationality standard applicable in many substantive due process claims.[45]

Although the Supreme Court has not examined the constitutional right to avoid disclosure of personal matters since *Nixon*, the Tenth Circuit has decided a line of cases addressing this "confidentiality" branch of privacy. The next section introduces the Tenth Circuit's test for analyzing confidentiality cases.

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volved a statute compelling disclosure of personal information outside the context of a criminal investigation. *See Nixon*, 433 U.S. at 462; *Whalen*, 429 U.S. at 604 n.32.

39. *Nixon*, 433 U.S. at 455.

40. The Court referred to the Fourth Amendment privacy test, which analyzes the individual's "legitimate expectation of privacy." *See id.* at 458 (citing Katz v. United States, 389 U.S. 347, 351-53 (1967)). Commentators have suggested that the Court confused Fourth and Fourteenth Amendment privacy. *See* Borucki v. Ryan, 827 F.2d 836, 844 (1st Cir. 1987); Falby, *supra* note 36, at 234. On the other hand, the Court may simply have been suggesting that the Fourth Amendment test has applicability in the Fourteenth Amendment context. *See Borucki*, 827 F.2d at 844; *see also* discussion *supra* note 36.

41. *Nixon*, 433 U.S. at 465.

42. *Id.*

43. *See* Igneri v. Moore, 898 F.2d 870, 873 (2d Cir. 1990); *cf.* Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978) ("The Court did not speak in usual terms of standard of review."). For one commentator's analysis on what the proper level of scrutiny should be, see Falby, *supra* note 36, at 242-45.

44. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973).

45. *See* United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938) (adopting a rationality standard in economic substantive due process claims, but intimating that a more stringent standard of review might apply to statutes "directed at particular religious or national or racial minorities"); *Bowers*, 478 U.S. at 196 (applying minimum rationality to a claim that a law prohibiting homosexual sodomy violated the due process right to privacy). Prior to *Casey*, the Court applied heightened scrutiny when disclosure requirements had a "chilling effect" on decisionmaking protected under the "autonomy" branch of privacy. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 765-72 (1986) (invalidating a statutory provision that required disclosure of a woman's political affiliation, among other information, before she could obtain an abortion).

2. Prior Tenth Circuit Decisions

In a 1981 opinion, *Denver Policemen's Protective Ass'n v. Lichtenstein*,[46] the Tenth Circuit adopted a three-part test for analyzing claims under *Nixon*. In *Lichtenstein*, a state judge issued a discovery order compelling disclosure of police department personnel files.[47] Under the order, the court would first review the files *in camera* to determine whether the criminal defendant accused of assaulting a police officer was entitled to exculpatory evidence within the files.[48] To analyze the claim that disclosure of the personnel records violated the individual officers' right to privacy, the Tenth Circuit employed a three-part balancing test: (1) whether "the party asserting the right ha[d] a legitimate expectation of privacy" in keeping the information confidential; (2) whether "disclosure serve[d] a compelling state interest"; and (3) whether "disclosure [was] made in the least intrusive manner."[49] The Tenth Circuit concluded that even if the officers had a reasonable expectation of privacy in keeping the personnel records confidential, the state had a compelling interest in ascertaining the truth in a criminal trial and in maintaining the defendant's right to obtain exculpatory material in his defense.[50] Furthermore, the state judge had ordered the disclosure of the records in the least intrusive manner by reviewing them *in camera* and deleting personal material prior to disclosure.[51]

In a subsequent case, *Mangels v. Pena*,[52] the Tenth Circuit analyzed only the first element of the *Lichtenstein* test and found in favor of disclosure. The plaintiffs, city fire department employees, were terminated after a department investigation for illegal drug use.[53] They alleged that a city official's disclosure to the media of the investigative report violated their right to privacy.[54] Initially, the court noted that whether information falls within the scope of constitutional protection "depends, at least in part, upon the intimate or otherwise personal nature of the material."[55] Relying on the Supreme Court's holding in *Paul v. Davis*,[56] the Tenth Circuit held "[v]alidly enacted . . . laws" gave the plaintiffs notice that any conduct that violated those laws would not

46. 660 F.2d 432 (10th Cir. 1981).

47. *Lichtenstein*, 660 F.2d at 434.

48. *Id.*

49. *Id.* at 435. The *Lichtenstein* court adopted this test from the Colorado Supreme Court in Martinelli v. District Court, 612 P.2d 1083, 1091 (Colo. 1980), which had in turn adopted the test from Byron, Harless, Schaffer, Reid & Assocs. v. State *ex rel.* Schellenberg, 360 So. 2d 83, 94-97 (Fla. Dist. Ct. App. 1978), *rev'd sub nom.* Shevin v. Byron, Harless, Schaffer, Reid & Assocs., 379 So. 2d 633, 638 (Fla. 1980) (refusing to expand privacy rights to informational privacy).

50. *Lichtenstein*, 660 F.2d at 436.

51. *Id.*

52. 789 F.2d 836 (10th Cir. 1986).

53. *Mangels*, 789 F.2d at 837.

54. *Id.* Although not at issue in *Mangels*, when a plaintiff asserts a constitutional claim for damages under 42 U.S.C. § 1983 (1994), a defendant may raise the qualified immunity defense. *See* Anderson v. Creighton, 483 U.S. 635 (1987); Harlow v. Fitzgerald, 457 U.S. 800 (1982); *see also* F.E.R. v. Valdez, 58 F.3d 1530, 1532 (10th Cir. 1995) (granting defendants qualified immunity when plaintiff claimed privacy violation in agency's action of seizing medical records during an investigation into alleged Medicare fraud).

55. *Mangels*, 789 F.2d at 839.

56. 424 U.S. 693 (1976); *see* discussion *supra* note 36.

receive constitutional protection from disclosure.[57] Because the report did not contain any personal information unrelated to the investigation into the plaintiffs' illegal drug use, the court found that the plaintiffs had no legitimate expectation of privacy in relation to the investigative files.[58]

Thus, *Mangels* suggests one limitation on a plaintiff's ability to satisfy the first *Lichtenstein* element. "Public" matters do not merit a "legitimate expectation of privacy." More fundamentally, *Mangels* redefined the Fourth Amendment concept of the "legitimate expectation of privacy" for Fourteenth Amendment privacy claims.[59] When evaluating Fourth Amendment privacy claims, courts apply a test with both subjective and objective components.[60] In contrast, the *Mangels* court only asked whether the information in the report was "intimate and personal" when determining the legitimacy of a privacy expectation.[61]

Also apparent in *Mangels* is that the Tenth Circuit has recognized two subinterests within the general interest in avoiding disclosure of personal matters. *Whalen*, *Nixon*, and *Lichtenstein* involved government actions compelling an individual to disclose personal information to the government.[62] Claims of a privacy violation in this context usually accompany a request for injunctive relief.[63] *Mangels*, on the other hand, involved government dissemination of information previously obtained from the individual. Such cases often arise as damages claims against a state official under 42 U.S.C. § 1983.[64] Cases discussed in this Survey involve both scenarios.

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57. *Mangels*, 789 F.2d at 839.

58. *Id.*

59. In *Schellenberg*, the Florida court interpreted *Nixon* to adopt the Fourth Amendment standard in the Fourteenth Amendment context, and, accordingly, the court adopted the two-part Fourth Amendment test. *Schellenberg*, 360 So. 2d at 94; *see Nixon*, 433 U.S. at 458.

60. *See* Falby, *supra* note 36, at 240.

61. In several other cases addressing this issue, the Tenth Circuit has consistently held that "public" matters, such as criminal conduct or a public employee's job performance, are not "intimate and personal" and thus do not merit a "reasonable expectation of privacy." *E.g.*, Flanagan v. Munger, 890 F.2d 1557, 1570-71 (10th Cir. 1989) (holding that police officers did not have a reasonable expectation of privacy in facts contained within an internal investigation file). The court has indicated, however, that sexual history, personal photographs, and other highly sensitive matters do fall within the zone of privacy. *See* Eastwood v. Department of Corrections, 846 F.2d 627, 631 (10th Cir. 1988) (upholding district court's refusal to grant qualified immunity where officer asked irrelevant questions concerning victim's sexual history during sexual assault investigation); Slayton v. Willingham, 726 F.2d 631, 635 (10th Cir. 1984) (reversing dismissal of privacy claim where police officers exhibited previously seized "highly sensitive, personal, and private" photographs to acquaintances). Neither of these cases, however, involved a decision on the merits of the claim.

62. Inherent in disclosure to state officials is the risk of dissemination of the same information to the public. *See Whalen*, 429 U.S. at 600; Falby, *supra* note 36, at 241.

63. For example, a facial attack on the statute or an action to enjoin a court order would fall within this category. *See, e.g.*, *Lichtenstein*, 660 F.2d at 434.

64. *See, e.g.*, *Mangels*, 789 F.2d at 836-37. 42 U.S.C. § 1983 (1994) authorizes damage claims against officials who violate individuals' constitutional rights. Similar claims can arise against a federal official. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 397 (1971); Western States Cattle Co. v. Edwards, 895 F.2d 438, 441 (8th Cir. 1990).

3. Tenth Circuit Decisions

The Tenth Circuit decided two cases addressing the constitutional right to avoid government dissemination of personal matters during the survey period. For the first time, the Tenth Circuit found a government action violative of this branch of constitutional privacy.

a. Nilson v. Layton City[65]

In *Nilson*, the Tenth Circuit further described what matters are *not* "personal" enough to merit constitutional protection. Following the *Mangels* decision, the *Nilson* panel held that the Constitution does not protect against dissemination of information already considered public. In *Nilson*, even where the plaintiff had expunged records of a prior arrest under Utah law, the expungement did not truly remove the material from the public record for constitutional purposes.

i. Facts

In 1981, plaintiff Demar Nilson, while employed as a schoolteacher in Davis County, Utah, pled no contest to sexual abuse charges.[66] In 1984, Nilson obtained a teaching position with the Jordan School District in Salt Lake County, Utah.[67] He later obtained an expungement order under a Utah statute to seal records pertaining to his 1981 arrest.[68] The statute provided: "Any agency or its employee who receives an expungement order may not divulge any information in the sealed expunged records."[69] The state court did not file the order with any city of Layton official.[70] In 1991, a Layton police officer with first-hand knowledge of the 1981 conviction spoke to a local television station regarding the conviction. The discussion led to a report on the evening news that "received substantial publicity."[71]

Nilson filed a civil rights action under 42 U.S.C. § 1983, claiming that the officer's disclosure of the expunged conviction violated his right to privacy.[72] The district court found that because neither the officer nor any Layton official knew of the expungement order, and thus had not violated the Utah statute prohibiting an official from divulging such information, "they could not be held liable under section 1983."[73]

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65. 45 F.3d 369 (10th Cir. 1995).
66. *Nilson*, 45 F.3d at 370.
67. *Id.*
68. *Id.*
69. *Id.* at 370 n.1; *see* UTAH CODE ANN. § 77-18-2(5)(a) (1990) (repealed 1994).
70. *Nilson*, 45 F.3d at 370. Between 1990 and 1991, the Jordan School District received complaints about Nilson's past conviction and new complaints of sexual abuse by Nilson. *Id.* at 370-71. After an investigation, Salt Lake County officials filed charges against Nilson for sexual abuse. *Id.* at 371. These charges did not result in a conviction but the Jordan School District discharged Nilson in 1992. *Id.*
71. *Id.*
72. *Id.*; *see* 42 U.S.C. § 1983 (1994).
73. *Nilson*, 45 F.3d at 370-71.

ii. Decision

On appeal, the Tenth Circuit analyzed Nilson's privacy claim under the *Lichtenstein* test.[74] The court held that Nilson failed to show a legitimate expectation of privacy with regard to the expunged conviction.[75] Citing *Mangels*, the court emphasized that information must be highly personal or intimate and not readily available to the public to warrant a reasonable expectation of privacy.[76] The expungement order did not create a legitimate expectation of privacy regarding the arrest and conviction because those events were recorded in documents not sealed by the expungement order and remembered by the people present.[77] Thus, the expungement order never "truly removed" the arrest and conviction from the public record.[78]

Nilson illustrates a continued adherence to the court's reasoning in *Mangels*: to merit protection under substantive due process, information must relate to intimate and personal matters rather than public matters. After *Nilson*, however, a workable definition of "intimate and personal" remained elusive. Precedent had established only that "highly sensitive" materials might fall within the scope of a "legitimate expectation of privacy" under the Fourteenth Amendment, and that matters of public record or of public concern did not.[79]

b. Sheets v. Salt Lake County[80]

Sheets illustrates more precisely what types of information *do* create a "legitimate expectation of privacy" under the *Lichtenstein* test's first element. In *Sheets*, the Tenth Circuit recognized a violation of the right to privacy in avoiding disclosure of personal matters.

i. Facts

After a terrorist bomb killed plaintiff Gary Sheets's wife, police investigators asked Sheets for his wife's diary, a common practice in a murder investigation.[81] Believing the information in the diary would remain confidential, Sheets gave it to the police.[82] Investigators and detectives assigned to the bombing case received copies of the diary, including one of the defendants,

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74. *Id.*
75. *Id.*
76. *Id.* at 372. The court emphasized that disclosed information must independently merit constitutional protection as a "fundamental personal interest[ ] derived from the Constitution." *Id.* (quoting *Mangels*, 789 F.2d at 839). State statutes and regulations are merely factors to consider in determining the scope of constitutional privacy. *Id.*
77. *Id.*
78. *Id.*
79. *See supra* text accompanying notes 55, 76.
80. 45 F.3d 1383 (10th Cir. 1995).
81. *Sheets*, 45 F.3d at 1386.
82. *Id.* The detective who received the diary did not remember whether he assured the plaintiff that the information would remain confidential. *Id.* Another detective on the case, however, testified that he assured Sheets the diary would remain confidential. *Id.*

Mr. George.[83] George took thorough handwritten notes from the contents of the diary and made photocopies of the diary.[84] After the suspected bomber was convicted, the department archived the diary and the rest of the investigative file, which made it available for public inspection.[85] Consistent with an "unwritten policy" in the Salt Lake County Attorney's office allowing employees to speak freely with the press after a case was closed, George met with three authors who were writing books about the bombing incident.[86] George allowed one of the authors, Lindsay, to examine his notes, and he responded to the other authors' questions.[87] Some time later, Lindsay published a book containing direct quotes from the diary.[88]

In 1989, Sheets filed suit against the county and several investigators, asserting a constitutional invasion of privacy.[89] After the district judge denied the defendants' motion for judgment as a matter of law at the close of plaintiff's case, the trial resulted in a jury verdict of $650,000 in favor of Sheets.[90]

ii. Decision

Affirming the district court's decision, the Tenth Circuit initially noted that Sheets had presented ample evidence for the jury to find that Sheets gave the diary to the defendants with the understanding that they would keep the diary confidential.[91] To meet the first *Lichtenstein* element, this understanding must have created a "legitimate expectation that [the diary would] remain confidential while in the state's possession."[92] The court, therefore, directed its focus to whether the diary displayed the "intimate or otherwise personal nature" required to merit substantive due process protection.[93]

First, the inquiry should concentrate on the nature of the material disclosed, not on the author.[94] The fact that Sheets' wife wrote the diary had no bearing on whether Sheets had a "legitimate expectation of privacy" in the diary's contents.[95] Furthermore, the information did not have to be "embarrassing to be personal."[96] The court listed other "personal" types of information such as medical[97] and financial records, which did not necessarily

83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id. Sheets* later amended the complaint to include a claim under 42 U.S.C. § 1983 against George and a Salt Lake County attorney, the only defendants remaining at trial. *Id.*
90. *Id.* at 1387.
91. *Id.* at 1388.
92. *Id.* at 1387.
93. *Id.* at 1387-88. The court did not make any reference to the two-part Fourth Amendment inquiry adopted in *Schellenberg*. *See supra* notes 49, 59-60.
94. *Sheets*, 45 F.3d at 1388.
95. *Id.*
96. *Id.*
97. *See* F.E.R. v. Valdez, 58 F.3d 1530, 1535 (10th Cir. 1995) (noting that patients have a legitimate expectation of privacy in medical records, but granting defendants qualified immunity

involve embarrassing information but had nonetheless been afforded constitutional protection.[98] The Tenth Circuit concluded that whether the diary was sufficiently personal to merit protection under the Due Process Clause was a proper question for the jury.[99]

The court rejected the defendants' contention that the plaintiff had no reasonable expectation of privacy because he knew that many investigators would have access to the diary.[100] The court distinguished disclosure for a limited purpose from public release through publication.[101] Addressing the other *Lichtenstein* elements, the Tenth Circuit held that the government did not have a compelling interest in disclosing the contents of the diary.[102]

In summary, the Tenth Circuit's analysis after *Sheets* looks first to whether the information in question is personal or public. If the information is not public, the court lets the jury decide whether the information is sufficiently personal to merit protection. If so, the government must show a compelling interest and use the least intrusive means to compel disclosure or disseminate the information.

4. Other Circuits

Led by the Third and Fifth Circuits, most other circuits have indicated an acceptance of the right to privacy in avoiding disclosure of personal matters.[103] The Sixth Circuit continues to reject the general right to privacy against government disclosure of private information,[104] and the First and D.C. Circuits have questioned the doctrine.[105]

To analyze claims involving the right to confidentiality, the Third,[106] Fifth,[107] Eleventh,[108] and Second[109] Circuits apply a pure balancing

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where agency had seized medical records in an investigation for Medicare fraud).

98. *Sheets*, 45 F.3d at 1388. To guide its analysis, the court referenced the *Restatement (Second) of Torts* and the common law tort of invasion of privacy. *Id.* at 1388 n.1. The *Restatement* test looks to whether the information "involve[s] a matter of public concern," and whether public disclosure "could be considered highly offensive to the reasonable person." *Id.* The court noted, however, that the *Restatement* merely provides guidance for the constitutional analysis. *Id.*

99. *Id.* at 1388.

100. *Id.*

101. *Id.*

102. *Id.* at 1388-89.

103. *See* James v. City of Douglas, 941 F.2d 1539, 1543 (11th Cir. 1991); Doe v. Attorney Gen. of the United States, 941 F.2d 780, 795 (9th Cir. 1991); *Western States Cattle Co.*, 895 F.2d at 441-43; Daury v. Smith, 842 F.2d 9, 13 (1st Cir. 1988); Pesce v. J. Sterling Morton High Sch., 830 F.2d 789, 796 (7th Cir. 1987); Taylor v. Best, 746 F.2d 220, 225 (4th Cir. 1984), *cert. denied*, 474 U.S. 982 (1985); Barry v. City of New York, 712 F.2d 1554, 1559 (2d Cir.), *cert. denied*, 464 U.S. 1017 (1983); United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980); Plante v. Gonzalas, 575 F.2d 1119, 1128 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979).

104. *See* Jarvis v. Wellman, 52 F.3d 125, 126 (6th Cir. 1995); Doe v. Wigginton, 21 F.3d 733, 740 (6th Cir. 1994); J.P. v. DeSanti, 653 F.2d 1080, 1090 (6th Cir. 1981).

105. National Fed'n of Fed. Employees v. Greenberg, 983 F.2d 286, 293 (D.C. Cir. 1993) (refusing to consider the privacy argument as part of a facial challenge to the National Agency Questionnaire); Borucki v. Ryan, 827 F.2d 836, 838-49 (1st Cir. 1987) (finding for the purposes of qualified immunity that no clearly established right against government disclosure of personal matters existed as of June 17, 1983).

106. *Westinghouse*, 638 F.2d at 577, 580.

107. *Plante*, 575 F.2d at 1134.

108. *James*, 941 F.2d at 1544.

test.[110] This majority approach does not attempt to quantify the "sensitivity"[111] of the individual's privacy interest, but simply balances whatever personal interests exist against the public or state interests present.[112] A second approach, taken by the Eighth Circuit, focuses on whether the individual's interest is sufficiently "fundamental," and then requires a compelling interest to justify the action.[113]

Other courts have applied similar tests to the two tests above. The Ninth Circuit has applied the Third Circuit balancing test,[114] but has also recognized a shifting standard of review, where "the more sensitive the information, the stronger the state's interest must be."[115] The Fourth and Seventh Circuits have refused to acknowledge a constitutionally protected confidentiality interest when the information's subject matter relates to conduct not protected under the "autonomy" branch of privacy.[116]

No court has drawn a distinction between cases involving compelled disclosure to the government and government dissemination of confidential information.[117] Those cases in which the individual's interest has prevailed

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109. *Barry*, 712 F.2d at 1559.

110. *See* Clark, *supra* note 36, at 134.

111. Rather than look to the nature of the information, most courts seem to apply the "intimate and private" standard. *See, e.g., supra* text accompanying note 93. In practice, this standard's only requirement is that information be sufficiently confidential so as not to be already known or knowable to the public. *See* Clark, *supra* note 36, at 134; Falby, *supra* note 36, at 240 (advocating a requirement that considers if the information would remain confidential but for the government action).

112. Some of the seven factors considered under the Third Circuit analysis include: the type of record and information requested, the potential for harm and degree of potential injury in nonconsensual disclosures by the state, the "adequacy of safeguards to prevent unauthorized disclosure," the degree of need for state or public access, and the extent of any "recognizable public interest militating toward access." *Westinghouse*, 638 F.2d at 578. The Fifth Circuit has not articulated a seven element test, but has referred to the factors considered in *Nixon* and *Whalen* for help in balancing individual versus public interests. *Plante*, 575 F.2d at 1134. Similarly, the Second Circuit has adopted a balancing test, where the government must show a "substantial" interest in disclosure. *Barry*, 712 F.2d at 1559.

113. Alexander v. Peffer, 993 F.2d 1348, 1350 (8th Cir. 1993) (holding that disclosure must constitute a "shocking degradation," "egregious humiliation," or constitute a "flagrant breech of a pledge of confidentiality," to merit protection as a constitutional tort).

114. *Doe*, 941 F.2d at 795-96. For a discussion of the elements of the Third Circuit's balancing test, see *supra* note 112.

115. The Ninth Circuit has not adopted a clear standard by which to evaluate the "sensitivity" of information. *See Doe*, 941 F.2d at 795-97 (analyzing defendant's qualified immunity defense and deciding that it was reasonable for him to assume that disclosing information about the plaintiff's AIDS infection did not violate plaintiff's due process right); Thorne v. City of El Segundo, 726 F.2d 459, 471 (9th Cir. 1983) (finding that questions into plaintiff's sexual history had no relevance to any legitimate interest of defendant police officers in conducting their investigation), *cert. denied*, 469 U.S. 979 (1984).

116. *See* Walls v. City of Petersburg, 895 F.2d 188, 193 (4th Cir. 1990) (finding that facts about homosexual relations are not the type of information that an applicant had a right to keep private in light of Bowers v. Hardwick, 478 U.S. 186 (1986)); Hedge v. County of Tippecanoe, 890 F.2d 4, 7-8 (7th Cir. 1989) (granting qualified immunity to defendants where plaintiff alleged violation of privacy when asked "sexually related" questions, since the interrogation occurred while the Supreme Court was still contemplating *Bowers*).

117. Concerns about federalism, however, seem to affect outcomes. *See* Clark, *supra* note 36; *see also* J.P. v. DeSanti, 653 F.2d 1080, 1091 (6th Cir. 1981) ("As with the disclosure in *Paul v. Davis*, protection of appellants' privacy rights here must be left to the states or the legislative process."). *Compare* Alexander v. Peffer, 992 F.2d 1348, 1350 (8th Cir. 1993) (refusing to recog-

involved either a government official's wanton dissemination of personal information[118] or a mandatory disclosure of private information in exchange for some public benefit.[119]

5. Analysis

The disparity between the Third and Eighth Circuit's approaches reflects a fundamental disagreement about the source and scope of any constitutional privacy interest in avoiding disclosure of personal matters.[120] Nevertheless, both approaches recognize the need for protecting the individual's right to confidentiality in some circumstances, but also give credence to the public interest in limited disclosure when safeguards are present. The first approach accomplishes this goal by imposing affirmative requirements that a state must meet to justify disclosure. The second approach does it by imposing a high threshold for an individual to establish a constitutional right balanced by an equally high threshold for the government to compel disclosure.

In contrast, the Tenth Circuit's analysis weighs heavily in favor of the individual's interest. Although the *Lichtenstein* test purports to adopt the Fourth Amendment "legitimate expectation of privacy" standard, subsequent decisions have demonstrated that the Tenth Circuit follows the less exacting "intimate and private" approach when evaluating the extent of the individual's interest.[121] To compensate for the lack of a bright-line standard in

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nize a constitutional right to privacy protecting against state dissemination of personal information unless the information disclosed is a "shocking degredation," "egregious humiliation" or the dissemination involves a flagrant breach of a pledge of confidentiality) *with Western States Cattle Co.*, 895 F.2d 438 (recognizing right to nondisclosure of personal information under Fifth Amendment Due Process in a *Bivens* action, and applying the Fifth Circuit *Plante* analysis before finding that no violation occurred).

118. *See James*, 941 F.2d at 1543-44 (deciding that defendants were not entitled to qualified immunity where the police exhibited personal video footage obtained in a criminal investigation); Fadjo v. Coon, 633 F.2d 1172, 1174-75 (5th Cir. 1981). *But see* Walls v. City of Petersburg, 895 F.2d 188, 194 (4th Cir. 1990) (finding no violation where safety mechanisms in polygraph procedure reduced the risk of unwarranted disclosure).

119. *See Thorne*, 726 F.2d at 468-72. *But see Hedge*, 890 F.2d at 7-8 (granting qualified immunity to defendants where plaintiff alleged violation of privacy when asked "sexually related" questions). In both of these situations, however, the defendant avoids liability by attempting to limit the dissemination to a specific and legitimate government purpose. *See, e.g.*, Hester v. City of Milledgeville, 777 F.2d 1492, 1497 (11th Cir. 1985) (control questions used during polygraph examinations were general in nature, asked for the specific and legitimate purpose of maintaining the reliability of the test, and left out the most personal of questions relating to marriage, family, and sexual relations).

120. Critics of the balancing approach have difficulty recognizing a "fundamental" right in avoiding disclosure of all "personal" information without regard to content. *DeSanti*, 653 F.2d at 1090 (discussing the requirement in *Paul* and *Roe* that a private interest must be "fundamental" or "implicit in the concept of ordered liberty" to merit protection under substantive due process). These critics interpret the term "fundamental" as requiring that information be extremely sensitive or involve conduct protected under the autonomy branch of privacy. Clark, *supra* note 36, at 139. Critics of the autonomy-based approach are troubled by the prospect of heightened scrutiny. *See Plante*, 575 F.2d at 1134 (adopting a balancing standard in light of the Supreme Court's warning against establishing new "fundamental" interests) (referring to San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973)).

121. Several commentators have suggested an inquiry similar to the Fourth Amendment's "legitimate expectation of privacy" test as the appropriate standard to determine when information is constitutionally protected. Katz v. United States, 389 U.S. 347, 351-53 (1967). The Fourth

determining the types of information to be protected, the Third Circuit's balancing test weighs the individual's interest against the government's interest, the existence of safeguards against unnecessary disclosure, and other factors.[122] Employing a hybrid of the balancing and autonomy-based approaches, the Tenth Circuit lets the jury decide what interests are intimate and private (without a clear standard as guidance) and then requires what appears to be strict scrutiny to justify the public's interest. As a result, the scenarios in *Mangels* and *Nilson* present the only means by which the state can gain access to private records under any circumstances. *Nilson*, however, only removes publicly accessible matters from the scope of protected information,[123] while *Mangels* only removes matters of public concern.

Despite these analytical problems, several factors indicate that *Sheets*, *Nilson*, *Mangels*, and *Lichtenstein* would have been decided the same way under the pure balancing test used by the majority of circuits. First, circuits adopting the majority approach have also recognized the threshold requirement in *Mangels* and *Nilson* that information be private, not public, to merit constitutional protection.[124] Second, the defendant in *Sheets* could not have justified his disclosure to the media even if the court had applied intermediate review since the facts indicate that he disclosed the diary for personal gain, not for any state purpose. Finally, the defendants' victory in *Lichtenstein* suggests that the Tenth Circuit did not apply the level of strict scrutiny applicable in equal protection cases.[125]

C. *Reproductive Privacy*

A woman's right to choose abortion falls within the "autonomy" strand of due process privacy interests identified in *Whalen*, the "interest in independence in making certain kinds of important decisions."[126] The landmark abortion case of *Roe v. Wade*[127] continues to spark heated controversy in the area

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Amendment test looks to the individual's subjective intent to keep the information confidential and the objective reasonableness of that expectation. *See* Lawrence J. Leigh, *Informational Privacy: Constitutional Challenges to the Collection and Dissemination of Personal Information by Government Agencies*, 3 HASTINGS CONST. L.Q. 229, 251 (1976); *see also* Falby, *supra* note 36, at 240 (advocating a three-pronged analysis with both subjective and objective components).

122. *See supra* note 112.

123. For an example of ordinarily personal information potentially available to the state under *Nilson*'s public accessibility exception, see Ramie v. City of Hedwig Village, 765 F.2d 490, 492-93 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986), where the plaintiff's driver's license and evidence she attended church regularly precluded any assertion that information concerning her gender or religious beliefs was confidential and protected.

124. *See, e.g., id.*

125. Gerald Gunther has referred to strict scrutiny in the equal protection context as "'strict' in theory and fatal in fact." Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection?*, 86 HARV. L. REV. 1, 8 (1972). Moreover, an earlier Tenth Circuit case directed the district court to apply a balancing standard, rather than a compelling interest standard, to evaluate a due process right to confidentiality claim. *See* Slayton v. Willingham, 726 F.2d 631, 635 (10th Cir. 1984) (directing the district court on remand to determine whether plaintiff's "privacy interest outweighed the public need for . . . disclosure").

126. *Whalen*, 429 U.S. at 599-600; *supra* note 29 and accompanying text.

127. 410 U.S. 113 (1973).

of reproductive freedom.[128] Despite its erosion in *Planned Parenthood v. Casey*,[129] *Roe* remains authoritative in the area of reproductive privacy.[130] In *Roe*, the Court recognized a liberty interest under the Fourteenth Amendment Due Process Clause protecting a woman's right to decide "whether or not to terminate her pregnancy."[131] The Court upheld this privacy right in the absence of a compelling government interest.[132] Because an unborn fetus was not held to be a "person" within the meaning of the Fourteenth Amendment, the state interest in protecting the health and safety of a fetus was not "compelling" enough to override the woman's right to privacy.[133] Legally, the fetus represented only the potentiality of life.[134] Once the fetus reached viability, however, the government's interests in protecting the potential human life and the mother's health became "compelling."[135]

To effectuate its holding, the Court set forth a trimester framework to analyze a state government's power to regulate abortions.[136] During the first trimester, the state could not regulate abortions.[137] Because the risk that abortion posed to the health of the woman increased throughout the pregnancy, the Court reasoned that after the first trimester, the state had a "compelling" interest in protecting the life and health of the mother.[138] Thus, after the first trimester, the state could regulate abortions "to the extent that the regulation reasonably relates to the preservation and protection of maternal health."[139] Because the state had a compelling interest in preserving potential life at viability, the Court held that the state may regulate abortions to protect the fetus after viability.[140] A regulation could even *prohibit* abortions after viability, "except when . . . necessary to preserve the life or health of the mother."[141]

After *Roe*, issues arose regarding the extent to which a state could regulate abortions after viability. In *Thornburgh v. American College of Obstetricians & Gynecologists*,[142] the Supreme Court struck down a statute requiring an abortion method that would give the child the best chance for survival

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128. *See, e.g.*, A. Michael Froomkin, *The Metaphor Is the Key: Cryptography, the Clipper Chip, and the Constitution*, 143 U. PA. L. REV. 709, 842 (1995).

129. 505 U.S. 833 (1992).

130. *Casey*, 505 U.S. at 868-70 ("We conclude that the basic decision in Roe was based on a constitutional analysis which we cannot now repudiate."). *But see* C. Elaine Howard, *The* Roe*'d to Confusion:* Planned Parenthood v. Casey, 30 HOUS. L. REV. 1457, 1475-76 (1993) ("[T]he [*Casey*] Court defined the essential holding [of *Roe*] so narrowly that almost nothing fits inside.").

131. *Roe*, 410 U.S. at 153.

132. *Id.* at 155.

133. *Id.* at 162.

134. *Id.*

135. *Id.* at 162-63.

136. *Id.* at 163.

137. *Id.* When the Court decided *Roe*, current medical data showed that it was possible for the mortality rate of women during childbirth to exceed the mortality rate of women having first trimester abortions. *Id.*

138. *Id.* at 150, 163.

139. *Id.* at 163.

140. *Id.* at 163-64. The point of viability at the time of *Roe* was thought to be between 24-28 weeks, approximately the end of the second trimester. *Id.* at 160.

141. *Id.* at 163-64.

142. 476 U.S. 747 (1986), *overruled in part by* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

unless that method "would present a significantly greater medical risk to the life or health of the pregnant woman" than another form of abortion.[143] The Court found that this provision established a "trade-off" between the health of the woman and the survival of the child.[144] Instead, the right to privacy recognized in *Roe* required that "maternal health be the physician's paramount consideration."[145]

In the early 1990s, responding to a perceived shift in the Court disfavoring the privacy right recognized in *Roe*,[146] several states passed abortion statutes designed to limit a woman's right to privacy in electing abortion.[147] This burst of legislative activity culminated with the Supreme Court addressing the constitutionality of Pennsylvania's abortion statute in *Casey*. The *Casey* Court redefined the standard of review for state restrictions on abortion. Justice O'Connor, writing for a plurality, underscored that "Roe was a reasoned statement, elaborated with great care."[148] The opinion reaffirmed *Roe*'s "central holding that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."[149] The Court also "reaffirm[ed] *Roe*'s holding that 'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'"[150] The Court was troubled, however, by later cases[151] that upheld *Roe*'s requirement that government regulations affecting abortion must always survive strict scrutiny.[152]

In light of this concern, the *Casey* Court modified *Roe*'s strict scrutiny standard and abandoned the trimester system. Instead, to justify a pre-viability regulation, a state must show that the regulation would not "impose[] an undue burden" on a woman's right to choose an abortion.[153] Before viability, the

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143. *Thornburgh*, 476 U.S. at 768.

144. *Id.* at 768-69.

145. *Id.*

146. *See, e.g.*, Jan Gehorsam, *In the Hands of Women*, ATLANTA J. & CONST., Jan. 7, 1992, at D1 (discussing abortion groups organizing in fear that the Court was about to overrule or severely limit *Roe v. Wade* in light of the Court's decision in *Webster* in 1989 and the appointment of Clarence Thomas to the Court).

147. *See* Steve McGonigle, *Near-ban on Abortion Is Rejected*, DALLAS MORNING NEWS, Mar. 9, 1993, at 1A; *see also* Webster v. Reproductive Health Serv., 492 U.S. 490, 491 (1989) ("Roe implies no limitation on a State's authority to make a value judgment favoring childbirth over abortion."). This statement in *Webster* sparked the movement to pass new abortion statutes in the 1990s. Karen S. Conway & Michael R. Butler, *State Abortion Legislation as a Public Good*, ECON. INQUIRY, Oct. 1, 1992, at 609 (predicting the political stance of each state should the Court overturn *Roe*).

148. *Casey*, 505 U.S. at 868-69.

149. *Id.*

150. *Id.* at 877-78 (quoting *Roe*, 410 U.S. at 164-65).

151. *See* Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 427 n.10 (1983) (holding unconstitutional statutory provisions requiring, among other things, parental and informed consent), *overruled by* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

152. *Casey*, 505 U.S. at 870-72. Justice O'Connor reasoned that *Roe*'s trimester framework misconceived the nature of the woman's interests and unnecessarily limited important state interests in preserving potential life and protecting maternal health. *Id.* at 872-74.

153. *Id.* at 874-75. The Court defined an undue burden as a state action having the "purpose

state was still precluded from promulgating regulations prohibiting a woman from making the ultimate decision of whether to terminate the pregnancy.[154] An informed consent requirement and a twenty-four hour waiting period provision, both aimed at ensuring an informed decision, did not impose such a burden because they did not unduly interfere with a woman's ultimate decision.[155] On the other hand, a provision requiring spousal notification prior to abortion did impose an undue burden. Factual findings of spousal abuse convinced the Court that mandatory spousal notification would foreclose "a significant number of women" from making the ultimate decision to have an abortion.[156]

In the aftermath of *Casey*, lower courts questioned how the undue burden standard relates to facial attacks on statutes. In *United States v. Salerno*,[157] the Court had held that a facial challenge must be rejected unless there exists no set of circumstances in which the statute can be constitutionally applied.[158] The *Casey* court, however, invalidated the spousal notification provision even though the provision did not impose an undue burden on women who would have informed their husbands anyway.[159] Despite Justice Scalia's indication that he would apply the *Salerno* rule to the abortion context,[160] Justices O'Connor and Souter have argued that *Casey* abandoned the *Salerno* rule in considering the facial validity of abortion statutes.[161] The next section discusses circuit court decisions addressing abortion restrictions after *Casey* and their application of the undue burden standard.

1. Other Circuits

In *Sojourner T v. Edwards*,[162] the Fifth Circuit addressed a Louisiana abortion statute criminalizing abortions except in instances of rape, incest, or to preserve the life or health of the unborn child or mother.[163] The Fifth

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or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id. See generally* Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 878-92 (1994) (attempting to clarify the proper analysis under the undue burden standard and arguing that the standard looks to both the legislative purpose and to the effect on the individual's right to choose abortion).

154. *Casey*, 505 U.S. at 874-75.

155. *Id.*

156. *Id* at 889-95.

157. 481 U.S. 739 (1987).

158. *Salerno*, 481 U.S. at 745.

159. *Casey*, 505 U.S. at 892-97 ("The proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.").

160. Ada v. Guam Soc'y of Obstetricians & Gynecologists, 506 U.S. 1011 (1992) (Scalia, J., dissenting) (reasoning that restricting facial challenges to statutes allows states to refine the legislative process).

161. Fargo Women's Health Org. v. Schafer, 507 U.S. 1013 (1993) (O'Connor, J., concurring). For a discussion of the expansion of the overbreadth doctrine and facial challenge issues, see generally Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994). This example simply demonstrates the circuits' varied application of *Casey*.

162. 974 F.2d 27 (5th Cir. 1992), *cert. denied*, 507 U.S. 972 (1993).

163. *Sojourner T*, 974 F.2d at 29. Although the Fifth Circuit found it "usually true that if a case can be decided either on statutory or constitutional law, [the court] should address the statutory issue first," the court decided that in light of the "clear holding of *Casey*," and the fact that the plaintiffs brought a facial challenge to the statute's constitutionality, the court could address

Circuit held that the statute, on its face, imposed an undue burden on a woman's right to choose to terminate her pregnancy.[164]

In contrast, in a separate case, the Fifth Circuit upheld the facial constitutionality of a Mississippi abortion law requiring parental consent before minors could obtain abortions.[165] Because the minor could bypass the requirement through a confidential judicial-bypass procedure, the court held that the provision did not, on its face, place an "undue burden" on the minor's privacy interest.[166] The Eighth Circuit similarly upheld as facially constitutional the informed consent provision of a North Dakota statute.[167] The court held that the statute was virtually identical to the Pennsylvania statute at issue in *Casey* and did not impose an "undue burden" on the woman's right to privacy.[168]

2. *Jane L. v. Bangerter*[169]

a. *Facts*

In *Jane L.*, the Tenth Circuit addressed a facial attack on a Utah statute that severely limited access to abortions except in five specific circumstances.[170] The plaintiffs filed a complaint challenging the constitutionality of the Utah statute in 1991.[171] The Supreme Court's decision in *Casey* the following year declared the statute's restrictions on abortions before twenty weeks gestation[172] and its spousal notification provision[173] unconstitutional.[174]

Ruling on the remaining provisions in light of *Casey*, the district court upheld a choice of method provision,[175] a serious medical emergency exception,[176] and severe limitations on post-twenty-week abortions.[177] Sections 307 and 308 of the statute related to choice of method[178] and required that

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the constitutional issues first. *Id.* at 30.

164. *Id.* at 31.

165. Barnes v. Mississippi, 992 F.2d 1335, 1338-39 (5th Cir.), *cert. denied*, 114 S. Ct. 468 (1993).

166. *Id.* at 1341.

167. Fargo Women's Health Org., 18 F.3d at 532-33.

168. *Id.*

169. 61 F.3d 1493 (10th Cir. 1995), *rev'd sub nom.* Leavitt v. Utah, No. 95-1242, 1996 WL 327446 (U.S. June 17, 1996).

170. *Jane L.*, 61 F.3d at 1495.

171. *Id.*

172. UTAH CODE ANN. § 76-7-302(3) (1995).

173. UTAH CODE ANN. § 76-7-304(2) (1995) (requiring a married woman to notify her husband of an abortion).

174. *Jane L.*, 61 F.3d at 1496; *see* Jane L. v. Bangerter, 809 F. Supp. 865, 873-77 (D. Utah 1992), *aff'd in part, rev'd in part*, 61 F.3d 1493 (10th Cir. 1995).

175. UTAH CODE ANN. §§ 76-7-307, 308 (1995). These provisions provide that the medical procedure used must give the unborn child the best chance of survival. *Id.*

176. UTAH CODE ANN. § 76-7-315 (1995) (exempting a woman from certain restrictions in the case of a serious medical emergency).

177. *Jane L.*, 61 F.3d at 1496; *see Jane L.*, 809 F. Supp. at 873-74. Section 76-7-302(3) states, "After 20 weeks gestational age, measured from the date of conception, an abortion may be performed only for those purposes and circumstances described in subsections (2)(a), (2)(d), and (2)(e)." UTAH CODE ANN. §76-7-302(3). These circumstances occurred when the procedure was "necessary to save the pregnant woman's life," "prevent grave damage to the woman's medical health," or prevent "the birth of a child that would be born with grave defects." UTAH CODE ANN. § 76-7-302(2)(a)-(e).

178. The discussion of the *Jane L.* case in this Survey will focus only on those claims impli-

when a post-twenty-week abortion was allowed, the method of abortion should be the one which "would best assure the unborn child's chances of survival unless such a method would gravely damage a woman's medical health."[179] The district court determined that sections 307 and 308 "bore 'a rational relationship to the legitimate state interest in the preservation of viable fetal life'" and held the provisions facially valid.[180]

b. *Decision*

The Tenth Circuit first addressed section 302(3) of the Utah statute that prohibits post-twenty-week abortions except to protect the mother's life, prevents "grave" damage to her health, or prevents the birth of a child with grave defects.[181] The court did not address the claim that section 302(3) facially violated the right to privacy by imposing an "undue burden" on pre-viability abortions. Instead, the Tenth Circuit held the provision invalid because the section was not severable from section 302(2).[182] In spite of the Utah Legislature's express intent to make the statute severable,[183] the court reasoned that ambiguities in the legislative intent made it impossible to determine whether the Utah legislature would have passed section 302(3) without passing section 302(2).[184]

The sole privacy issue that the Tenth Circuit addressed was whether a choice of method provision violated the constitutional right to privacy as redefined in *Casey*. The court concluded that the Utah choice of method provision, on its face, violated the right to privacy.[185] Although *Casey* modified *Roe*'s strict scrutiny standard of review, *Casey* reaffirmed *Roe*'s holding that a state may regulate post-viability abortion "except where it is necessary, in appropriate medical judgment, for the preservation of the life and health of the mother."[186] Therefore, *Thornburgh* still had precedential value in analyzing whether a "choice of method" provision regulating post-viability abortions violates the constitutional right to privacy.[187]

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cating the right to privacy. While plaintiffs asserted that a ban on "experimentation" of "[l]ive unborn children" violated their constitutionally protected right to privacy, the court resolved that issue by declaring the provision was unconstitutionally vague. *Jane L.*, 61 F.3d at 1500-02.

179. *Id.* at 1502; *see* UTAH CODE ANN. §§ 76-7-307, 308.

180. *Jane L.*, 61 F.3d at 1503.

181. *See supra* note 177.

182. *Jane L.*, 61 F.3d at 1499.

183. *See* UTAH CODE ANN. § 76-7-317 (1995).

184. *Jane L.*, 61 F.3d at 1499. This Survey addresses the severability issue only to point out that the Tenth Circuit avoided the underlying constitutional issue in adjudicating § 302(3). The Supreme Court recently reversed, holding the provisions severable under Utah law. *Leavitt*, 1996 WL 327446, at *4. The Court then remanded the case to the Tenth Circuit for further proceedings in light of this determination. *Id.*

185. *Jane L.*, 61 F.3d at 1505.

186. *Id.* at 1504 (quoting *Casey*, 505 U.S. 877-79).

187. *Id.* To strengthen this holding, the court identified "the importance of maternal health . . . [as the] thread that runs from *Roe* to *Thornburgh* and then to *Casey*." *Id.* Whatever *Casey* did to weaken *Roe* and *Thornburgh*, it only reaffirmed the idea that maternal health takes precedence over fetal survival. *Id.*

Thornburgh "emphasized that the woman's health must be the physician's 'paramount consideration.'"[188] The court concluded that the Utah statute's "grave damage to [the woman's] medical health" standard was even more oppressive than the "significantly greater" risk standard in the Pennsylvania statute in *Casey*.[189] Thus the court found the Utah statute unconstitutional under *Thornburgh*.[190]

3. Analysis

a. *The Post-Twenty-Week Abortion Ban*

The district court held that the pre-twenty-week abortion ban imposed an "undue burden" on pre-viability abortions but upheld the post-twenty-week ban against a facial attack.[191] Had the Tenth Circuit found the provisions severable, the court would have had to address the constitutionality of the post-twenty-week ban.[192]

The Utah statute's twenty-week demarcation between viability and non-viability imposes the same type of "rigid construct" as the trimester system in *Roe*.[193] When section 302(3) takes effect at the beginning of the twenty-first week, most fetuses have not reached viability.[194] Thus, the section prohibits some pre-viability abortions. *Casey* held that prohibiting abortion before viability constitutes an undue burden.[195]

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188. *Id.* (quoting *Thornburgh*, 476 U.S. at 768-69).

189. *Id.* at 1503-04. The court found persuasive testimony by expert witnesses defining "grave" as the "[l]oss of structure or function, shortening of life, irremedial pain and suffering, . . . [s]erious, complex, [and] threatening." *Id.* at 1503.

190. The defendants also contended that the "grave damage" standard was the same as the "grave damage" standard a woman must meet to have a post-viability abortion in the first place. *Id.* However, since the court had already reversed the district court and concluded that the post-viability restriction was not severable from the pre-viability provisions and was thus invalid, the defendant's argument lacked force. *Id.* at 1504-05.

191. *Jane L.*, 809 F. Supp. at 871-72 (upholding the provision based on a facial challenge analysis under *Salerno*, 481 U.S. at 745). The district court refused to consider the possibility of a non-viable fetus more than 21 weeks after conception. *Id.* However, the district court noted that the majority in *Casey* had abandoned traditional facial challenge analysis in favor of an undue burden standard combined with a facial challenge analysis. *Id.* at 872 n.10. Thus, at the very least, the constitutionality of this provision is questionable.

192. The Tenth Circuit's analysis under Utah severability law is extremely tenuous. *See supra* note 184. Harris v. McRae, 448 U.S. 297, 306-07 (1980), established a prudential limitation requiring a federal court to avoid constitutional issues when alternative grounds are available. *But see Sojourner T*, 974 F.2d at 30 (finding facts and procedural posture of facial attack on a similar statute warranted dispensing with the *Harris* requirement).

193. *Casey*, 505 U.S. 870-72. Justice O'Connor's opinion repeatedly denounced the trimester framework as being inconsistent with the "essential holding" in *Roe*, that a woman has a right to terminate her pregnancy before viability. *Id.* at 833-34. O'Connor found that although *Roe* had been a "reasoned statement, elaborated with great care," its arbitrary act of "judicial line drawing" demanded reconsideration. *Id.* at 870. *But see supra* text accompanying notes 149-50.

194. *See* John M. Swomley, *Abortion and Public Policy*, ST. LOUIS U. PUB. L. REV. 409, 410 (1993) (identifying lung development as the most significant factor preventing medical technology from reaching a viability point of less than about 24 weeks).

195. *Casey*, 505 U.S. at 878-901; *see* Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting* Casey *in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2050-51, 2089 n.137 (1994) (arguing for a per se rule against facially undue burdens, and noting that the Utah provision violated *Casey* as a facially undue burden on the right to choose to terminate one's pregnancy).

The Tenth Circuit's finding that sections 302(2) and 302(3) were not severable allowed the court to avoid addressing the constitutional issues implicated in section 302(3). The Supreme Court's recent reversal on the severability issue will force a determination of the constitutional issues on remand.

b. *The Choice of Method Provision*

Based on the court's rejection of strict scrutiny in *Casey*, the district court upheld the choice of method provision as rationally related to a legitimate state purpose on the belief that *Casey* meant the Court no longer considered the woman's interest fundamental.[196] In contrast, the Tenth Circuit continued to hold maternal health paramount over any state interest in potential life.[197] The Tenth Circuit's analysis reflects an understanding that *Casey* did not devalue or recharacterize the fundamental nature of the woman's privacy interest. It simply reminded courts that states also have legitimate interests related to abortion which courts should protect when they do not burden the woman's right to choose abortion.

D. *Conclusion*

In deciding *Sheets* and *Nilson*, the Tenth Circuit better defined the boundaries of the confidentiality branch of privacy under the Fourteenth Amendment. The *Lichtenstein* test remains problematic after *Sheets* and *Nilson* because it fails to adequately consider legitimate state interests. This problem occurs even when disclosure would cause little or no harm to the individual. Although the test as applied in prior cases produced results similar to the majority balancing approach, the Tenth Circuit's test may produce inconsistent results in future cases.

Conversely, in *Jane L.*, the Tenth Circuit heeded the Supreme Court's directive to more thoughtfully consider both the individual's interest and legitimate state interests. Perhaps, however, the court avoided an easily addressable constitutional issue. Only when courts test the undue burden doctrine will its true effectiveness as a balance between state and individual interests be revealed.

II. THE FAIR HOUSING ACT

A. *Background*

1. General Background

Congress enacted the Fair Housing Act ("FHA," "the Act," or "Title VIII") in 1968.[198] The declaration of policy in the statute states, "It is the policy of the United States to provide, within constitutional limitations, for fair

196. *Jane L.*, 809 F. Supp. at 875-76 n.25.

197. *Jane L.*, 61 F.3d at 1504.

198. Pub. L. No. 90-284, 82 Stat. 81 (1968) (current version at 42 U.S.C. §§ 3601-31 (1994)) [hereinafter FHA].

housing throughout the United States."[199] This statement, coupled with comments made during floor debate on the original act,[200] clearly indicate that Congress intended a broad interpretation of the Act's provisions. Originally, the FHA prohibited discrimination in the rental and sale of any "dwelling"[201] on the basis of race, color, religion, or national origin.[202] In 1974, Congress amended the Act to prohibit discrimination on the basis of gender.[203] In 1988, Congress drafted the Fair Housing Amendments Act (FHAA).[204] The FHAA prohibited discrimination based on familial status or handicap in the sale or rental of housing or in the terms, conditions, or privileges of such sale or rental.[205] The cases in Part II focus on two of the protected classes, familial status[206] and handicapped persons.[207]

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199. *Id.* § 801.

200. For Senator Mondale's comments during the Senate floor debate, see *infra* note 243.

201. Congress defined the term "dwelling" as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof." FHA § 802(b).

202. Id. § 804.

203. Act of Aug. 22, 1974, Pub. L. No. 93-383, § 808(b)(1), 88 Stat. 729 (1974).

204. Pub. L. No. 100-430, 102 Stat. 1619, 1620 (1988).

205. *Id.* § 6 (codified as amended at 42 U.S.C. § 3604(f)(1) (1994)).

206. The FHAA defines "familial status" as

> one or more individuals (who have not attained the age of 18 years) being domiciled with—(1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

42 U.S.C. § 3604(k). The definition also applies to persons who are pregnant or "in the process of securing legal custody of any individual who has not attained the age of 18 years." *Id.* § 3604(k). The Act places a single individual within the definition of "family." *Id.* § 3602(c) (1994). The Act, however, does not protect that individual from discrimination unless she falls within the definition of "familial status." *Id.* § 3604(k). Marital status is not a basis for protection unless the couple has standing as members of another protected class. *See id.* §§ 3604-06 (1994); James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1106-07 (1989).

207. The Act defines "handicap" as

> (1) a physical or mental impairment which substantially limits one or more of the person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of Title 21).

42 U.S.C. § 3602(h). Congress suggests a broad definition of "handicap," as the Act protects not only actual physical and mental disabilities but also protects persons who may be perceived by others as having such disabilities. Although the definition specifically leaves out "current" use of illegal controlled substances, courts have held that patients in drug rehabilitation programs fall within the statute. *See* United States v. Southern Mgmt. Corp., 955 F.2d 914, 919 (4th Cir. 1992); Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 459 (D.N.J. 1992).

Other examples of persons having "handicaps" within the meaning of the FHA include persons infected with the human immunodeficiency virus (HIV). *See* Support Ministries for Persons with AIDS, Inc. v. Village of Waterford, 808 F. Supp. 120, 132 (N.D.N.Y. 1992); Baxer v. City of Belleville, 720 F. Supp. 720, 730 (S.D. Ill. 1989). Persons suffering from multiple sclerosis are also "handicapped" under the FHA. *See* Shapiro v. Cadman Towers, Inc., 844 F. Supp. 116, 123 (E.D.N.Y. 1994). Last, elderly persons under daily care are included under the FHA. "K" Care, Inc. v. Town of Lac du Flambeau, 510 N.W.2d 697, 700 (Wis. Ct. App. 1993). *See generally* William D. McElyea, *The Fair Housing Act Amendments of 1988: Potential Impact on Zoning Practices Regarding Group Homes for the Handicapped*, ZONING AND PLAN. L. REP., Sept. 1989, at 148 (stating that "[t]he definition of 'handicap' in the Fair Housing Act Amendments . . . is broad, and designed to protect a wide range of people from housing discrimination").

2. Discrimination Under the FHA

The Act prohibits several types of discriminatory conduct.[208] Owners or brokers may not refuse to sell or rent property, or negotiate for sale or rental, on a discriminatory basis.[209] Owners and brokers may not discriminate in the terms, conditions, or privileges of a real estate transaction,[210] misrepresent housing availability,[211] or discriminate in advertising the sale or rental of property.[212] In addition, brokers may not engage in "blockbusting."[213]

The Act may also impose liability on municipal defendants.[214] Plaintiffs have successfully challenged discriminatory municipal zoning laws and official policies under the FHA.[215]

3. Exemptions

Although the FHA sweeps broadly, prohibiting a wide variety of discriminatory practices in the sale and rental of housing, the Act provides for several exemptions. Two exemptions are relevant to this Survey.[216] First, government entities may pass restrictions reasonably limiting the number of occupants in dwellings.[217] Second, provisions prohibiting discrimination based on familial status do not apply to "housing for older persons."[218] Courts, however, interpret these exemptions narrowly.[219]

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208. For a more detailed discussion on what types of discriminatory practices are prohibited by the Act, see Jennifer J. Ryan, *A Real Estate Professional's and Attorney's Guide to the Fair Housing Law's Recent Inclusion of Familial Status as a Protected Class*, 28 CREIGHTON L. REV. 1143, 1148-54 (1995).

209. 42 U.S.C. § 3604(a)(f)(2). This type of conduct is commonly known as "steering." *See* Ryan, *supra* note 208, at 1148.

210. 42 U.S.C. § 3604(b); *see* Ryan, *supra* note 208, at 1149-50.

211. 42 U.S.C. § 3604(d); *see* Ryan, *supra* note 208, at 1150.

212. 42 U.S.C. § 3604(c); *see* Ryan, *supra* note 208, at 1150-53.

213. "Blockbusting" means inducing a landowner to sell or rent property by representing to that landowner that renting or selling to a particular class of people will cause adverse effects, such as reduced property values. *See* Ryan, *supra* note 208, at 1154; *see also* 42 U.S.C § 3604(c) (discussing the prohibition of "[a]ttempt[ing] to induce any person to sell or rent a dwelling . . . [to] persons of a race, color, religion, sex, handicap, familial status, or national origin).

214. A municipality is a "person" as defined in §§ 3602 and 3613 of the FHA and can thus be liable under the Act. United States v. City of Black Jack, 508 F.2d 1179, 1183-84 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

215. *See, e.g., id.* at 1186. In similarly postulated cases, plaintiffs have alleged a violation of § 3604(a), claiming that the city has denied them an opportunity to rent or buy housing, or have alleged a violation of § 3617, claiming that the city interfered with their right to "equal housing opportunity." *See id.* at 1181; Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 130 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights (Arlington Heights II), 558 F.2d 1283, 1287 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

216. In addition to the exemptions discussed in this section, religious organizations and private clubs who own dwellings may limit the sale, rental, or occupancy of those dwellings or give preference to their members. *Id.* § 3607(a). Also, owners may refuse to sell or rent property to any person who has previously been convicted of "the illegal manufacture or distribution of a controlled substance as defined in § 802 of Title 21." 42 U.S.C. § 3607(b)(4) (1994).

217. *Id.* § 3607(b)(1).

218. *Id.*

219. *See* City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802, 804 (9th Cir.) (holding "a broad remedial statute . . . must be read narrowly"), *aff'd*, 115 S. Ct. 1176 (1995).

4. Administrative Procedure

When seeking redress for injuries caused by discriminatory housing practices, "aggrieved person[s]" may file an administrative claim or bring a civil cause of action under the FHA.[220] Because the Act provides for both administrative and judicial remedies, a plaintiff may pursue either course without exhausting administrative remedies.[221] However, when a claimant chooses to file an administrative claim with the Secretary of the Department of Housing and Urban Development (HUD), specific procedures of the FHA apply.[222] The individual claimant may also seek an adjudicatory administrative hearing under § 3612.[223]

5. Theories of Discrimination Under the FHA

Courts have recognized two theories of discrimination under the FHA: disparate treatment discrimination and disparate impact discrimination.[224] The cases surveyed in this article address both theories.

a. *Disparate Treatment Discrimination*

The most obvious type of housing discrimination arises where a defendant intentionally discriminates against a plaintiff with protected status.[225] To intentionally discriminate, the defendant's policy must, on its face, treat the harmed party differently from other persons. A tenancy policy in which

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220. 42 U.S.C. § 3613(a)(1)(A) (1994). An "'aggrieved person' includes any person who—(1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. § 3602(i). Thus, even individuals who are not a members of one of the classes against which the Act expressly prohibits discrimination may still find protection as "aggrieved person[s]." *See* HUD v. Blackwell, 908 F.2d 864, 874 (11th Cir. 1990) (finding violation of FHA where white lessors preferred to sell a house to a white family over an African-American family). Of course, the plaintiff must also meet constitutional standing requirements to maintain an action under the FHA. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 372 (1982).

221. *See* Oxford House, Inc. v. City of Virginia Beach, 825 F. Supp. 1251, 1260 (E.D. Va. 1993). However, plaintiffs who have already entered into a conciliation agreement concerning the allegedly discriminatory conduct or initiated proceedings at the administrative level may not seek relief in federal court before exhausting the administrative process. 42 U.S.C. §§ 3613(2)-(3) (1994).

222. *See* 42 U.S.C. §§ 3610(a)-(g) (1994) (establishing, in part, period of limitations, notice requirements, and proper conciliation procedures).

223. *Id.* § 3612(a). The Act affords the parties the opportunity to "be represented by counsel, present evidence, cross-examine witnesses, and obtain the issuance of subpoenas." *Id.* § 3612(c). The hearing takes place before an Administrative Law Judge (ALJ), "no later than 120 days following the issuance of the charge, unless it is impracticable to do so." *Id.* § 3612(g)(1). Within 60 days after this hearing, the Act directs the ALJ to make "findings of fact and conclusions of law" and issue the appropriate civil penalty or dismiss the case. *Id.* § 3612(g)(2)-(7). The Secretary has the power to review these findings and conclusions for up to 30 days after the ALJ issues them. *Id.* § 3612(h)(1). If the Secretary does not review the order within 30 days, the order becomes final. *Id.* At this point, "[a]ny party aggrieved by a final order for relief . . . granting or denying in whole or in part the relief sought may obtain a review of such order." *Id.* § 3612(i)(1).

224. Different sources have referred to the concept of disparate impact as discriminatory impact, discriminatory effect, and disproportionate impact. For a discussion of the various names for the doctrine, see Comment, *Justifying a Discriminatory Effect Under the Fair Housing Act: A Search for the Proper Standard*, 27 UCLA L. REV. 398 n.8 (1979) [hereinafter Comment].

225. *See supra* text accompanying notes 202-05.

prospective tenants must be white to qualify, for example, clearly falls within this category. This type of discrimination is known as "disparate treatment" discrimination because it involves "differential treatment of similarly situated persons."[226] A plaintiff may recover under the FHA by demonstrating that the defendant intended to discriminate and that the defendant committed one of the discriminatory actions prohibited by the FHA.[227]

Plaintiffs may prove discriminatory intent in several different ways. Providing actual evidence of intent to discriminate is the surest way to meet the standard. The Act does not require malevolent or unlawful intent, but simply intent to treat a protected class differently than other persons.[228] Courts may also infer intent by examining circumstantial factors, such as discriminatory effect on the injured party.[229] Once a plaintiff presents sufficient evidence of discriminatory intent, defendants may avoid liability if they can justify their actions based on a "legitimate nondiscriminatory business purpose."[230] The FHA does not require, however, that a plaintiff show discriminatory intent as the sole motivating factor for the challenged practice or conduct. Under the Act, a plaintiff must merely prove that discriminatory intent was a "significant factor" in the decision to initiate the discriminatory conduct.[231]

Proving intent in FHA discrimination cases is often difficult.[232] Moreover, actions not motivated by a discriminatory purpose often cause minorities as much or more harm than blatantly discriminatory actions.[233] For these reasons, courts have allowed plaintiffs to prove FHA discrimination by showing a discriminatory effect on a protected group.[234]

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226. NAACP v. Town of Huntington, 844 F.2d 926, 933 (2d Cir. 1988), *aff'd in part*, 488 U.S. 15 (1988).

227. Honce v. Vigil, 1 F.3d 1085, 1088 (10th Cir. 1993) ("The ultimate question in a disparate treatment case is whether the defendant intentionally discriminated against [the] plaintiff.").

228. *See* UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991) (discussing discriminatory intent in the employment context); United States v. Reece, 457 F. Supp. 43, 48 (D. Mont. 1978) (explaining how complainants can prove discriminatory intent in the context of renting apartments).

229. Two circuits have addressed claims involving private defendants and facially neutral policies where other evidence indicated discriminatory motives. United States v. Mitchell, 580 F.2d 789, 791 (5th Cir. 1978) (applying disparate impact as a way to prove unlawful steering where evidence suggested an apartment owner confined blacks to a specific area of the complex); Williams v. Matthews Co., 499 F.2d 819, 828 (8th Cir.) (considering fact that developer's policy to sell lots only to approved builders who would not build for blacks was "fraught with racial overtones" in finding disparate impact discrimination), *cert. denied*, 419 U.S. 1021 (1974). *But see* Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1534 (7th Cir. 1990) (holding that with private defendants, evidence of discriminatory impact is merely evidence of intent).

230. Betsey v. Turtle Creek Assocs., 736 F.2d 983, 989 (4th Cir. 1984); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 241-44 (1989) (recognizing "significant factor" doctrine in employment context).

231. Burris v. Wilkins, 544 F.2d 891, 891 (5th Cir. 1977).

232. *Black Jack*, 508 F.2d at 1185 (recognizing "clever men may easily conceal their motivations").

233. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988) (noting that "some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination").

234. *See, e.g.*, *Black Jack*, 508 F.2d at 1184-85 (discussing how a protected group can prove discriminatory effect to demonstrate FHA discrimination).

b. *Disparate Impact Discrimination*

The concept of disparate impact or disparate effect as proof of discrimination finds its roots in the context of employment discrimination under Title VII as discussed in *Griggs v. Duke Power Co.*[235] In *Griggs*, the employer required applicants to have a high school education and pass standardized tests in order to qualify for employment.[236] This policy resulted in whites obtaining nearly all jobs in the most desirable departments.[237] Finding that the purpose of Title VII was to eliminate discriminatory preference for any group over another,[238] the Supreme Court held the Act not only proscribed overt discrimination but also practices "fair in form, but discriminatory in operation."[239] Mindful of the defendant's interest in qualified employees, the Court required that defendant show a "business necessity" to justify the policy.[240] The Court held the policy violated the Act because the defendant had not sufficiently demonstrated that its hiring policy reasonably measured an applicant's ability to perform on the job.[241]

The Court's analysis in *Griggs* set forth the disparate impact doctrine that later emerged in FHA law. In applying *Griggs* to Title VIII housing discrimination cases,[242] the appellate courts have found many similarities between Title VIII and Title VII, including legislative history,[243] purpose, and structure.[244] Based on these similarities, courts have concluded that the employment law approach should apply in the housing context.[245]

The plaintiff must first establish a prima facie case in a disparate impact discrimination claim under the FHA.[246] Courts will then either shift the

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235. 401 U.S. 424 (1971).
236. *Griggs*, 401 U.S. at 427-28.
237. *Id.*
238. *Id.* at 431.
239. *Id.*
240. *Id.*
241. *Id.*
242. *Town of Huntington*, 844 F.2d at 934; *Betsey*, 736 F.2d at 987; Halet v. Wend Inv. Co., 672 F.2d 1305, 1311 (9th Cir. 1982); *Mitchell*, 580 F.2d at 791; *Rizzo*, 564 F.2d at 147-48; *Arlington Heights II*, 558 F.2d at 1288-89; *Black Jack*, 508 F.2d at 1184-85.
243. Legislative history suggests that Congress did not intend to require proof of discriminatory intent to sustain a violation of the FHA. During floor debate on the FHA, Senator Mondale remarked that the best way to ensure fair housing is to eliminate segregation. 114 CONG. REC. 3422 (1968). One commentator reasoned that unless the courts interpret the statute to prohibit all de facto discrimination, they could not ensure an end to segregation. Comment, *supra* note 224, at 406. Thus, a discriminatory effect approach is necessary to honor legislative intent. The Seventh Circuit accepted this reasoning in *Town of Huntington*, 844 F.2d at 934. Furthermore, the Senate rejected an amendment that would have made proof of intent a necessary element in any case of discrimination under the FHA. *Rizzo*, 564 F.2d at 147; *cf. Town of Huntington*, 844 F.2d at 935 (narrowing *Rizzo* by pointing out that the proposed amendment would only have applied to single-family owner-occupied houses).
244. Courts have noted many similarities between Title VIII and Title VII. *Town of Huntington*, 844 F.2d at 935. Congress enacted both statutes as part of a scheme of civil rights legislation intended to end racial discrimination. *Id.* The two statutes also have similar proof requirements. *Id.*
245. Courts have also pointed to practical concerns, such as the difficulty in proving motivation for a discriminatory practice, as a final reason why the disparate impact analysis from Title VII should apply under the FHA. *Id.*; *Black Jack*, 508 F.2d at 1185.
246. *E.g.*, Williams v. Matthews Co., 499 F.2d 819, 826-27 (8th Cir. 1974) (noting that "the concept of 'prima facie case' applies to discrimination in housing").

burden to the defendant to show some level of nondiscriminatory justification, like a "business necessity,"[247] or they will apply a balancing test[248] to determine whether the defendant is liable under the FHA.

The Eighth Circuit announced the basic elements of a prima facie case of disparate impact discrimination in *United States v. City of Black Jack*.[249] To show disparate impact discrimination, a plaintiff must demonstrate that a specific policy of the defendant actually results or predictably will result in racial discrimination.[250] The *Black Jack* court determined that plaintiffs established a prima facie case where a zoning ordinance banned multiple family dwellings in an area with a 99% white population.[251]

Plaintiffs often use statistical evidence to show discriminatory effect. The circuit courts do not agree, however, on what statistics sufficiently demonstrate a prima facie case of discriminatory impact. There are at least two ways to show discriminatory effect.[252] The first way to show a measurable adverse impact on a specific racial group.[253] The second is to show that the action resulted in harm to the community by perpetuating segregation.[254]

Once a plaintiff establishes a prima facie case of housing discrimination under the Act, some courts apply a balancing test to determine whether to impose liability for the practice having a discriminatory effect.[255] The Seventh Circuit, in *Metropolitan Housing Development Corp. v. Village of Arlington Heights* (*Arlington Heights II*),[256] adopted the first of these tests. The *Arlington Heights II* four-part test examines: (1) the strength of the plaintiff's showing of discriminatory effect; (2) the evidence of some discriminatory intent on the part of the defendant;[257] (3) the defendant's interest in

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247. *See, e.g., Betsey*, 736 F.2d at 988-89.

248. *See, e.g., Arlington Heights II*, 558 F.2d at 1291-92 (applying a four-part test).

249. 508 F.2d 1179, 1184 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

250. *Black Jack*, 508 F.2d at 1184.

251. *Id.* at 1186. Although the city passed the ordinance before the construction of such dwellings, the court found "ample proof" that blacks would have lived in the planned development of townhouses had the plaintiffs been allowed to construct them. *Id.* Thus, discrimination was *predictable* because the zoning ordinance perpetuated segregation and limited the opportunities of blacks to live in Black Jack. *Id.*

252. *Arlington Heights II*, 558 F.2d at 1290 (citing effects on a racial group and effect on a community).

253. *See, e.g., Rizzo*, 564 F.2d at 143 (finding prima facie case of discrimination where minorities constituted 95% of the waiting list for public housing).

254. *See Town of Huntington*, 844 F.2d at 937 (finding prima facie case of discrimination because, although proposed housing project intended a minority population of 25%, allowing it to be built would serve to begin desegregating a community which was currently 98% white). In *Black Jack*, instead of looking at the statistical data to see what percentage of blacks compared to whites living in the metropolitan area would be barred from living in the area to which the zoning ordinance applied (which was 32% of blacks compared with 29% of whites), the court focused on years of "deliberate racial discrimination" which effectively barred 85% of blacks living in the metropolitan area from being able to live in Black Jack. *Black Jack*, 508 F.2d at 1186.

255. *See, e.g., Arlington Heights II*, 558 F.2d at 1290 (applying a four-part test).

256. 558 F.2d 1283 (7th Cir. 1977).

257. Even when adopting the test, the Seventh Circuit admitted that the second element, evidence of discriminatory intent, merits the least weight in the test. *Arlington Heights II*, 558 F.2d at 1292. Subsequent decisions adopting the other elements of the test have left out the second element completely. Arthur v. City of Toledo, 782 F.2d 565, 575 (6th Cir. 1986). The Seventh Circuit has noted that when evidence of intent presents itself, such evidence inevitably weighs in

taking the action complained of; and (4) whether the plaintiff seeks "to compel the defendant to affirmatively provide housing for members of minority groups or merely restrain the defendant from interfering with individual property owners who wish to provide such housing."[258] The Fourth and Sixth circuits have adopted similar tests in cases involving municipalities.[259]

Although the requirements for a prima facie case also apply to the first element of the *Arlington Heights II* test, courts do not use the test as an alternative to the prima facie case requirement from *Black Jack*.[260] Instead, courts weigh the evidence the plaintiff presents when establishing a prima facie case as part of the determination on the merits.[261] In jurisdictions applying this test, the minimum evidence needed to prevail on the merits provides the threshold for a prima facie case.

Courts that apply some version of the *Arlington Heights II* balancing test consider the defendant's justification in evaluating her interest.[262] Other courts shift the burden to the defendant to show some business necessity or other justification when the plaintiff establishes a prima facie case of discriminatory impact.[263] The *Black Jack* court required a "compelling government interest" to overcome a prima facie case. Subsequent decisions by the courts reserve such an onerous burden for equal protection analysis and apply a less stringent standard.[264] The Third Circuit, in *Resident Advisory Board v. Rizzo*,[265] first articulated the majority view which later courts have used to evaluate cases involving municipal defendants.[266] This approach analyzes

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favor of the plaintiff when viewing the other considerations. *Arlington Heights II*, 558 F.2d at 1292; *see also Matthews Co.*, 499 F.2d at 828 (considering "racial overtones" in rejecting defendant's business justification for a practice which was racially discriminatory in effect).

258. *Arlington Heights II*, 558 F.2d at 1290.

259. *See Arthur*, 782 F.2d at 575 (refusing to adopt the second element); Smith v. Town of Clarkton, 682 F.2d 1055, 1065 (4th Cir. 1982). The Second Circuit, although applying the Eighth Circuit's burden-shifting test to a municipal defendant, considered the third and fourth factors of the *Arlington Heights II* test. *Town of Huntington*, 844 F.2d at 936. The Fourth Circuit has expressly refused to apply the test to cases involving private defendants. *Betsey*, 738 F.2d at 989 n.5.

260. *See Town of Huntington*, 844 F.2d at 935-36; *Rizzo*, 564 F.2d at 148 n.32. The Second Circuit said that the test is to be considered in a "final determination on the merits," not when considering the plaintiff's burden of establishing a prima facie case. *Town of Huntington*, 844 F.2d at 935.

261. *Town of Huntington*, 844 F.2d at 935-36.

262. *See Arthur*, 782 F.2d at 577; *Smith*, 682 F.2d at 1065.

263. *E.g., Town of Huntington*, 844 F.2d at 940 (considering the fourth *Arlington Heights II* factor in a burden-shifting analysis); *Betsey*, 736 F.2d at 988-89. The Eighth circuit has consistently applied the burden-shifting approach to cases involving both private and public defendants. *See Matthews Co.*, 499 F.2d at 828-29 (involving a private defendant).

264. *Rizzo*, 564 F.2d at 148.

265. 564 F.2d 126 (3d Cir. 1977).

266. *Rizzo*, 564 F.2d at 148-49; *see Town of Huntington*, 844 F.2d at 939. In *Griggs* and other employment cases, courts have considered whether the test having a discriminatory effect was "substantially related to job performance." *Rizzo*, 564 F.2d at 148. The *Rizzo* court could not identify a single objective in the housing context by which to analyze all of a defendant's potential legitimate justifications. *Id.* at 149; *see also Town of Huntington*, 844 F.2d at 936 (noting that "in Title VIII cases there is no single objective like job performance to which the legitimacy of the facially neutral rule may be related"). The provider of housing is principally interested only in the tenant's ability to pay, maintaining the value of her property, and maintaining the health and safety of her tenants. The court in *Rizzo* noted that "the consequences of an error in admitting a tenant do not seem nearly as severe as, for example, the consequences of an error in hiring an

defendant justifications on a case-by-case basis[267] under two guidelines. First, the housing practice complained of must serve a "legitimate, bona fide interest of the Title VIII defendant."[268] Second, the defendant must show that no alternate, less discriminatory action was available to serve the defendant's interest.[269]

Only the Fourth Circuit has distinguished between private and public defendants in evaluating the defendant's justification.[270] In a case involving a private defendant, the Fourth Circuit held that to rebut a prima facie case, the defendant must show a "business necessity sufficiently compelling to justify the challenged practice."[271]

The Fourth Circuit's decision in *Smith v. Town of Clarkton*[272] emphasizes the importance of the final element of the *Arlington Heights II* test. The *Smith* court held that by withdrawing from a joint low income housing authority, and thereby blocking the construction of a proposed low-income housing project to be financed by HUD, the municipal defendant discriminated against the plaintiff because of his race.[273] At the same time, however, the court reversed that part of the lower court ruling requiring the city to *build* low-income housing from its own local treasury.[274]

B. *Tenth Circuit Decisions*

1. *Bangerter v. Orem City Corp.*[275]

a. *Facts*

In *Bangerter v. Orem City Corp.*, the Tenth Circuit addressed a claim of housing discrimination based on both disparate treatment and disparate impact.[276] A Utah state hospital discharged the mentally handicapped plaintiff and placed him in a group home with two other mentally handicapped men.[277] The group home was located in a zoning district designated as "single family" with a number of exceptions that allowed for group homes.[278]

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unqualified airline pilot." *Rizzo*, 564 F.2d at 148-49.

267. *Rizzo*, 564 F.2d at 149.

268. *Id.*

269. *Id.*

270. *See Betsey*, 736 F.2d at 985 (considering claim that an adults-only policy had a racially discriminatory effect). For a related view, compare *Smith*, 682 F.2d at 1058-59, considering claim against municipal defendant, *Rizzo*, 564 F.2d at 150, and *Matthews Co.*, 499 F.2d at 828-29, requiring less restrictive alternative analysis to justify a private developer's policy of selling to only approved builders.

271. *Betsey*, 738 F.2d at 988.

272. 682 F.2d 1055 (4th Cir. 1982).

273. *Smith*, 682 F.2d at 1055.

274. *Id.* at 1069. The court held that requiring a municipality to build the housing project would "be an unwarranted intrusion into Clarkton's local governmental function, disproportionate to the wrong committed." *Id.* at 1069-70. Subsequently, in *Betsey*, the Fourth Circuit interpreted the element to apply only to government defendants. *Betsey*, 736 F.2d at 988 n.5.

275. 46 F.3d 1491 (10th Cir. 1995).

276. *Bangerter*, 46 F.3d at 1494.

277. *Id.*

278. *Id.* The exceptions included "nurses' homes, foster family care homes, convents, monasteries, rectories . . . and group homes for the elderly." *Id.*

The city allowed group homes for the mentally and physically handicapped in this zoning district only on the condition that they obtain a conditional use permit.[279] State statutory conditions[280] also required the facility operator to assure proper 24-hour supervision and the establishment of a community advisory committee that allowed neighbors to address concerns.[281]

The home's operator, RLO, Inc., had not obtained a conditional use permit when the plaintiff moved in but later applied for the permit at the city's insistence.[282] The city granted the permit subject to the two restrictions noted above.[283] After the plaintiff was transferred out of the city, he filed an action against Orem City alleging (1) that the FHA preempted the conditions the Utah statute imposed and such conditions violated the FHAA, and (2) that the application process violated the FHAA by requiring the plaintiff to subject himself to threats and disparaging remarks in public hearings.[284]

In granting defendant's motion to dismiss on both claims, the district court characterized the claim as one of discriminatory effect.[285] The district court found that Bangerter had established a prima facie case by showing that the statute treated handicapped persons differently from non-handicapped.[286] The district court ruled, however, that the requirements "rationally related to the [city's] legitimate government interest of integrating the handicapped 'into normal surroundings,'" and dismissed the complaint.[287]

b. *Decision*

The Tenth Circuit reversed, finding that the district court mischaracterized the nature of the discrimination claim, applied the incorrect standard of review, and improperly granted the motion to dismiss.[288] Reviewing relevant employment cases on the issue, the court first noted that "discriminatory treatment" does not require malevolent intent,[289] but rather a showing of "explicitly differential" treatment of a protected group.[290] In light of this distinction, the Tenth Circuit held that when a plaintiff challenges "facially discriminatory actions," rather than "the effects of facially neutral actions," the court should decide plaintiff's claim under a disparate treatment analysis and not a disparate

279. *Id.* According to the record before the Tenth Circuit, the conditional use permit requirement only applied to group homes for handicapped and not to any of the other types of group homes listed. *Id.* at 1495 n.1.

280. *Id.* at 1495 n.2; *see* UTAH CODE ANN. § 10-9-2.5 (1992).

281. *Bangerter*, 46 F.3d at 1495 n.2.

282. *Id.* at 1495-96.

283. *Id.* at 1496 & n.6. A third restriction required psychiatric certification to ensure residents were not violent. *Id.*

284. *Id.* at 1496.

285. *Id.* at 1497 n.9.

286. *Id.* at 1496.

287. *Id.* at 1497.

288. *Id.* at 1500.

289. *Id.* at 1501.

290. *Id.*

impact analysis.[291] The court concluded that the district court improperly characterized Bangerter's claim as one of disparate impact.[292]

Thus, the Tenth Circuit analyzed Bangerter's claims under a disparate treatment analysis. First, Bangerter made out a prima facie case of disparate treatment when he alleged that Orem imposed restrictions on group homes for handicapped that it did not impose on other group homes.[293] Next, the Tenth Circuit held that the district court erred in applying a "rational relationship" standard of review in analyzing the defendant's justifications for the discriminatory policy.[294] Instead, the Tenth Circuit looked to the FHAA itself, the statute's legislative intent, and interpretive decisions to determine what justifications, if any, Congress thought adequate to support a facially discriminatory law or policy.[295]

The Tenth Circuit identified two justifications for the discriminatory restrictions. First, § 3604(f)(9) of the FHAA permits "reasonable restrictions on the terms or conditions of housing when justified by public safety concerns."[296] The court cautioned that such restrictions "must be tailored to particularized concerns about individual residents," not to "blanket stereotypes about the handicapped."[297] The restrictions must also bear a "necessary correlation to the actual abilities of the persons upon whom it is imposed."[298] Second, a defendant may impose special zoning restrictions applicable only to handicapped persons where the restrictions benefit the handicapped.[299] The benefit such restrictions provide to the handicapped persons, however, must "clearly outweigh" the burden they impose.[300] Furthermore, like safety measures, restrictions intended to benefit the handicapped must be "narrowly tailored" to the special needs of the particular individuals affected by them.[301]

Thus, *Bangerter* distinguished between disparate impact and disparate treatment and held that courts should look to the expressed and implied FHA

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291. *Id.*

292. *Id.*

293. *Id.* at 1502; *see* Honce v. Vigil, 1 F.3d 1085, 1088 (10th Cir. 1993) (noting that "the ultimate question in a disparate treatment case is whether the defendant intentionally discriminated against plaintiff").

294. *Bangerter*, 46 F.3d at 1503. The "rational relationship" test, applicable to equal protection claims not involving a suspect class was inappropriate since the plaintiff's complaint sought relief under the FHA, not the Fourteenth Amendment. *Id.*

295. *Id.*

296. *Id.*; *see* 42 U.S.C. § 3604(f)(9) (permitting denial of housing based on a "direct threat to the health or safety"). The court reasoned that if a defendant may deny housing altogether for this purpose, then certainly it may impose reasonable restrictions. *Bangerter*, 46 F.3d at 1503.

297. *Bangerter*, 46 F.3d at 1503; *see* H.R. Rep. No. 100-711, 100th Cong., 2d Sess. 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2179.

298. *Bangerter*, 46 F.3d at 1504 (quoting Potomac Group Home Corp. v. Montgomery County, 823 F. Supp. 1285, 1300 (D. Md. 1993)). On remand, the court directed the district court to consider the extent of the residents' mental disabilities, the scope of the restrictions, and whether the restrictions reasonably addressed safety concerns arising from the residents' handicaps. *Id.*

299. *Id.* The court stated that "the FHAA should not be interpreted to preclude special restrictions upon the disabled that are really beneficial to, rather than discriminatory against, the handicapped." *Id.*

300. *Id.*

301. *Id.* The defendant must also show that there is no less restrictive alternative that would serve the same purpose. *Id.* at 1505.

exemptions when analyzing a defendant's justification for a facially discriminatory policy. The next case discusses the standard when dealing with justifications for facially neutral policies having a discriminatory effect.

2. *Mountain Side Mobile Estates Partnership v. Secretary of HUD*[302]

a. *Facts*

In *Mountain Side*, the Tenth Circuit adopted disparate impact as the test for proving discrimination under the FHA.[303] The defendants in *Mountain Side* owned and operated a trailer park.[304] The park, built in the 1960s, had a density greatly exceeding modern parks.[305] The defendants leased the lots individually "for placement of one mobile home," and provided "water, power, telephone, and sewer hookups to each lot."[306] Until 1989, the defendants maintained an adults only policy.[307] When the FHAA became effective in 1989, the defendants decided to eliminate the adults only policy rather than modify the policy to fall within the "housing for older persons" exemption.[308] The defendants hired a contractor to conduct a study on the effect of an increase of population on the quality of life in the park.[309] As a result of this study, the defendants decided to adopt a limited occupancy policy allowing no more than three occupants per trailer.[310]

Jacqueline VanLoozenoord, her three minor children, and Michael Brace, her "roommate and companion," moved into the park in 1991.[311] The plaintiffs purchased their mobile home from a third party who did not advise them of the occupancy limit.[312] The plaintiffs also did not apply for tenancy with park management.[313] The resident manager discovered that five people occupied the trailer and confronted Brace.[314] Management then initiated eviction proceedings against the plaintiffs, and prevailed solely on the grounds that the tenants had failed to apply for residency.[315] Plaintiffs Brace and VanLoozenoord filed separate complaints with HUD, asserting that Mountain Side had discriminated on the basis of "familial status" in violation of the FHA.[316]

HUD issued charges against Mountain Side for discriminating against the plaintiffs on the basis of their familial status.[317] After a full evidentiary

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302. 56 F.3d 1243 (10th Cir. 1995).
303. *Mountain Side*, 56 F.3d at 1250.
304. *Id.* at 1246.
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.*
310. *Id.* at 1255-56.
311. *Id.* at 1246.
312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.* at 1246-47.
316. *Id.* at 1247.
317. *Id.* Attempts at conciliation failed when the tenants refused to attend. *Id.* Thereafter,

hearing, an Administrative Law Judge (ALJ) dismissed the discrimination charges.[318] The Secretary of HUD remanded the case twice to the ALJ to reconsider the dismissal.[319] Both times the ALJ rejected HUD's claims.[320] Finally, the Secretary reversed the decision and entered a judgment for HUD.[321] The ALJ then granted damages and injunctive relief to the complainants after making several factual findings.[322]

b. *Decision*[323]

Before reversing the final order, the Tenth Circuit initially reaffirmed *Bangerter*'s dictum that a claimant may prove FHA discrimination by disparate impact.[324] Finding the occupancy limit facially neutral, the court characterized the case as one of disparate impact.[325]

The court did not fully address whether the plaintiffs had established a prima facie case by showing national statistical evidence that the three-person occupancy policy disproportionately excluded families with children.[326] Instead, the majority assumed without deciding that the plaintiffs had met their burden of establishing a prima facie case, as recognized in *Black Jack*.[327]

The majority adopted a modified form of the *Arlington Heights II* test, adopting three of the four factors, but refusing to adopt the element which looks to evidence of discriminatory intent.[328] The court added, "we are

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Mountain Side elected to have a hearing before an Administrative Law Judge (ALJ). *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.* The majority opinion lists these findings of fact in detail. *Id.* at 1255-56. First, after the FHAA took effect in 1989, Mountain Side considered modifying the policy to allow families a more "viable opportunity." *Id.* at 1255. Second, in 1988, Mountain Side conducted its own survey in which it considered "the condition and age of the utilities, the density of homes, and the overall size of the Park," and determined that the park could not support a population beyond a three-person per trailer maximum. *Id.* Nor did it consider feasible any alternatives to the occupancy limit. *Id.* In 1991, on the advice of counsel, the park hired an expert contractor to perform a similar study to evaluate the "legitimacy" of the three-person occupancy policy. *Id.* After evaluating only resident health and safety based on infrastructure limitations and resident comfort based on size and density, the expert recommended a two person per bedroom limit in addition to a maximum population limit of 916. *Id.* at 1256. Third, the park had historically experienced low water pressure and sewage problems. *Id.* Fourth, the park was almost twice as dense as new parks. *Id.*

323. The case came to the Tenth Circuit on direct appeal from the ALJ's final order. *Id.* at 1246.

324. *Id.* at 1250.

325. *Id.* at 1252.

326. Id. at 1253 (expressing doubt that national, rather than local, statistics were appropriate to prove a discriminatory effect in this case).

327. *Id.* at 1251-52; *see supra* notes 249-50 and accompanying text.

328. *Mountain Side*, 56 F.3d at 1252. The court stated:

> The three factors we will consider in determining whether a plaintiff's prima facie case of disparate impact makes out a violation of Title VIII are: (1) the strength of the plaintiff's showing of discriminatory effect; (2) the defendant's interest in taking the action complained of; and (3) whether the plaintiff seeks to compel the defendant affirmatively to provide housing for members of a protected class or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.

Id.

mindful of the Seventh Circuit's admonition that 'we must decide close cases in favor of integrated housing.'"[329] In discussing the first element of the test, the court gave little weight to the national statistical evidence the claimants had presented and on which the Secretary had relied.[330]

As to the second prong, the defendant's interest in the complained-of action,[331] the Secretary had required that defendants show "'compelling need or necessity'" to justify the occupancy policy.[332] The majority disagreed,[333] looking instead to *Griggs* and the "business necessity" defense for the proper standard.[334] Adapting this standard to the housing context, the court held that the defendant must show a "*manifest relationship*" between the discriminatory practice and the housing in question.[335] Applying the "manifest relationship" test, the court held that the two reasons given by the defendant for the occupancy limit: "sewer capacity" and "concern over the quality of park life," had a manifest relationship to the housing in the trailer park.[336]

Although the majority expressly adopted the fourth prong of the *Arlington Heights II* test in its holding (as the third prong in the Tenth Circuit test), the court did not discuss that prong of the test in its analysis of the facts.[337]

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329. *Id.* (quoting *Arlington Heights II*, 558 F.2d at 1294).

330. *Id.* at 1253. Remember that the majority had already assumed that this statistical evidence could establish a prima facie case of housing discrimination. *See supra* text accompanying note 330. According to the majority, the Secretary, in making his decision to remand, had relied on national statistics indicating:

> At least 71.2% of all U.S. households with four or more persons contain one or more children under the age of 18 years; . . . at least 50.5% of U.S. families with minor children have four or more individuals; and . . . at least 11.7% of households without minor children have four or more persons.

Mountain Side, 56 F.3d at 1253. The majority did not agree with the claimants that national statistics of family composition accurately reflected the composition of the local housing market. *Id.*

331. *Mountain Side*, 56 F.3d at 1253.

332. *Id.* at 1254.

333. "[T]here is no requirement that the defendant establish a 'compelling need or necessity' for the challenged practice to pass muster since this degree of scrutiny would be almost impossible to satisfy." *Id.* at 1254-55.

334. *Id.* at 1254. In the Title VII context, the employer has a burden of showing a "manifest relationship to the employment in question." *Id.* (quoting *Griggs*, 401 U.S. at 432). The court stated, "[O]nce plaintiffs establish a prima facie case of disparate impact, the burden shifts to the defendant to produce evidence of a 'genuine business need' for the challenged practice." *Id.* "The touchstone is business necessity." *Griggs*, 401 U.S. at 431.

335. *Mountain Side*, 56 F.3d at 1254 (emphasis added). To clarify the threshold of this standard, the court stated that "a mere insubstantial justification in this regard will not suffice, because such a low standard would permit discrimination to be practiced through the use of spurious, seemingly neutral practices." *Id.*

336. *Id.* at 1255-57. To reach that conclusion, the majority applied the facts of the case from the record established by the ALJ on the third remand. *Id.* Although the analysis is cursory at best, the crucial facts the majority relied upon seem to include the park's historical sewage problems and the conclusions in both studies that an occupancy limit was necessary in light of the structural limitations of the park. *Id.*; *see supra* note 322.

337. *Mountain Side*, 56 F.3d at 1253. The court simply noted that when a plaintiff seeks to require a defendant to "take affirmative action to correct a Title VIII violation, plaintiff must make a greater showing of discriminatory effect." *Id.*

c. *Dissenting Opinion*

In his dissenting opinion, Judge Henry made three arguments in response to the majority. First, he believed that the national statistics on which the Secretary had relied sufficed to meet the standard for a prima facie case of disparate impact discrimination.[338] Second, Judge Henry feared that the engineering study the defendants presented to justify their policy was a "post-hoc" rationalization for an otherwise discriminatory policy because the study had actually suggested an alternative policy.[339] Finally, Judge Henry disagreed with the majority for making the trade-off between the "quality of life" and providing equal access to housing for families with children.[340] In his view, Congress, in passing the FHAA, "chose to protect children and resolved this question in favor of nondiscrimination."[341]

C. *Analysis*

While the two cases reflect consistency within the Tenth Circuit, the holdings diverged from the trend in other circuits regarding housing discrimination issues. In *Bangerter*, the Tenth Circuit recognized that a plaintiff may prove discrimination by disparate impact, but then held that where a policy was facially discriminatory, a plaintiff may only recover on a disparate treatment theory. *Mountain Side*'s refusal to adopt the intent element of the Seventh Circuit's test for disparate impact thus seems consistent with the court in *Bangerter*.

The majority's approach in *Mountain Side*, however, imposes an evidentiary problem for claimants. Because the test does not consider proof of discriminatory intent, the court must accept as true any business justification the defendant proffers, as long as that justification flows logically from the facts. In contrast, a consideration of discriminatory *motives* would aid in a disparate impact analysis by giving the plaintiff an avenue to refute "post hoc" rationalizations. Because the disparate treatment analysis adopted in *Bangerter* asks only whether the policy is facially discriminatory, it also does not examine intent. As a result, "clever" defendants in the Tenth Circuit can "easily conceal

338. *Id.* at 1257 (Henry, J., dissenting); *see* Hung Ping Wang v. Hoffman, 694 F.2d 1146, 1148 (9th Cir. 1982) (holding that when a plaintiff presents *any* statistical evidence tending to show discrimination, the burden shifts to the defendant to rebut that evidence); *see also* Dothard v. Rawlinson, 433 U.S. 321, 330 (1977) (explaining that national height and weight statistics could be used to meet a prima facie case of employment discrimination when "there was no reason to suppose" that the national statistics would not reflect the characteristics of the local population).

339. *Mountain Side*, 56 F.3d at 1257. The limited occupancy plan recommended by the expert, which would have limited "occupancy to two-people-per-bedroom in each unit," would have allowed the plaintiffs to stay. *Id.* at 1258. At the time of the dispute, the actual occupancy limit was less than half of the "maximum" suggested by the expert, and there was no evidence of an expected population boom. *Id.* at 1259.

340. *Id.*

341. *Id.*

their motivations" and get away with it.[342] Thus, the court should reassess its refusal to consider a subjective element in its disparate impact analysis.

Another issue on which the Tenth Circuit diverged from other courts was in the standard for evaluating defendants' justifications for discriminatory policies. *Mountain Side*'s "manifest relationship" test does not reflect recent refinements of FHA disparate impact analysis which require, in part, that a defendant's policy employ the least restrictive means of furthering its business (or municipal) interest. As the dissent pointed out, the expert study suggested the *Mountain Side* defendants could have met their business goals by limiting occupancy to two persons per bedroom. Therefore, even though the plan they did adopt had a "manifest relationship" to the needs of the trailer park, they could have adopted a less restrictive policy to meet the same goals.

Finally, for the first time in any circuit, *Mountain Side* applied the *Arlington Heights II* test to analyze claims against a private defendant.[343] Rejecting the test in a similar context, the Fourth Circuit reasoned that the final element only makes sense when applied to public defendants. In contrast, the Tenth Circuit modified this element, applying it in the private context.[344] The Tenth Circuit's analogy is problematic since in *every* disparate impact case involving a private landlord or property owner, the defendant can characterize the plaintiff's claim as seeking to require the defendant to modify a neutral practice. Thus, either the last element will never apply to a private defendant because it contemplates a municipality, or, in every such claim, the Tenth Circuit will require "a greater showing of discriminatory effect."[345]

CONCLUSION

The Tenth Circuit has taken a step forward by recognizing the right of a plaintiff to prove housing discrimination by disparate impact. This advance, however, is marred by the court's failure to consider many issues in formulating the test for analyzing such claims. Unfortunately, the court will be forced to confront these matters again when its test fails to adequately address the issues in a different factual scenario. As with the right to informational privacy, the Tenth Circuit has set forth a disparate impact analysis that jealously protects one interest to the exclusion of almost all competing interests.

Paul Karlsgodt

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342. *Black Jack*, 508 F.2d at 1185 (recognizing that "clever men may easily conceal their motivations").

343. The majority did not address the Fourth Circuit's express refusal to apply a test in a case involving a private defendant. *See supra* text accompanying notes 270-71.

344. *Mountain Side*, 56 F.3d at 1253. The court of appeals framed this element: "'where plaintiff seeks a judgment which would require defendant to take affirmative action to correct a Title VIII violation [rather than enjoin the defendant from interfering with the plaintiff's rights], plaintiff must make a greater showing of discriminatory effect.'" *Id.* (quoting Casa Marie, Inc. v. Superior Court, 988 F.2d 252, 269 n.20 (1st Cir. 1993)).

345. *Id.* The fact that the majority did not analyze this element does not more strongly support one conclusion over the other.